MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JULY 17, 1919, TO DECEMBER 22, 1919.

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FEB 5 1921

SUPREME COURT.

CHIEF JUSTICE.

	TERM EXPIRES
JOHN E. BIRD, ADRIAN, ...	Dec. 31, 1919

ASSOCIATE JUSTICES.

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NELSON SHARPE,[2] WEST BRANCH, . . .	Dec. 31, 1919
JOSEPH B. MOORE, LAPEER, ...	Dec. 31, 1921
JOSEPH H. STEERE, SAULT STE. MARIE, .	Dec. 31, 1921
FLAVIUS L. BROOKE, DETROIT, . . .	Dec. 31, 1923
GRANT FELLOWS, HUDSON, ...	Dec. 31, 1923
JOHN W. STONE, MARQUETTE, ...	Dec. 31, 1925
FRANZ C. KUHN, MT. CLEMENS, . . .	Dec. 31, 1925

CLERK—JAY MERTZ, LANSING.

CRIER—ANDREW B. CHAPIN, LANSING.

ATTORNEY GENERAL—ALEX. J. GROESBECK, DETROIT.

The residences of the judges, given above, are as of the date of their election.

[1]Deceased September 11, 1919.
[2]Appointed October 1, 1919.

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14.	JOHN VANDERWERP,	MUSKEGON.
15.	FREDERICK W. KNOWLEN,	CONSTANTINE.
16.	JAMES G. TUCKER,	MT. CLEMENS.
17.	WILLIS B. PERKINS, JOHN S. McDONALD WILLIAM B. BROWN,	GRAND RAPIDS.
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37.	WALTER H. NORTH,	BATTLE CREEK.
38.	JESSE H. ROOT,	MONROE.
39.	BURTON L. HART,	ADRIAN.
40.	WILLIAM B. WILLIAMS,	LAPEER.

[1]Resigned.
[2]Appointed October 1, 1919.

MUNICIPAL JUDGES.

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CHARLES T. WILKINS, EDWARD J. JEFFRIES.

SUPERIOR COURT OF GRAND RAPIDS, MAJOR L. DUNHAM.

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JUNE TERM, 1919.*

In re MANSHAEM'S ESTATE.

MANSHAEM *v.* NICHOLS.

1. WILLS—CONSTRUCTION—INTENTION OF TESTATOR.
   The first and most important rule to be observed in construing wills is to ascertain the intention of the testator and to give effect to that intention if it be legally possible.

2. SAME—INTENT OF WILL AS A WHOLE.
   The intention must be gathered from the whole will, and where possible, effect must be given to all of its provisions.

3. SAME—CONSTRUCTION.
   While the will speaks from the death of the testator and not from its date, construction may often be aided by a consideration of the facts and circumstances existing at the date of the will.

4. SAME—ADEMPTION—REVOCATION—CHANGE OF PROPERTY—RULE.
   The rule as to ademption or the presumption of revocation through a change during the lifetime of the testator in the nature of the property devised or bequeathed does not apply where the proceeds of a certain property, and not the property itself, is the subject of the gift.

5. SAME—PERSONAL PROPERTY—EFFECT OF SALE OF REALTY DURING TESTATOR'S LIFETIME—INTENTION.
   Where testator in his will, after making certain specific bequests, and providing for certain expenses, gave to his two daughters the remaining personal property, and providing that, if it should not amount to $800, the two sons were to make up the deficiency, and stating that this provision, together with such gifts as he had already made them, should constitute their entire share in his estate, *held*, to negative the intention of testator that the daughters should share in the proceeds of the farm which

For authorities passing on the question of law governing construction of will, see note in 2 L. R. A. (N. S.) 443.

*Continued from Vol. 206.

the will directed should be sold and the proceeds divided equally between the two sons, but which was sold during his lifetime and the proceeds kept intact until his death.

6. SAME—BEQUEST OF PROCEEDS OF REALTY—SALE OF REALTY BY TESTATOR—EFFECT.

Where testator's will directed that the farm should be sold to the highest bidder, and provided that after the sale was consummated the entire rest and residue of the estate should go to the two sons in equal shares, the sale of the farm in testator's lifetime would not affect the rights of the sons under the will even if the sale was made with the avowed purpose of disinheriting them.

Error to Kent; Brown, J. Submitted June 13, 1919. (Docket No. 46.) Decided July 17, 1919.

Daniel F. Manshaem filed a petition for a construction of the last will of John Manshaem, deceased. There was a construction of said will in favor of petitioner, and Florence Nichols and another, contestants, appealed to the circuit court. Judgment for contestants. Petitioner brings error. Reversed.

Jewell & Smith, for appellant.

Charles E. Ward, for appellees.

On September 6, 1910, John Manshaem made and published his last will and testament in the following language:

"*First.* I direct payment of my just debts, funeral expenses, including the placing of a proper marker over my grave and the expense of administering my estate. I desire to be decently and respectably buried, but not expensively.

"*Second.* I give and bequeath unto my son, Evril J. Manshaem, my gold watch and chain and my bedstead, my mattress and feather bed and two feather pillows and the other bed clothes pertaining thereto.

"*Third.* I give and bequeath unto my daughter, Florence Nichols, two-thirds (2/3) of whatever personal property I shall die possessed of, and unto my

daughter, Della J. Dennis, the remaining one-third (1/3) of said personal property, to them and their respective heirs forever.

"Should my personal property, after the payment of debts, funeral expenses and administration charges, not equal eight hundred dollars ($800.00), then my two sons hereinafter named, shall in equal shares furnish enough moneys to produce the deficiency up to that sum, and in such event my said daughter Florence, shall have and receive five hundred dollars ($500.00) of said eight hundred dollars ($800.00), and my daughter Della three hundred dollars ($300.-00). The provisions made in this paragraph for my said daughters, together with such gifts as I have made them in the past, shall constitute their entire shares in my estate.

"*Fourth.* I hereby appoint Benjamin C. Porter, cashier of the South Grand Rapids State Bank, as executor hereof, and I hereby direct my executor, or his successors in office, or the person appointed to act in his stead, should he fail to qualify, to sell my farm in Wyoming township at public auction, after giving reasonable notice of such sale, the sale to be made to the highest bidder therefor, and convert the same into cash. After said sale has been consummated, I give, devise and bequeath unto my two sons, Daniel F. and Evril J. Manshaem, the entire rest and residue of my estate, the same to be had by them in equal shares, to have and to hold to them and their respective heirs forever.

"*Fifth.* Should my daughter-in-law, the wife of my said son, Daniel F. Manshaem, claim, or pretend to have any claim against my estate, and should she present the same for allowance, and should any sum be awarded her thereon, I direct that the same shall be paid to her out of the portion of my estate herein given to her husband.

"*Sixth.* I hereby revoke any and all wills and testamentary writings by me at any time heretofore made."

At that time he was 80 years of age. About three years later he was adjudged mentally incompetent; a guardian was appointed and on March 12, 1914, he was adjudged insane and admitted to the State hos-

pital at Kalamazoo where he died in August, 1915. He had been a widower for upwards of 20 years prior to his death and had made his home for the most part during that time with his son Daniel. His sole heirs at law consisted of his four children named in the will, none of whom contested the proceedings for guardianship nor the proceedings for the probate of the will which was duly admitted to probate in the probate court for Kent county. Following said probate and on July 1, 1916, Daniel F. Manshaem filed a petition for the construction of said will in the probate court. After argument the probate judge made the following finding as to the proper construction of the will:

"1st. The farm in Wyoming township sold for $6,000.00 and I determine that to be its value. This amount should be equally divided between the two sons, Daniel F. and Evril J. Manshaem, less their *pro rata* share of the administration expenses, and the expenses on the hearing of this petition hereafter to be determined.

"2d. The balance of the property of every kind and nature except the property mentioned in paragraph 'two' of deceased's will, is divided as follows: Two-thirds to Florence Nichols and one-third to Della J. Dennis, less their *pro rata* share of the expenses of administration and the expense on the hearing of this petition hereafter to be taxed."

—and later made an order for distribution based upon such finding. From this order Della J. Dennis and Florence Nichols, the two daughters of the deceased, filed a claim of appeal to the circuit court. Something more than a year after the making of the will and on December 6, 1911, the testator conveyed to his son, Daniel F. Manshaem, the farm mentioned in the will for an express consideration of $6,000. Said deed contained the following reservation:

"Said first party reserving to himself the right to use and occupy the downstairs front room in dwelling

house now located on said described premises during his lifetime, said room to be properly cared for by said second party, and kept in a neat and sanitary condition; said second party is also to do necessary laundry work for said first party or hire the same done at his own expense."

The money received from said sale passed into the hands of the guardian of testator and was in turn by him paid over to the executor of the estate after the death of the testator and now remains intact and ready for distribution under the will. The learned circuit judge who heard the case on appeal reversed the order of the probate court and made the following finding:

"In this proceeding Daniel F. Manshaem filed a petition in the probate court for the county of Kent, in which petition he prayed, in substance, that the will of John Manshaem, deceased, be construed to mean that the farm he then owned should be sold and the proceeds divided equally between Daniel F. Manshaem and Evril J. Manshaem (subject to the possible payment by them to Della J. Dennis and Florence Nichols of enough to bring their portion up to eight hundred dollars), without regard to the question whether he in his lifetime sell the farm, the proceeds thereof in his hands should not become personal property to be distributed as such under his will, but should be divided as above stated.

"Said petition also prayed, in substance, that said will be construed to mean that Della J. Dennis and Florence Nichols should have only the personal property John Manshaem then had, together with such personal property as he might thereafter acquire from any source except from the sale of said farm; the said Della J. Dennis and Florence Nichols, however, to have a minimum of eight hundred dollars, in case the personal property he then had, together with such addition thereto, if any, should not amount to eight hundred dollars at the time of his death.

"A hearing was had upon this petition in the probate court for the county of Kent before the Honorable Lewis L. Thompson, acting probate judge, who

made an order of distribution, granting the prayer of said petition and distributing said estate accordingly. Della J. Dennis and Florence Nichols appealed to this court from said order, and said cause came on to be heard before the court without a jury, whereupon the parties produced witnesses who were sworn in open court, and the case was then argued by counsel for the respective parties, after which the court had due deliberation thereon.

"There is no substantial difference between the counsel of the respective parties as to the law applicable to this case, both stating in substance that in order that the court sustain the finding and construction of the probate court, it must find from the language of the will itself that it was the intention of the testator that the devise or bequest to Daniel F. and Evril J. Manshaem should stand, notwithstanding any change in the form of the property during the lifetime of testator.

"The court is unable to find such an intention expressed in the will in question. On the contrary, the language:

> "'I give and bequeath unto my daughter Florence Nichols two-thirds of whatever personal property I may die possessed of, and to my daughter Della J. Dennis the remaining one-third of said personal property, to them and their respective heirs forever,'

—is plain and unequivocal, and it is not inconsistent with any other provision of the will.

"The construction contended for by Daniel F. Manshaem cannot be sustained without disregarding the language above quoted. No force or effect could be given the words 'whatever personal property I shall die possessed of,' if the contention of petitioner is sustained.

"It is the common understanding of laymen, as well as lawyers, that the making of a will disposing of a certain piece of property does not deprive the testator, during his lifetime, of the right and ability to himself dispose of that property, or to so change its form that the proceeds will pass under his will to persons other than those who would have received it had it remained intact until the death of the testator.

"The court finds that this was the opinion and understanding of John Manshaem at and after the time of making the will in question.

"The court finds that at and after the time of the execution of the deed of the farm in question on the 6th day of December, 1911, the said John Manshaem intended to so change the form of his property that the proceeds of said farm should become personal property.

"The court further finds that at and after the time of the making of said deed, the said John Manshaem intended that the proceeds of the sale of said farm to Daniel F. Manshaem should not be divided between Daniel F. Manshaem and Evril J. Manshaem under the fourth clause of his will or otherwise.

"The court further finds that the said John Manshaem had reason to and did undergo a change of feelings toward the said Daniel F. Manshaem after the making of said will, and that at and after the time of deeding said farm to the said Daniel F. Manshaem, the said John Manshaem felt and believed that his son Daniel F. Manshaem was not kind and considerate toward him; that the wife of said Daniel F. Manshaem was not kind and considerate toward him; that at and after the time of making said deed, the said John Manshaem felt and believed that in deeding said farm to said Daniel F. Manshaem for the consideration of six thousand dollars he was actually making a gift to the said Daniel F. Manshaem by reason of the fact that the said farm was worth a substantial sum in excess of six thousand dollars; that the said Daniel F. Manshaem had used and appropriated to his own use farm tools and other personal property considered by John Manshaem to be of considerable value, belonging to the said John Manshaem and that much ill feeling arose and contention had between John Manshaem and Daniel F. Manshaem over said tools; that the said Daniel F. Manshaem had received all he ought to receive in view of the circumstances. The said John Manshaem also felt and believed that, after he had deeded said farm to said Daniel F. Manshaem reserving a room in the house on said farm and the right to certain care and attention therein, the said Daniel F. Manshaem and the wife of said Daniel

F. Manshaem treated him with indifference and unkindness, and said John Manshaem stated in substance to various people that Daniel F. Manshaem had received all that he would ever get from him; that he had received all he was entitled to, and that he knew and understood what had been done by him and the effect thereof, and, in substance that the proceeds of said farm would not be divided between the said Daniel F. Manshaem and Evril J. Manshaem but would go to his daughters.

"The court finds that said farm was worth a substantial sum over and above six thousand dollars at the time it was deeded to petitioner; that petitioner did have and use some of the tools and other property of the said John Manshaem, and that the said John Manshaem had some reason to feel he was not treated with the kindness due him, especially after deeding his farm to petitioner.

"The court finds that the language in the fourth paragraph in said will does not show an intention on the part of the testator that the proceeds of the farm in question, if sold by testator in his lifetime and converted into money or other personal property, should be divided between Daniel F. Manshaem and Evril J. Manshaem; and the court is of the opinion that the testator, in providing that the executor should sell said farm and then divide the proceeds between Daniel F. and Evril J. Manshaem, intended thereby only to provide against probable trouble and ill feeling between his two sons if they became owners in common of said farm directly under the will, and the testator did not intend or understand that by the provisions of said fourth paragraph, or by any other provision in said will, he had deprived himself of the right to dispose of said farm in his lifetime, and to handle and dispose of the proceeds as he saw fit, either during his lifetime or at his death, by and under the third paragraph of his said will.

"It follows that the construction placed upon said will by the probate court of Kent county was, under the terms of said will and under the evidence in the case, erroneous.

"The order of the probate court for the county of Kent, made on the 18th day of August, 1916, constru-

ing said will and distributing said estate, will therefore be set aside and reversed. That all the personal property belonging to said estate, including the proceeds of the sale of said farm, except that mentioned in the second paragraph of said will already distributed, will be divided between Florence Nichols and Della J. Dennis, according to the third paragraph of said will; that is to say, two-thirds thereof to Florence Nichols, and one-third thereof to Della J. Dennis, subject to the payment of the necessary expenses of administration in proportion to the share provided for each in said third paragraph.

"The probate court for the county of Kent will be directed to enter the necessary orders and take the necessary steps to settle and distribute said estate in compliance with this opinion and construction.

"Della J. Dennis and Florence Nichols will recover their costs in this proceeding against Daniel F. Manshaem, including an attorney fee of twenty-five dollars.

"Execution therefor will be allowed."

Daniel F. Manshaem now reviews the case in this court under some 33 assignments of error.

BROOKE, J. (*after stating the facts*). The question involved is whether under a proper construction of paragraphs three and four of the will, the sale of testator's farm during his lifetime worked an ademption or revocation *pro tanto* so that the proceeds of the farm should pass to the daughters under paragraph three instead of to the sons under paragraph four. We have repeatedly held that the first and most important rule to be observed in construing wills is to ascertain the intention of the testator and to give effect to that intention if it be legally possible. *Stender* v. *Stender,* 181 Mich. 648; *In re Ives' Estate,* 182 Mich. 699; *In re Shumway's Estate,* 194 Mich. 245 (L. R. A. 1918A, 578); *Kirsher* v. *Todd,* 195 Mich. 297; *In re Blodgett's Estate,* 197 Mich. 455. That intention must be gathered from the whole will, and, where possible, effect must be given to all of the provisions

of the instrument. While the will speaks from the death of the testator and not from its date, construction may often be aided by a consideration of the facts and circumstances existing at the date of the will. At the time the will was made it is obvious that the testator was possessed of personal property not exceeding in value the sum of $800. The provisions of paragraph three indicate that the testator believed that that class of property at the time of his death might be less than that amount, he, therefore, provided that the two sons named in paragraph four should, if necessary, contribute in equal shares a sum sufficient to make up such possible deficiency. After this provision and as a part of paragraph three he used this significant language:

"The provisions made in this paragraph for my said daughters, together with such gifts as I have made them in the past, shall constitute their entire shares in my estate."

In the fourth paragraph he names his executor and provides for a sale by the executor of his farm, adding:

"After said sale has been consummated, I give, devise, and bequeath unto my two sons, Daniel F. and Evril J. Manshaem, the entire rest and residue of my estate, the same to be had by them in equal shares, to have and to hold to them and their respective heirs forever."

After reading these two paragraphs it is impossible to doubt that it was the testator's intention most clearly expressed to give to his two daughters the personal property remaining after certain specific bequests, testator's funeral expenses, administrator's expenses and burial expenses had been paid. This balance from his knowledge of the estate he presumed might not amount to $800 and therefore he provided that his two sons should make up such possible deficiency. He further indicated that the farm should be, by his executor, sold and the entire rest and resi-

due of his estate was devised and bequeathed equally to his two sons. The rule as to ademption or the presumption of revocation through a change during the lifetime of the testator in the nature of the property devised or bequeathed does not apply where, as in this case, the proceeds of a certain property and not the property itself is the subject of the gift.

Paragraph four does not constitute a specific devise of the farm to the two sons. Speaking of a similar situation, the court, in the case of *Bills* v. *Putnam*, 64 N. H. 554 (15 Atl. 138), said:

"They treat this matter as though there was a specific devise of real estate, or as though the last clause of the will was incapable of disposing of anything but real estate. If that were so, there might be some ground for their position. But when we see there is no specific devise of real estate, and that the last clause of the will, instead of being restricted to disposing of real estate, is a sweeping residuary clause, capable of disposing of both personal and real estate, this whole objection is at once disposed of. The conveying of part of the real estate by the testatrix after the making of the will, with such a residuary clause as is in this will, does not indicate any change of intention on her part in regard to the disposition of her will *pro tanto*, because she was perfectly aware that the proceeds of this real estate, being in personal property, could pass equally as well under this residuary clause as the real estate itself."

See, also, upon this point, 2 Alexander on Wills, p. 1089; *Black's Estate*, 223 Pa. 382 (72 Atl. 631); and *Miller's Exr.* v. *Malone*, 109 Ky. 133 (58 S. W. 708, 95 Am. St. Rep. 338).

Testimony introduced at the time of the trial as to fugitive statements made by the testator after the sale of the farm to Daniel to the effect that Daniel would never receive any more of his property, are relied upon by appellees as indicating a change in the testator's intention toward Daniel Manshaem and

that he intended by the sale of the farm to Daniel to change the farm into personalty for the purpose of having it go to his daughters under paragraph three instead of to his sons under paragraph four. We have seen that the sale of the farm by the testator during his lifetime to Daniel does not legally affect the rights of Daniel and his brother under paragraph four of the will. If it appeared beyond peradventure (which is not at all the case), that this sale was made with the avowed purpose of disinheriting Daniel and his brother, the result must be the same.

The judgment is reversed, with costs to appellant.

BIRD, C. J., and OSTRANDER, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

CHRISTE *v.* SPRINGFIELD FIRE & MARINE INSURANCE CO.

1. COMMENCEMENT OF SUIT—FILING DECLARATION—SERVICE—STATUTE—LEGISLATIVE INTENT.

   Under the judicature act (3 Comp. Laws 1915, § 12407) suits may be commenced by simply filing the declaration with indorsed notice thereon; it being the evident intention of the legislature to change the former rule requiring service by omitting any reference whatever thereto.

2. INSURANCE—FIRE INSURANCE—LIMITATION OF ACTIONS—SERVICE.

   Where a fire insurance policy limited the commencement of an action thereon to 12 months next after the fire, and the declaration with rule to plead attached was filed five days before the expiration of said time limit, but was not served until four days after its expiration, *held*, that the action was commenced within the time limited in the policy.

Error to Wayne; Webster (Arthur), J. Submitted June 11, 1919. (Docket No. 36.) Decided July 17, 1919.

Assumpsit by Elmer H. Christe against the Springfield Fire & Marine Insurance Company on a policy of insurance. Judgment for plaintiff. Defendant brings error. Affirmed.

Frederick J. Ward, for appellant.

William Friedman, for appellee.

BROOKE, J. This is an action on a fire insurance policy. It was tried by the circuit judge without a jury under a stipulated statement of fact and a judgment was rendered in favor of the plaintiff which defendant here reviews. The policy contained the following provision:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve (12) months next after the fire."

The fire occurred on September 15, 1916. Suit was thereafter commenced by declaration with rule to plead attached. The declaration was filed on September 10, 1917. It was served by a deputy sheriff of Ingham county on the insurance commissioner of the state on September 19, 1917. It is therefore apparent that the declaration was filed five days before the expiration of the year, but served four days after the expiration of the year limited by the terms of the policy. The sole question presented on this record is whether the learned circuit judge was right in holding that the suit was commenced within one year in accordance with the terms of the policy.

Section 9985 of the Compiled Laws of 1897 as amended by Act No. 168, Pub. Acts 1899, and Act No. 76, Pub. Acts 1905, provided:

"Actions brought for the recovery of any debt, or for damages only, may be commenced, either:

"1. By original writ; or,

"2. By filing in the office of one of the clerks of the court a declaration, to which is attached, or upon which is indorsed, a rule requiring the defendant to plead to such declaration within fifteen days after the service of a copy thereof and notice of such rule, and serving a copy of such declaration, and notice of such rule personally on the defendant." * * *

Under the provisions of this statute this court held in several cases that inasmuch as the statute provided for serving a copy of the declaration, suit was not commenced until such service was had. *Detroit Free Press Co.* v. *Bagg,* 78 Mich. 650; *Cofrode* v. *Wayne Circuit Judge,* 79 Mich. 332 (7 L. R. A. 511); *Wilton* v. *City of Detroit,* 138 Mich. 67; and *Boyle* v. *City of Detroit,* 152 Mich. 248.

In 1915, the so-called judicature act was passed. Section 12407, 3 Comp. Laws 1915, a part thereof, provides as follows:

"All actions at law in any court of record, except mandamus, quo warranto, and certiorari, may be commenced either,

"1. By original writ; or

"2. By filing in the office of one of the clerks of the court, a declaration upon which is indorsed a notice in substantially the following form:

"To.....Defendant:

"You are hereby notified that a suit has been commenced against you as defendant by....., as plaintiff, and that the within is a true copy of plaintiff's declaration in said cause, and that if you desire to defend the same, you are required to plead thereto within fifteen days after service upon you of a copy of said declaration.

"Dated.....

"....., "Attorney for plaintiff."

It will be noted that in this statute there is no reference whatever to service. The framers of the new

act undoubtedly had the old one before them and the omission of the provision for service of the declaration as a part of the necessary procedure in commencement of actions, it appears to us is significant. We are of opinion that it was the legislative intention to change the rule as to the commencement of suits by declaration and by the enactment of the above quoted section provide that said suits might be *commenced* simply by filing the declaration with the indorsed notice thereon.

Judgment is affirmed.

BIRD, C. J., and OSTRANDER, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

OAKMAN *v.* RECORDER OF THE CITY OF DETROIT.

CRIMINAL LAW—PRESENTMENT—GRAND JURY—SECRECY—RECORDER'S COURT OF DETROIT.

Where the recorder of the city of Detroit conducted an investigation for the discovery of crime under authority of Act No. 196, Pub. Acts 1917, he was exercising functions analogous to those of grand juries, upon whom secrecy is enjoined by 3 Comp. Laws 1915, § 15703, and his act in making his findings in a so-called "presentment" part of the official records of his court was therefore illegal, and the issuance of warrants out of his court some time later charging the president of the board of water commissioners with the commission of various offenses recited in said "presentment" would not validate his unwarranted act.

Mandamus by Robert Oakman to compel Charles T. Wilkins, recorder of the city of Detroit, to strike a

certain document from the files of the recorder's court. Submitted January 14, 1919. (Calendar No. 28,283.) Writ granted July 17, 1919.

Barnard & VanDeMark, for plaintiff.

Edwin Henderson, for defendant.

This is an application for a writ of mandamus to require the respondent to strike from the files of the recorder's court of the city of Detroit a certain document designated as a "presentment" and to expunge from the records of said recorder's court all references to said so-called presentment in the proceedings of said court. The paper, the subject of the application, is self-explanatory and is as follows:

"(Filed October 8, 1917.)
"John A. Grogan, Clerk.

"Presentment to the recorder's court of the city of Detroit, by William F. Connolly, recorder of the city of Detroit, holding an inquisition into undiscovered and unpunished crime in the city of Detroit, under and by virtue of Act No. 196 of the Public Acts of 1917, being an 'Act to authorize proceedings for the discovery of crime and to provide penalties for the violation of such procedure.'

"Foreword.

"This inquiry has been directed, in part, to the conduct of the water board, with particular reference to the building of extensions of water mains and service lines. It is in testimony that any person desiring to have a service line laid in a street where there are no houses, must first deposit in cash with the water board, a bonus equal to fifteen per cent. of the estimated cost of laying a six-inch pipe. This, until recently, has been the uniform and unbroken rule and practice of the water board.

"It is in testimony that Robert Oakman, a real estate dealer in the city of Detroit, is president of the board of water commissioners. Further, that he has filed a large number of applications for the laying of

service pipe lines in subdivisions of which he is the owner. An investigation of the records of the water board, discloses that contrary to the uniform practice and rule of the water board, he does not, in every instance, pay in advance the fifteen per cent. bonus required. On the contrary, that he keeps an open account with the water board, for the bonuses which he should pay. On the pipe laid by the water board upon Mr. Oakman's applications, it is estimated that he ought to have paid the water board $15,564.10, and that he has actually paid the board about $9,200, leaving an unpaid balance of approximately $6,000. Pipes for which these bonuses should have been paid in advance, have almost entirely been laid by the board of water commissioners.

"The laying of water pipes in streets whereon no houses are built, is a matter of great expense to the board of water commissioners, and the rate payers of the city of Detroit, whom that board represents. Where there are no houses upon such streets, the board can derive no revenue from the sale of water through the use of these pipes. Naturally, it is questionable business policy, when pipe is up to $60 a ton, to lay pipes which will not be revenue producing, even though the 15 per cent bonus were paid, because the other 85 per cent must come out of the funds of the water board. The situation is aggravated, of course, when, as in the case of Commissioner Oakman, even the 15 per cent bonus is not paid in full, where there are no houses to be a source of revenue for the board from the use of such pipes.

"It is in evidence further that a 36-inch feed main and a 6-inch service pipe were laid on the Ford Highway, from Twelfth street to Linwood avenue, a distance of approximately one-half mile, without an order of the board of water commissioners, and that as to the 6-inch service line, no application for the laying of the same was ever made, and no bonus ever estimated or paid. It is in evidence further that on Burlingame avenue, west of Twelfth street, over 1,400 feet of 8-inch service pipe have been laid without any application for the same, without any estimate or payment

of a bonus, and without any order or even record of the laying of such pipe.

"When no application is made for the laying of service pipe, of course no estimate of the bonus can be had, and, therefore, no payment of bonus can be exacted by the fiscal department of the board. Hence, in the cases above cited, there being no application made, and the pipe in question being laid by the general manager without the bonus being estimated, it could not be charged against the open account which it is claimed Commissioner Oakman has ordered to be kept with himself on the water board's ledger.

"It is also in evidence that about two years ago, one R. D. Baker, upon the order of Robert Oakman, opened a 'blow-off' in a water main of the board of water commissioners of the city of Detroit, at Otsego avenue and the city line, installed a three-inch meter thereon, and attached thereto a galvanized iron pipe which furnished water to two streets outside of the city limits in one of the Oakman subdivisions. It is further in evidence that no record was ever made in any department of the water board as to this transaction, and that it was discovered by accident. At the time it was discovered, the meter had been working for something like a year. It was what is known as a million meter, that is to say, that it would automatically turn back and start over its recording when the million foot point was reached. By order of one of the commissioners, the secretary billed Commissioner Oakman for the amount of water recorded upon the said meter, and subsequently, by order of the same commissioner, presented the bill to Commissioner Oakman at a meeting of the board. The bill for this water has never been paid.

"It is further in testimony that much confusion and controversy has arisen in the keeping of the accounts of the board with the American Car & Foundry Company, its contractors for iron pipe, by reason of the fact that General Manager Leisen ordered the diverting of a large quantity of water board pipe from the use of the board to the use of Commissioner Oakman in one of his real estate operations. The water board had a favorable contract, at $29 per ton, for this pipe. At a time when the market price was considerably

higher, and the smaller sizes of pipe practically unobtainable, it was unprofitable for the water board to supply outsiders with pipe from its favorable contract, because as soon as the quantity purchased upon the contract was delivered, the board was compelled to enter into a new contract at an advanced price. Nevertheless, this was done, and there still exists a foggy controversy as to whether some of this pipe should be paid for by the water board or by Commissioner Oakman, the representatives of the contracting company billing the same, and demanding pay from the water board for this pipe.

"It is superfluous to comment upon these relations of the president of the water board with the activities of his board. Also it is superfluous to suggest that wide stretches of plow land, even though subdivided, do not, from the viewpoint of public service, require the adornment of miles of water mains, varying in size from 16 to 36 inches, when future commitments of the water board for pipe supply will have to be made on a basis of $60 per ton.

(Signed) "W. F. CONNOLLY."

It was filed on October 8, 1917, and immediately became public. On October 17, 1917, counsel for petitioner made an application to the recorder's court for an order to strike said so-called "presentment" from the files. On January 7, 1918, two several warrants were issued out of the recorder's court for the city of Detroit against the petitioner wherein said petitioner stands charged with the commission of certain offenses, some of which are mentioned in the so-called "presentment," but others of which are not. On the following day, January 8, 1918, the court denied the order to strike, saying:

"It appearing by the files and records of this court, that the said statement constituting an informal complaint and finding of probable cause against the said Robert Oakman is now superseded by and merged in a formal complaint and warrant filed in and issued out of this court, on January 7, 1918, charging said Robert

Oakman with wilful neglect of duty, enjoined by law as a public officer, and covering the matters set forth in said formal complaint and more, the court holds that said motion to expunge involves only a moot question.

"Read, corrected and signed in open court.

"W. F. CONNOLLY,

(Seal.) "Recorder of the city of Detroit."

On the 28th day of January, 1918, an order to show cause issued out of this court directed to the recorder of the recorder's court of the city of Detroit. In the meantime and on January 9, 1918, Hon. William F. Connolly had ceased to be recorder and Hon. Charles T. Wilkins had succeeded him in said office. The return to said order to show cause is in part as follows:

"I do further return that for a considerable period of time before the filing of the paper writing referred to in the petition herein and denominated 'presentment' the said William F. Connolly, then being a judge of a court of record, to wit: Recorder of the city of Detroit, presiding over the recorder's court in said city, upon filing of a complaint with him, as such official, and having probable cause to suspect that crimes had been committed within his jurisdiction and that certain persons might be able to give material evidence respecting such offenses, acting by the authority of law and particularly under the authority of Act No. 196 of the Public Acts of 1917, did require the attendance before him of divers persons as witnesses and did take certain testimony concerning the alleged commission of crimes within his jurisdiction. That upon and as a result of such inquiry, the said William F. Connolly, as such judge, being satisfied that certain crimes had been committed and that there was probable cause to suspect said Robert Oakman to have been guilty of the commission thereof, thereupon made his findings in the premises, and that the said crimes had been committed and that there was probable cause to suspect the said Robert Oakman of having been guilty thereof, and for the purpose of causing the apprehension of the said Robert Oakman by proper process to answer for such crimes, said William F. Connolly, acting in his

judicial capacity aforesaid, made and filed the paper writing referred to in said petition and called therein a 'presentment,' and thereafter, by means of and by use of the said presentment and findings of fact, and as the result of the taking of the testimony aforesaid in the investigation aforesaid, warrants charging the crimes therein found recorded and stated, were prepared and issued, and the said Robert Oakman was thereafter apprehended by the said warrants of the said recorder, William F. Connolly, charging the crimes aforesaid against the said Oakman, and based upon said findings as stated in said presentment, and held to answer therefor, as provided by law. That said Oakman was duly arraigned upon said warrants and on a plea of not guilty, let to bail therein; which proceedings and warrants and charges of crime at the date of this return are still pending against said Oakman and are yet undetermined before this respondent. Copies of said warrants are hereto attached and made a part of this return, and marked Exhibits B and C."

STEERE, J. (*after stating the facts*). Act No. 196 of the Public Acts of 1917 is entitled:

"An act to authorize proceedings for the discovery of crime, and to provide penalties for a violation of such procedure."

Sections 1 and 2 of said act are as follows:

"Whenever by reason of the filing of any complaint which may be upon information and belief, any justice of the peace, police justice or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance, shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon

such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

"If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process, and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint, and in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors."

Sections 3 and 4 provide for the punishment of recalcitrant witnesses and under certain circumstances for immunity of witnesses compelled to give incriminating testimony. It is the contention of the relator that the closing words of section 2,—

"and in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry the justice, judge, prosecuting attorney, etc. * * * shall be governed by the provisions of the law relative to grand jurors,"

—were intended by the legislature to operate as a limitation upon the power of the conservator of the peace and to enforce secrecy on the part of the officer making the investigation in the same manner as secrecy is enjoined upon grand jurors in the course of their investigation. The oath of a grand juror set forth in section 15703, 3 Comp. Laws 1915, provides in part:

"your own counsel, and the counsel of the people and of your fellows you shall keep secret."

Section 15713 follows:

"No grand juror or officer of the court shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, otherwise than by issuing or executing process on such indictment, until such person has been arrested."

Assuming, as was apparently assumed by the recorder, that in making the investigation he was exercising functions analogous to those of a grand jury, it is the contention of relator that the so-called "presentment" filed by him should, upon application, have been expunged from the records under the authority of *Bennett* v. *Kalamazoo Circuit Judge,* 183 Mich. 200. A comprehensive review of the authorities touching the matter of presentments and indictments by grand juries will be found in that case and need not here be repeated.

It is, we think, clear, that the respondent, acting either as a conservator of the peace or in the exercise of powers analogous to those possessed by grand juries, was without power to make his so-called "presentment" a part of the official records of his court. On behalf of the respondent it is urged that the fact that some three months later warrants were issued out of his court formally charging the petitioner with the commission of various offenses recited in the so-called "presentment" is sufficient to distinguish the case at bar from *Bennett* v. *Kalamazoo Circuit Judge, supra.* This argument is not without force, but in the light of the reasoning of the decisions digested in that opinion we believe that the subsequent, though tardy, issuance of the warrants does not validate an act which at the time of its performance was unwarranted. It is quite true, as contended on behalf of the respondent, that the subsequent issuance of the warrants has made public in a legal way the matter contained in the

"presentment," but we are unable to see how this fact should affect the determination of a naked legal question.

The mandamus will issue as prayed.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred. OSTRANDER, J., did not sit.

SYLVESTER *v.* BUTTON.

1. EXECUTORS AND ADMINISTRATORS—POSSESSION OF DEVISED LANDS SUBJECT TO DEBTS—EJECTMENT.

   Where defendant, without the consent of the administrator of his father's estate, took possession of a farm devised to him by his father subject to "my just debts and funeral expenses," and claims were allowed against the estate exceeding the value of the farm, which was practically the only property in the State available to pay the debts, the administrator being entitled to possession under 3 Comp. Laws 1915, § 13850, the evidence justified the court below in directing a verdict in his favor, in an action of ejectment.

2. APPEAL AND ERROR—EJECTMENT—REVIEW.

   Where plaintiff administrator, in ejectment for the possession of a farm devised to the defendant son of testator, subject to the debts of the estate, did not appeal from that part of the judgment in favor of the purchaser of a part of said farm from defendant, whether said part of the judgment was erroneous, *held*, not before the court.

Error to Van Buren; Des Voignes, J. Submitted June 11, 1919. (Docket No. 12.) Decided July 17, 1919.

Ejectment by William H. Sylvester, administrator with the will annexed of the estate of James P. Button, deceased, against Earl P. Button and others. Judgment for plaintiff on a directed verdict. Defendant Button brings error. Affirmed.

Earl L. Burhans and *David Anderson,* for appellants.

Cady & Andrews and *Thomas J. Cavanaugh,* for appellee.

STONE, J. This is an action of ejectment, begun August 5, 1918, brought by the administrator of the estate (with the will annexed), of James P. Button, deceased, against the defendants and Fred J. Overton and Cynthia Overton for 80 acres of land in the township of Bangor, Van Buren county, which belonged to the said James P. Button in his lifetime. April 27, 1912, said testator made a will by the terms of which his son, defendant Earl Porter Button, was devised the lands described in the declaration, and $800 out of sale of a store building at Milford, Illinois. Emily L. Button, widow of testator, was devised a farm in Berrien county. It seems to be conceded, however, that this last-named farm was owned by deceased and said Emily L. Button as tenants by the entirety, at the time of his death, and so did not pass to her under the will. She was also devised 40 acres of land in Butler county, Kansas, and a store building and lot in Milford, Illinois, subject to the $800 legacy above mentioned. She was also the residuary legatee under the will.

These devises were all expressly subject to the payment of the just debts and funeral expenses of the testator. The testator died December 23, 1913, and the will was duly admitted to probate in the probate court of Berrien county on February 2, 1914. An appraisal was made of the estate bearing date March 3,

1914, which included the farm here involved at $6,000; 40 acres in Kansas at $800; store building in Illinois at $5,000, and personal property at $400, aggregating $12,200. As appears by the report of the commissioners on claims, bearing date July 25, 1914, claims were allowed against the estate aggregating $6,116.44. This, however, included a mortgage on the farm in question amounting to $2,294.95, which, after foreclosure by advertisement and sale, was redeemed from by the defendant, and should not be included in the indebtedness. The claims allowed also included claim of the widow "Emily L. Button paid J. P. Button mortgage and interest $2,135." It is claimed by defendants that this last claim was a mortgage on the Berrien county farm which, having been paid by the widow, the survivor, does not constitute a valid claim against the estate—a question that is not before us.

At the time of the death of James P. Button the store building in Milford, Illinois, was not insured, and the administrator did not insure it. It burned, and defendant Earl Porter Button filed in the said probate court a petition in said estate alleging the facts as to said building, that it was the duty of the administrator to insure it, that he had neglected his duty, that the building was destroyed March 18, 1914, and that the estate was damaged thereby to the extent of $4,000, and that the administrator should be held liable for such damage and loss to the estate. An order denying this petition was made on May 1, 1915. Later, a petition, by the administrator, to sell the real estate described in the declaration, for the purpose of paying debts, was filed in the probate court for Berrien county and a license was issued (the date not appearing in the record) but no sale was made under this license. On April 27, 1918, another petition was filed by the plaintiff praying for a license to sell, but no order was

made thereon. There was evidence that the plaintiff filed a petition in said probate court asking leave to bring this suit, and to employ counsel for that purpose, and an order was granted—the date not appearing. This was an *ex parte* proceeding, of which defendants had no notice. The defendant Earl Porter Button was called by the plaintiff for cross-examination under the statute, and he testified, among other things, that the Milford lot with the building burned off was worth, in his judgment, $2,500. He also testified as follows:

"I took possession of the farm in August, 1914. My father died in December, 1913. When he died Mr. Willis, the tenant, was living on the place, and in August, 1914, I took possession from Willis. I bought him out, and have held possession of the property ever since. The administrator has never asked me for any rent of the property and never interfered in any way with my possession. * * * As to the 20 acres I sold to Overton, he had an interest in that twenty before he got his deed. He had a lease of the twenty acres. He got his lease from me. I think it was in December. I know it was in 1914. It was two or three months after I took possession of the place. So I leased it to Overton and he was in possession under his lease, and last December (1917) I sold it to him and gave him a deed. Since August, 1914, I have taken the crops from the place, and have never shared in any way with the estate, and have never been required to do so. I have occupied the land as my own from August, 1914. * * * I went into possession of the farm by virtue of having bought out I. W. Willis. He had leased this farm from my father by a written lease, and I bought out his right and moved in by virtue of having bought out his right. * * * My father was dead when I bought out Willis. * * * I bought out the share of crops that he had growing in the year 1914, and in that way I got him to move, and then I took possession and I have had full control and possession in every way ever since without any interference from the administrator in any way, shape or manner."

This case was tried in the court below in November, 1918. Said defendant did not pay the taxes on the farm in question for the years 1914, 1915, 1916, or 1917.

At the time of the mortgage foreclosure sale above mentioned there was due on the mortgage on this farm, including costs, $2,693. The farm was sold for $5,900, thus leaving a surplus of $3,207, which remained in the hands of the sheriff, until it was taken out and used to redeem by the defendant Earl Porter Button, who also obtained $3,000 from said Overton by the sale of 20 acres of the farm, which made a sufficient sum to redeem. The taxes paid by the purchaser were the subject of the litigation in *Wood* v. *Button*, 205 Mich. 692. It appears from the record that the only property in Michigan in which said estate has any interest is the farm in question, and the $400 of personal property.

At the close of the testimony the defendants moved for a directed verdict in their favor, on the following grounds:

1. That the plaintiff, under the evidence, has shown no right to recover.

2. That the undisputed evidence in the case shows that James P. Button died December 23, 1913, leaving a last will and testament, under which this farm was specifically devised to the defendant Earl Porter Button, and that in August, 1914, said defendant obtained possession of this farm, which was his devise, and has ever since held possession thereof, without any reference to the administrator, and without being requested by the administrator, in any wise to account to him for any of the proceeds; and that said defendant has in all ways treated the property as his own.

3. Because the evidence shows that the probate court has not at any time, determined there was a deficiency in the property necessary to pay debts. Consequently there is no evidence before the court that there is any deficiency.

4. Because the undisputed evidence shows that no opportunity has been given to said defendant to pay any share of any deficiency in assets that might fall upon him, in settling the debts of said estate.

5. Because such administrator cannot, under any circumstances, maintain ejectment against a devisee in possession under the terms of the will, where that possession is with the consent of the administrator or executor, or otherwise.

6. That the undisputed evidence shows that there are other legatees, and other pieces of property devised, and these other legatees are bound to contribute towards the payment of debts as well as said defendant Earl Porter Button; and there has been no determination of the probate court, showing the amount that any devisee or legatee should be called upon to contribute.

This motion was denied. Thereupon both parties asked for a directed verdict. The trial court directed a verdict and judgment against defendants Earl Porter Button and wife, for the undisposed of portion of the land, and in favor of Fred Overton and Cynthia Overton for the 20 acres purchased by said Fred Overton.

The defendants Button have brought error, and by proper assignments of error have raised the same questions urged in the motion for a directed verdict, and they assert here that upon the whole record, and the statutes applicable thereto, the plaintiff is not entitled to recover.

The appellants rely upon the provisions of sections 13797 to and including 13801, 3 Comp. Laws 1915, and the decisions of this court thereunder, and especially upon *Atwood* v. *Frost*, 51 Mich. 360. Appellants call attention particularly to section 13799, 3 Comp. Laws 1915, which is as follows:

"All the devisees and legatees, who shall, with the consent of the executor or otherwise, have possession of the estate given to them, by will, before such liability

shall be settled by the probate court, shall hold the same subject to the several liabilities mentioned in the preceding section, and shall be held to contribute according to their respective liabilities to the executor or to any devisee or legatee from whom the estate devised to him may have been taken for the payment of debts or expenses; * * * and the persons who may, as heirs, have received the estate not disposed of by the will as provided in this chapter, shall be liable to contribute, in like manner as the devisees or legatees."

We are of the opinion that a careful examination of the statutes referred to, and of *Atwood* v. *Frost, supra,* will show that they are not applicable to the conditions here presented.

At the time defendant got possession of the farm in question, debts to a considerable amount had been proved against the estate. The property in question is the only property in this State available to pay the debts—save the small amount of personal property. The last petition for license to sell, although introduced in evidence, does not appear in the record. It probably was in the usual form and stated the amount of the debts unpaid. A careful reading of *Atwood* v. *Frost, supra,* will show that in that case the executor filed in the probate court a petition in which he recited the sales made by him, and stated that the sums received were insufficient for the satisfaction of the demands against the estate, and praying that the devisees and legatees who had received property from the estate under the will be decreed to pay the same in proportion to the value of the property received by them respectively; and the court granted the prayer of the petition and made an order of contribution in which a certain sum was assigned to be paid by Mrs. Dibol. This order of contribution was made on due notice to the parties concerned. That was the reason for the following significant language of Justice COOLEY:

"The action of the executor and of the probate court assumed that the land in dispute had been delivered into the possession of Mrs. Dibol with the executor's consent. That being so, the proceedings to compel her to contribute must have been taken under this statute. It was never contemplated that the executor might still treat the property as assets to be disposed of in the ordinary way."

We think that that case is readily distinguished from the instant case. Here all the property devised was made subject to "my just debts and funeral expenses," and the farm in question had not come into the possession of defendant Earl Porter Button with the executor's consent. As against the plaintiff's right, the possession of said defendant was wrongful, and the plaintiff has the right to possession for the statutory purpose. In our opinion, section 13850, 3 Comp. Laws 1915, entitles the plaintiff to possession of the real estate in question, and under the evidence justified the trial court in directing the verdict and judgment for the plaintiff. Whether that part of the verdict and judgment in favor of the Overtons was erroneous is not before us, as the plaintiff has not appealed.

We find no error in the record of which the appellants can justly complain, and the judgment below is therefore affirmed.

BIRD, C. J., and OSTRANDER, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

PERKETT *v.* MANISTEE & NORTHEASTERN RAILROAD CO.

1. CARRIERS—DELAY IN TRANSIT—DAMAGE TO FRUIT—INSPECTION—SUFFICIENCY—QUESTION FOR JURY.

In an action against a railroad company for damages to fruit alleged to have been caused by delay in its shipment, testimony by plaintiff as to the condition of the peaches at time of shipment, that while he examined only 80 or 85 baskets of peaches out of a shipment of 389 baskets, he examined four or five baskets in each load, that he could see the peaches through the openings between the slats of which the baskets were made, that he personally saw every basket as it went into the car, that from this method of inspection he was able to testify as to the quality and condition of the fruit of the entire lot, and that this was the usual, ordinary, and general way in which shippers and purchasers of fruit, when shipping, examine it, *held*, sufficient to present a question of fact for the jury as to the condition of the peaches at the time of inspection before shipment, and that the court below was in error in limiting recovery to the 80 baskets actually examined.

2. SAME.

In such action, testimony by a witness for plaintiff as to the condition of apples shipped by plaintiff after arrival at their destination, that he only inspected about 15 barrels of the apples at the time of the actual delivery to the consignee, but later on, when the apples were sold, that he actually handled every barrel himself and opened the barrels and made inspection, that he had had 30 years' experience and was able to testify, from the inspection made, whether or not they had become heated, *held*, in connection with other testimony offered, to present a question of fact for the jury as to the condition of the apples at the time of their delivery to the consignee, and the court below was in error in limiting recovery to 37 barrels.

Error to Grand Traverse; Mayne, J. Submitted June 4, 1919. (Docket No. 40.) Decided July 17, 1919.

Assumpsit by Louis F. Perkett against the Manistee & Northeastern Railroad Company for damages to certain fruit in transit. Judgment for plaintiff for less than amount claimed. Plaintiff brings error. Reversed.

John J. Tweddle, for appellant.

Edgar H. Johnson (*Travis, Merrick, Warner & Johnson,* of counsel), for appellee.

KUHN, J. This cause, which involves an action of assumpsit for damages to two cars of fruit, was before this court before, and the decision is found reported in 191 Mich. 106. That opinion contains a statement of fact sufficient for an understanding of the issues involved. The cause, having being reversed, was sent back for a new trial, which resulted in a judgment recovered against the defendant for $266.61, by virtue of the Carmack amendment to the interstate commerce act.

The principal errors relied upon may be grouped under two headings:

(1) Error of the court in limiting the recovery of damages (for the decay of peaches) to 80 baskets of peaches.

(2) Error in limiting the recovery of damages (for the alleged decay of apples) to 37 barrels of apples.

1. It is the contention of the appellant that there was sufficient evidence to show the condition of the peaches at the time they were loaded and shipped and that the question of fact as to the condition of the fruit at that time should have been submitted to the jury for them to determine. The trial judge limited the recovery to 80 baskets of peaches for the reason that the plaintiff testified that he only opened 85 or 80 baskets of peaches and only made an actual ex-

amination of that many baskets. But his testimony shows that he examined four or five baskets in each load. The peaches were in regular peach baskets, and he testified that he could see the peaches through the openings made between the slats of which the baskets were made, and that it is the usual, ordinary, and general way in which shippers and purchasers of fruit, when shipping it, examine the fruit. He testified that he had been in business for 30 years, during which time he has observed this custom, and that other shippers had also observed the same custom, and that from this method of inspection he was able to testify as to the quality and condition of the fruit of the entire lot, which comprised 389 baskets of peaches, he having actually seen every basket of peaches as it went into the car. Upon this testimony we think that the claim of the appellant is justifiable that it presented a question of fact for the jury to determine as to what the condition of the peaches was at the time of the inspection before shipment.

2. The trial judge limited the recovery for the apples to 37 barrels, because of the fact that the testimony only showed that that many barrels were actually inspected after their arrival at their destination. Mr. Frost, a witness for the plaintiff, testified as to the condition of the apples upon their delivery to the consignee. He stated that he had only inspected about 15 barrels of the apples at the time of the actual delivery to the consignee, but later on, when the apples were sold, that he actually handled every barrel of apples himself, and opened the barrels and made inspection. He testified that he had had 30 years' experience and was able to testify from the inspection he made of the apples whether or not they had become heated. We are of the opinion that this testimony presented at least a question of fact for the jury to determine what the condition of the apples

was, in connection with the other testimony offered, at the time of their delivery to the consignee, and the question of fact should have been submitted to the jury.

There is also a claim made that the court erred in instructing the jury that the plaintiff admitted that the cars were properly iced according to the contract. As the case will be sent back for a new trial, if there is any merit to this claim, the error will probably not be repeated, and it is therefore unnecessary to discuss it.

For these errors the case will be reversed and a new trial granted, with costs to the appellant.

BIRD, C. J., and OSTRANDER, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

BRENNAN v. RECORDER OF THE CITY OF DETROIT.

1. MANDAMUS—JUDGE OF RECORDER'S COURT OF DETROIT—DETERMINATION BINDING UPON INCUMBENT.

Where, since the order to show cause was issued in mandamus proceedings to compel the recorder of the city of Detroit to take a complaint for violation of a city ordinance he has been succeeded in office by another, the determination of the matter will be binding upon the incumbent; the proceedings being directed to the judge officially.

2. MUNICIPAL CORPORATIONS — MOTOR VEHICLE LAW — HIGHWAYS AND STREETS—AUTOMOBILES—ORDINANCES.

An ordinance of the city of Detroit regulating the speed of automobiles upon the streets of the city and fixing a

greater penalty for its violation than that provided in the "motor vehicle law," *held*, not in contravention of the State law, since it does not make it less stringent or relax it.

3. STATUTES—CONSTRUCTION—MOTOR VEHICLE LAW.
Requirements of the "motor vehicle law" for recording and certifying the convictions thereunder, *held*, merely incidents of the enforcement of the statute that do not affect the rule of conduct therein prescribed.

4. CONSTITUTIONAL LAW—POWER OF LEGISLATURE.
The legislature may not do by indirection that which it cannot do directly.

5. SAME — MUNICIPAL CORPORATIONS — HIGHWAYS AND STREETS — RIGHT TO REASONABLE CONTROL.
Held, that the legislature may not, by providing for a system of recording or certifying convictions of violations of the "motor vehicle law" to the secretary of State, nullify the right of municipalities, under section 28, Art. 8, of the Constitution, to the reasonable control of its highways.

Mandamus by Vincent M. Brennan, assistant corporation counsel, to compel William F. Connolly, recorder of the city of Detroit, and another to take a complaint for an alleged violation of a city ordinance. Submitted July 2, 1919. (Calendar No. 28,219.) Writ granted July 17, 1919.

Vincent M. Brennan (*Clarence E. Wilcox*, of counsel), *in pro. per.*

Edwin Henderson, for defendants.

KUHN, J. The relator seeks mandamus to compel the respondents to take a complaint under a city ordinance of the city of Detroit for an alleged violation of the provisions of the section of an ordinance which prohibits "speeding," so-called, in that city. The learned recorder took the view that the ordinance, in so far as it undertook to punish "speeding," contravened the "Michigan motor vehicle law," and refused

to entertain complaints under the ordinance in his court for that offense. He also instructed the other respondent, the clerk of his court, to refuse to take such complaints.

Since the time when the order to show cause in this matter was issued against the respondent, he has left the bench and has been succeeded by the Hon. Charles T. Wilkins, the present recorder. However, as the proceeding is directed to the judge officially, the determination of this matter is binding upon the incumbent, whoever he may be. *People* v. *Bacon*, 18 Mich. 247.

It is the contention of counsel for respondents that the municipality has power only to legislate upon the subject-matter of the control of its streets when the legislature of the State has not by general legislation covered the subject-matter. In support of this contention, the case of *People* v. *McGraw*, 184 Mich. 233, is relied upon. In that opinion it was said:

"The municipality retains *reasonable control* of its highways, which is such control as cannot be said to be unreasonable and inconsistent with regulations which have been established, or may be established, by the State itself with reference thereto. This construction allows a municipality to recognize local and peculiar conditions and to pass ordinances regulating traffic on its streets, which do not contravene State laws."

Section 30 (1 Comp. Laws 1915, § 4826) of the "Michigan motor vehicle law" confers jurisdiction to hear, try and pass sentence for any and all violations of any of the provisions of the act, upon police justices of any city or justices of the peace of the county where any such violation shall occur; and section 33 (1 Comp. Laws 1915, § 4829) of the same act provides for a comprehensive method of certifying convictions under the State law, for recording such certificates

by the secretary of State and for the certification by the secretary of State to the several county clerks of the State, of convictions under section 21, and for furnishing copies of the records of convictions under section 21 by the county clerks of the State to the magistrates in each county before whom violations of the provisions of the "Michigan motor vehicle law" are triable. It is urged that if a prosecution and conviction should be had under the city ordinance for an offense defined by the State law, such conviction cannot be reported to the secretary of State, as provided by the State law, and therefore that the purpose of the State law is in that respect contravened and nullified. It is conceded by counsel that it is the settled law in this State that the legislature may delegate to municipalities the power to legislate against crimes already denounced by the general State law (*People* v. *Hanrahan*, 75 Mich. 611 [4 L. R. A. 751]), but it is insisted that under the decision in *People* v. *McGraw*, *supra*, the power reserved to municipalities with reference to control of its streets extends only to such subjects as are not covered by the general State law. In our opinion, this decision should not be given any such construction. The force of that decision is that the rule of conduct established by the State with reference to the highways of a municipality cannot be relaxed or made less stringent by a city ordinance, but incidents that may be found necessary by the legislative body to enforce the rule of conduct are not what was contemplated in the previous decision when we said that the ordinance should not contravene the State law. There is no question in the instant case that the rule of conduct established by the ordinance does not contravene the State law, in that it does not make it less stringent or relax it. The recording with the secretary of State of the infractions of the State law and the other requirements

of the statute for recording and certifying the convictions, are merely incidents of the enforcement of the statute that do not affect the rule of conduct therein prescribed. In the decision of *People* v. *McGraw, supra,* it was held that section 9 of Act No. 318 of the Public Acts of 1909, which attempted to prohibit municipalities from passing local ordinances with reference to motor vehicles, was unconstitutional and void, as it interfered with the constitutional right of a municipality to the reasonable control of its highways. Section 28, art. 8, Constitution of 1909. If the contention of counsel for respondent is sustained in this case, the legislature might, by indirection, prohibit the municipality from legislating on the subject by providing, as they did in the law now being considered, for a system of recording or certifying convictions to the secretary of State. The legislature cannot do by indirection that which it cannot do directly.

The writ will issue as prayed for, but without costs to either party.

BIRD, C. J., and OSTRANDER, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

MAHDER *v.* SOULE.

MORTGAGES—PAYMENT—DISCHARGE.

On a bill for the discharge of a mortgage, the finding of the court below that said mortgage was included in the amount of another mortgage which has been fully paid, and therefore plaintiff was entitled to the relief prayed, *held*, sustained by the record.

Appeal from Ottawa; Cross, J. Submitted June 5, 1919. (Docket No. 57.) Decided July 17, 1919.

Bill by Anna L. Mahder against Fay F. Soule for the discharge of a mortgage. From a decree for plaintiff, defendant appeals. Affirmed.

Louis H. Osterhous, for plaintiff.

Charles E. Misner, for defendant.

Plaintiff by her bill of complaint in this cause sought to have a certain mortgage declared paid and discharged of record. Defendant has appealed from a decree of the circuit court granting the relief prayed for. The circumstances disclosed by the evidence are as follows. On November 10, 1909, Charles E. Soule, an attorney of Grand Haven, acting as agent for a Mrs. Cummings, whose funds he had for investment, loaned $275 of her money to one Dwight H. Cheeseman, taking the promissory note of said Cheeseman and wife, of which the following is a copy:

"$250.00 GRAND HAVEN, MICH., Nov. 10, 1909.

"Within six years after date, we, or either of us, promise to pay Fay F. Soule, trustee, or bearer, two hundred seventy-five dollars at National Bank here, in sums and at dates, viz.: Nov. 10, 1910, $25 and $50 per year for five years thereafter at said date,

with interest at 6% per year on all unpaid amounts, payable semi-annually, for value received.

"DWIGHT H. CHEESEMAN, and
"MARIA CHEESEMAN."

—and a collateral mortgage, executed by Cheeseman and wife to "Fay F. Soule as trustee for the holder of the promissory note hereinafter mentioned, and without other interest," covering lots 5, 6, 7, 8 and south half of lot 4, in block E, of the village of Robinson, Ottawa county; also the southeast quarter of the northeast quarter of section 13, town 7 north, range 15 west, in Robinson township in said county. Fay F. Soule is the son of Charles E. Soule. The purpose in making the note and mortgage run to a trustee was thus explained by Mr. Soule in his testimony:

"I made them in such shape that I could sell the mortgage and the note without any indorsement, without any assignment, and I could tell people now there won't anybody know that you hold that paper at all, your name isn't mentioned in there, it goes to my son as trustee, and there don't anybody know you hold it, and that is quite an object in making that kind of loan, and it transfers just exactly like a hundred dollar bill, by delivery."

The mortgage was a first lien on the village lots and a second lien on the 40-acre farm, on which latter the Grand Haven State Bank held the first mortgage. Following is a chronological history of the transactions affecting this note and mortgage and the lands which it covered:

1910

Sept. 15 Mr. Soule, as agent for both Mrs. Cummings and a Mrs. Duryea (whose funds he also had for investment) took over the note and mortgage for Mrs. Duryea, paying over from Mrs. Duryea's funds to Mrs. Cummings' funds the amount of principal and interest then due on the said note and mortgage.

This transfer was made without indorsement or assignment.

Oct. 7 Cheeseman and wife conveyed the village lots covered by the mortgage to William Foster, by warranty deed with full covenants, not excepting the mortgage.

Nov. 15 Foster paid the interest on the note and mortgage to Nov. 10th, also $25 on account of the principal, and deeded the village lots to Samuel Mahder.

Dec. 5 Cheeseman and wife conveyed the farm property to Frank Allen by warranty deed with full covenants, not excepting the mortgage.

Dec. 30 Allen paid in full the mortgage given to the Grand Haven State Bank which was the first lien on the farm property. (This mortgage had been taken over by Mr. Soule from the bank, in order to protect the second mortgage, and foreclosure proceedings had been instituted by him.) This payment left Mrs. Duryea's mortgage the first lien on the farm property as well as on the village lots.

1911

Mar. 13 Samuel Mahder conveyed the village lots to Anna Lascobar, who is the plaintiff herein, having afterwards, by marriage to said Samuel Mahder, become Anna Mahder.

Apr. 26 Anna Lascobar executed a new note and mortgage to Fay F. Soule, trustee, for $550, due three years after date, covering the village lots and other property.

It is the plaintiff's claim that this new note and mortgage were given in payment of the balance of the Cheeseman note and mortgage, $250, and that she received in addition $290 in cash, Mr. Soule charging $10 for his services; and that the old note and mortgage ought, therefore, to have been surrendered, canceled and discharged. What the real facts were in connection with this transaction of April 26, 1911, is the principal question in issue.

Plaintiff's version of the matter is thus stated by her counsel in his brief:

"Early in April, 1911, the plaintiff needed some money for the purpose of making repairs upon the house on the premises and applied to the Peoples Savings Bank, of which Charles E. Soule was a director and for which he was attorney, for an additional $300 loan on the lots and other lands. Later Mr. Soule and the cashier of the bank went out to the property and looked it over and advised Mrs. Mahder that the bank could not make the desired loan upon the premises, but that if she would come down to Grand Haven and see Mr. Soule, he might be able to arrange the loan for her. Mr. Soule gives as his reasons for advising the bank not to make the loan: *first,* under the law the bank could not take a second mortgage, and *second,* that the value of the property was not more than $750 or $800, and was not, therefore, sufficient security.

"Mrs. Mahder later went to Grand Haven and saw and talked with Mr. Soule, in the directors' room of the Peoples Savings Bank, and there, on April 26, 1911, she completed negotiations with him, executing and delivering at his request, payable to Fay F. Soule, as trustee, a promissory note for $550, due three years after date and secured by mortgage upon the village lots and other property.

"Mrs. Mahder claims that upon the execution and delivery of the $550 mortgage, Mr. Soule paid to her in currency the sum of $290, being the $300 loan she had been seeking, less a charge of $10 for examination of abstract and preparing the mortgage; that the $250 Cheeseman mortgage and the new $300 mortgage were merged in the new mortgage for $550; that the $250 mortgage was in that manner fully paid and satisfied and should have been discharged.

"Thereafter Mrs. Mahder regularly paid to Mr. Soule the interest upon the $550 mortgage; on April 25, 1914, she paid $170 upon the principal; and, on or about May 2, 1914, she paid the balance due upon the mortgage in full to Charles E. Soule, and the same was discharged May 18th.

"At no time after April 26, 1911, although for three years she was paying interest to him upon the $550 mortgage and eventually paid all of the principal, did Mr. Soule say anything to the plaintiff, nor did the plaintiff say anything to Mr. Soule, concerning the

$250 mortgage, and no claim was at any time made by Mr. Soule to her that the $250 mortgage had not been paid, and she was never asked for the payment of interest or any other sum on account thereof."

Defendant's version is thus set forth in his counsel's brief:

"Plaintiff called Mr. Soule into a room, away from the cashier and Dr. DeKleine, said she had to have the money and asked him if he would not get it. This is Mr. Soule's testimony, and, to this point, there is no conflict. Plaintiff testifies,—

"'She took Mr. Soule into another room and told him she had to have the money, and he asked her what she wanted to do with the money.'

"In this there is conflict:

"'She said Mr. Mahder was in trouble in Chicago and she had to have the money to help him out.'

"She says, in reply to his question:

"'Well, I want to fix my place up.'

"She denies she told him she wanted the money to help Mahder out of trouble; denies there was any trouble. She admits she eloped with him from Chicago, where he deserted his family there.

"Mahder testifies:

"'He was arrested in Chicago for living an adulterous life out here with Mrs. Lascobar, the plaintiff in this case.'

"Mr. Soule says he told her if she would come to Grand Haven after he could examine the title, he might help her out, and made an appointment for April 26th. She contradicts. Mahder says Mr. Soule would send a card and could see him at Peoples Savings Bank. She met him in bank directors' room, April 26th. He says no one else was present; she says that Mahder was there, her 'husband.' Mahder denies he was her husband, says:

"'At that time he was living on this property with Anna Lascobar, and he went down to the Peoples Savings Bank where they met Mr. Soule in the directors' room.'

"Mr. Soule had looked up the two titles without abstracts; Mrs. Lascobar wanted, 'had to have,' $400 to free Mahder from his troubles in Chicago by her eloping with him, deserting his family there. Mr. Soule makes it $400 positively from her wanting that amount from the bank, and his paying her $390 by his check, $10 less as part of commission, which she indorsed and put through the bank regularly, her indorsement admitted by her and Mahder.

"She 'had to have the money,' and agreed to make a note and mortgage for $550; $60 for Mr. Soule's commission, $100 for his legal opinion and effort to have the Allen farm pay the mortgage, and $390 she was to have in money; a note was made for $550, payable to Fay F. Soule, or bearer, secured by a mortgage quite identical with the Cheeseman mortgage, due three years after date with interest at 6 per cent., payable semi-annually, the mortgage to 'Fay F. Soule, as trustee for the holder of the promissory note hereinafter mentioned, and without other interest'; Mr. Soule drew the papers and she signed them and Mr. Dornbos, the cashier, and Mahder were called in for acknowledgment and witnesses; he gave her his check of Mrs. Edmonds' money he then had to loan for $390, which she indorsed and put through the bank regularly; he charged in his journal that day, Mrs. Shirley Edmonds to bills receivable, $550; bank, $390, fees $160. This is Mr. Soule's testimony. * * *

"The testimony shows that plaintiff received the following check:

"'Grand Haven, Mich., April 26th, 1911. No. 2869.

"'The Peoples Savings Bank of Grand Haven: Pay to Anna Lascobar, or order, $390, Three hundred ninety dollars.

"'CHAS. E. SOULE.'

"Indorsed on back:

"'Anna Lascobar.'

"Bank's stamp on face:

"'Peoples Savings Bank of Grand Haven. Paid April 27th, 1911.'

"Plaintiff admitted that this was her name on there, and she wrote it there herself. * * *

"The other item, which makes up the amount of the 'Lascobar mortgage,' $100, was by virtue of an agreement between Judge Soule and plaintiff. The Cheeseman mortgage covered two parcels of land, Robinson village lots and 40-acre farm. The former being sold first to plaintiff, and later the farm was sold to one Allen. Judge Soule informed plaintiff that he believed the Allen forty would have to pay the Cheeseman mortgage, amounting to $250, as neither deed made any mention of the mortgage.

* * * "An agreement was made whereby Mr. Soule was to receive $100 to look after this matter and have the Allen 40 pay the mortgage. Mr. Soule performed his part of the agreement, in upholding his legal opinion. In the case of *Allen* v. *Soule* (191 Mich. 194) he defended the suit, and made a defense both in the circuit and Supreme Court. This case cost Mr. Soule more than $139 in cash for fees and costs and he received no compensation for services in either court. * * *

"The final item which makes up the amount of the 'Lascobar mortgage of $550' is $60, paid to Charles E. Soule for examining two titles without abstracts, making papers, and getting her the money. The question is not whether this commission is excessive, but is this the amount? Mr. Soule candidly admits that he charged plaintiff a large commission because of the adulterous relations with Mahder, and she had to have the money to get him out of trouble."

The suit of *Allen* v. *Soule*, above referred to (see 191 Mich. 194) arose in this way: In December, 1910, Mr. Soule had given to Mr. Allen a written agreement to discharge the $250 mortgage from the 40-acre parcel, in consideration of the payment of $35 to Mr. Soule, not to be applied on account of the mortgage. It is Mr. Soule's claim, however, that though Mr. Cheeseman paid this $35 to Mr. Allen, the latter never turned it over to Mr. Soule. Later Mr. Allen went to Mr. Soule and offered to purchase the mortgage from him, but Mr. Soule refused to sell it. Mr. Allen then filed a bill, asking for a decree requiring the village lots to be sold first in any fore-

closure proceedings which might be brought. The decree was granted, and was affirmed on appeal.

Relative to the $390 check above referred to, it is plaintiff's claim that she did not receive such a check and cash it on the following day, but that she was paid only $290, and this in currency and at the time of the signing of the papers. She admits that the signature on the back of the check is hers, but says that Mr. Soule must have asked her to place her signature there when she was signing the other papers, without explaining to her what it was.

It is defendant's claim that on June 20, 1911, the Cheeseman note and mortgage were sold and transferred by delivery to one David Alston, who held them until September 24, 1912, when he sold them to the Peoples Savings Bank. That the bank later sold them to a party in Chicago, and that in May, 1917, a Chicago attorney forwarded the papers for the purpose of having the mortgage foreclosed for one Woodhouse, claimed to be the present owner. Upon learning that foreclosure proceedings by advertisement had been commenced, plaintiff filed her bill of complaint in the present proceeding.

The learned chancellor, after hearing the testimony, made the following findings:

"Charles E. Soule claims that the $250 mortgage was not included in the $550 mortgage, but claims that although the plaintiff honestly owed the $250 mortgage and was willing to pay the same, that he, Charles E. Soule, conceived the idea of making an innocent party pay the debt of the plaintiff, that for this advice to the plaintiff he charged her the sum of one hundred dollars and that he also charged her the sum of sixty dollars as a commission for making the loan to her, and that as a balance of the consideration for the $550 mortgage he let the plaintiff have the sum of $390.

"It appears that from the time the $550 mortgage was given, no interest was demanded or paid upon the $250 mortgage, until the present foreclosure proceed-

ings were commenced. Plaintiff paid the interest promptly upon the $550 mortgage, and has paid the principal in full.

"It is clear that the $250 mortgage was included in, and paid by the payment of the $550 mortgage, and that the same having been fully paid should be discharged of record.

"At the time of the making of the $550 mortgage, Charles E. Soule was the agent and attorney of the defendant and had full power and authority to collect and discharge the $250 mortgage, and the same having been fully paid to him, the plaintiff is entitled to a decree discharging the same of record."

From a decree made in accordance therewith, defendant appeals.

KUHN, J. (*after stating the facts*). This record presents one question for decision, Was the $250 Cheeseman mortgage included in and paid by the $550 mortgage given by the plaintiff to the defendant? This raises simply a question of fact. It is indeed most unfortunate that a controversy such as this, arising between an attorney of long and reputable standing at the bar and his client, finds its way to this court. In the decision of the case, however, as in all others, we must be guided simply by what the record discloses, weigh the testimony with care, and determine whether or not the plaintiff's case has been established. This being a chancery case, the cause is heard here *de novo*, and it is our duty, as was said in *Oliver* v. *Baldwin*, 201 Mich. 360, to exercise independent judgment in passing upon the evidence in this case. We cannot, however, overlook, in determining this question of fact, that the circuit judge who heard the case below, who knew the witnesses, had the opportunity of seeing them on the witness stand, and heard their manner of giving their testimony, had certain advantages which we do not possess in arriving at the truth with reference to the issue involved.

It would not profit any one for us to attempt in this opinion to review the conflicting testimony. It is sufficient to say that after a reading of the entire record and a careful consideration of the claims of counsel with reference to the disputed facts, we are forced to the conclusion that the material question of fact involved upon this record as presented was correctly determined by the trial judge, whose decree, therefore, must be affirmed, with costs to the appellee.

BIRD, C. J., and OSTRANDER, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred. MOORE, J., did not sit.

CITY OF DETROIT *v.* TRIANGLE LAND CO.

TAXATION—INJUNCTION—RES JUDICATA—WRIT OF ASSISTANCE.

On a bill by the city of Detroit to enjoin the service of a writ of assistance, on the ground that it was entitled to have the value of improvements admeasured and set off to it, and that defendant tax title purchaser was entitled to the interest in the land only, independent of the building, where said question was decided adversely to plaintiff's claim in a former decision by the Supreme Court, the decree of the court below dismissing the bill was proper.

Appeal from Wayne; Hosmer, J. Submitted June 6, 1919. (Docket No. 76.) Decided July 17, 1919.

Bill by the city of Detroit against the Triangle Land Company and another to enjoin the service of a writ

of assistance. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Walter Barlow (*Clarence E. Wilcox*, of counsel), for plaintiff.

Frederick E. DeCamp (*Albert DeCamp*, of counsel), for defendants.

OSTRANDER, J. After the decision in the cause of *Triangle Land Co.* v. *City of Detroit*, 204 Mich. 442, the Triangle Land Company was granted a writ of assistance, which writ was placed in the hands of the sheriff for service. This upon the order of a judge of the Wayne county circuit court. Service of the writ was temporarily enjoined, upon the filing of the bill in this cause, by another judge of the Wayne county circuit court. Thereupon the bill was answered and such proceedings were had that on April 5, 1919, a decree dismissing the bill was entered. From that decree the city of Detroit has appealed.

The land in question is lot 3 and the westerly one-half of lot 2, in block 55, of the Woodbridge farm as divided by commissioners in partition. The title to the land of the Triangle Land Company rests upon a tax levied thereon for the year 1907, the property being assessed April 1, 1907, the roll confirmed May 2, 1907. It was vacant property when assessed. The city purchased it of the owner May 22, 1907, for $2,250 and immediately erected thereon a building at a cost of more than $20,000 for use of its fire department. It is the claim of the city that the tax title holder and owner became possessed at the tax sale of only the interest in the land independent of the building and that the building is an interest which belongs to the city. It seeks in this suit to have the value of the improvement as distinguished from the value of the land admeasured and set off to it, either in

partition proceedings or by a sale of the premises and a division of the proceeds of the sale.

The defendant Triangle Land Company claims that it owns the premises as they are, and claims further that all the rights of the parties were adjudicated in the case of *Triangle Land Co.* v. *City of Detroit.* In that case, in resisting the application of the Triangle Land Company for a writ of assistance to put it in possession of the lands, the city set up the fact of the improvement and made a claim to the building as an improvement. Supplemental briefs were asked for by this court upon the subject of the discretionary power of a court of chancery to impose terms in granting a writ of assistance. After the opinion was filed, there was a motion for a rehearing by the city of Detroit, in which it was insisted that the court failed to consider its prayer that the city be allowed for improvements. The rehearing was denied. It is clear, therefore, that the question now presented was before the court in the original proceeding and was determined adversely to the contention of the city. We held:

"We are constrained to conclude that plaintiff has shown a compliance with requirements of the tax law establishing legal rights which it is entitled to maintain by this proceeding as the statute authorizes."

In short, we held that the Triangle Land Company was entitled to have the writ of assistance to put it in possession of the land as it was. Independent of this, we know of no statute and of no rule of law which sustains the contention of the plaintiff in this suit.

The decree of the court below is affirmed, with costs to appellee.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

COZADD *v.* PARROTT.

FRAUDULENT CONVEYANCES—BILL IN AID OF EXECUTION—EVIDENCE —SUFFICIENCY.

On a bill in aid of execution to set aside the conveyance of certain lots by the debtor to his present wife, in pursuance of an ante-nuptial contract whereby she paid about one-half of the value of the lots at the time of the transfer, said conveyance being alleged to be in fraud of plaintiff's rights as a creditor, testimony that the debt represented by the judgment is a part of the cost of constructing a house upon the premises in question, and that defendant did not intend to pay the debt, *held*, to justify the decree of the court below setting aside said conveyance, but subject to the claim and lien of the wife for the amount paid.

Appeal from Oakland; Smith, J. Submitted June 5, 1919. (Docket No. 64.) Decided July 17, 1919.

Bill in aid of execution by Charles C. Cozadd against William T. Parrott and another. From a decree for plaintiff, defendants appeal. Affirmed.

Perry & Lynch, for plaintiff.

Fitzgibbon & Quail, for defendants.

OSTRANDER, J. The bill is filed in aid of execution. It charges that on April 13, 1916, plaintiff recovered a judgment before one of the justices of the peace in and for the county of Wayne against defendant William T. Parrott for $323 damages and $6.45 costs of suit, that on or about April 26, 1916, plaintiff caused a transcript of said judgment so rendered to be filed in the circuit court for the county of Oakland "pursuant to the statute in such case made and provided," that previous to the rendition of said judgment said William

T. Parrott was the owner in fee simple of lots 4 and 5 of the University subdivision of the village of Orion, according to the plat thereof, that on April 26, 1916, a writ of *fieri facias* was issued, directed to the sheriff of Oakland county, where such real estate is situated, that William T. Parrott is a resident of Wayne county and has no goods or chattels in Oakland county, that on June 26, 1916, the sheriff levied said execution on said lots. It is further charged that prior to the rendition of said judgment, but after the indebtedness had accrued, and on December 22, 1915, defendant William T. Parrott made a pretended conveyance of said lands to Minerva J. Little, the other defendant, for the pretended consideration of one dollar, recorded in the office of the register of deeds for Oakland county, that the conveyance was not real, but was a sham, made with the intention of defrauding plaintiff out of his just demands, that no consideration was paid by said Minerva J. Little to said William T. Parrott for said conveyance and that the said premises are now held by said Minerva J. Little in trust for said William T. Parrott and for his use and benefit and for the purpose of preventing a levy and sale of the land under and by virtue of said execution, that since the making of said pretended conveyance the said William T. Parrott and Minerva J. Little have intermarried and said Minerva J. Little is now Minerva J. Parrott.

Five interrogatories are incorporated in the bill, which are:

"1st. For what purpose was the said lots 4 and 5 of the University subdivision of the village of Orion aforesaid conveyed to said Minerva Parrott by said William T. Parrott?

"2d. How much money was paid by the said Minerva Parrott to the said William T. Parrott for said lands?

"3d. If anything other than money was received as

a consideration for said land, state specifically in what the same consisted?

"4th. How much money has been at any time paid by the said Minerva Little to the said William T. Parrott for said lands?

"5th. Please state in what form the consideration for said lands was paid, if by check, the date and amount and the banks upon which the same was drawn, and if cash, what disposition was made of the money and where the same was deposited?"

The prayer is that the said conveyance of said lots may be set aside and vacated and declared to be null and void and that plaintiff be authorized to proceed upon his writ of *fieri facias*, or issue another writ as may be necessary, and the sheriff be directed to proceed to levy upon, advertise and sell the said lands and premises for the payment and satisfaction of plaintiff's said judgment.

There is a joint and several answer, in which, denying some of the material facts charged in the bill, the interrogatories are answered as follows:

"1st. Said land was conveyed to the said Minerva Little in accordance with a certain ante-nuptial agreement and settlement entered into by Minerva Little and Wm. T. Parrott.

"2d. Said Minerva Little paid this defendant in money, the sum of $1,012.31, the other considerations for said land being a promise to marry and a waiver by Minerva J. Little of her right of dower in the estate of this defendant.

"3d and 4th. This defendant considers interrogatories 3 and 4 answered in interrogatory 5, money received as above set forth was deposited in Dime Savings Bank, Detroit, Michigan."

The cause coming on to be heard in open court, testimony was introduced and a decree was entered setting aside the said conveyance, but subject to the claim and lien of Minerva J. Parrott for $1,012.31, and the sheriff is authorized to proceed to advertise

and sell the premises in default for 30 days of the payment of the amount of the said judgment and costs.

At the hearing, counsel for plaintiff made a statement of the case, not very complete, and when he had concluded counsel for defendant said:

"Counsel concedes those statements. I don't know that there is anything more for us to say. That is correct as far as the obtaining of a judgment is concerned and the consideration—"

The testimony includes that of the file clerk in the office of the clerk of Wayne county, who testified:

"I have the files of this case with me, transcript 7461. The suit was brought against Wm. T. Parrott in the justice court of the city of Detroit, in April, 1916, on a note and a judgment for $323.00 and costs $6.75, was rendered against Wm. T. Parrott in favor of Charles Cozadd on April 13, 1916."

The register of deeds for Oakland county was called and testified:

"On page 292, liber B, there was a levy on the property covered by the bill of complaint, on the 26th day of June, 1916."

This is the proof, and all of it, of a judgment and levy. There is no proof of a transcript, how it was taken, from what court to what court. The bill alleges a transcript from a justice of the peace of Wayne county filed in the circuit court for Oakland county, pursuant to the statute. This allegation is not admitted by the answer. It is said in the brief for the appellants that there is no machinery of law whereby plaintiff can obtain a transcript from the Wayne county justice and file it directly with the Oakland circuit court. No question was made at the hearing that there was any infirmity in the proceedings leading up to the issue of the execution and the levy. In the brief for appellee it is said:

"As to the contention now raised in appellants' brief as to the method of procedure we have only this to say. We have made no investigation as to whether or not his contention is accurate but we believe our procedure to have been the correct one and besides the judgment in question and all the proceedings in regard to the same were admitted on the trial without any objection and without the point in question being raised and if there were any force in their contention it cannot be raised now."

We cannot say what proof would have been made if timely objection had been made.

Plaintiff further offered the record of a deed from William T. Parrott to Minerva J. Little, dated December 22, 1915, and recorded December 29, 1915, and rested. We shall assume, as counsel and the court below assumed, that the only question to be determined was the one arising upon the merits.

It appears that on or about November 1, 1915, the parties defendant made an agreement which reads as follows:

"This agreement entered into this 1st day of November, A. D. 1915, by and between William T. Parrott and Minerva J. Little, both of the city of Detroit, Michigan.

"Whereas the respective parties hereto, both being unmarried, do hereby mutually agree and solemnly promise to marry each other. In further consideration of the mutual promises of marriage hereby mutually offered and hereby accepted, the said William T. Parrott hereby agrees to deed to Minerva J. Little and hereby does settle upon the said Minerva J. Little, lots four (4) and five (5) of the University subdivision in the village of Orion, State of Michigan, as and for an ante-nuptial agreement and settlement, and the said Minerva J. Little agrees to pay said William T. Parrott the sum of one thousand twelve and 31/100 dollars ($1,012.31), the receipt of which is hereby acknowledged by the said William T. Parrott, for said property in acceptance of said ante-nuptial settlement

and said Minerva J. Little hereby agrees to waive her right of dower in the estate of William T. Parrott.

"The covenants contained in the above ante-nuptial settlement and agreement are hereby mutually offered and accepted.

"WILLIAM T. PARROTT,
"MINERVA J. LITTLE.

"In presence of:
"J. GILBERT QUAIL."

There is proof that Minerva J. Little paid defendant William T. Parrott $1,012.31 and that the deed executed in December was executed pursuant to the said agreement and payment. Defendant William T. Parrott testified, among other things, as follows:

"*Q.* At the time you made this deed, in December, 1915, you conveyed away all the property that there was any record of that you owned?
"*A.* Yes, sir.
"*Q.* The consideration was $1,031?
"*A.* Yes, sir.
"*Q.* Do you think that was a valuable consideration for it?
"*A.* No, sir.
"*Q.* Then, why did you make it?
"*A.* Because Mrs. Little had more interest in the property than I had and was done so she would be protected.
"*Q.* You knew the notes were outstanding?
"*A.* Yes, and I intended to pay them.
"*Q.* What is a fair value for the property at the time the deed was made, not now?
"*A.* Probably $2,000 or $2,200."

There was testimony that at the time of the hearing the property was worth from $3,000 to $3,500. There is testimony, too, that the debt represented by the judgment is a part of the cost of constructing the house upon the premises in question, for which William T. Parrott gave his notes to the builder, and that defendant William T. Parrott did not intend to pay the notes, which were merged in the judgment,

because he considered himself aggrieved by conduct of the builder, whose work he claims was not all satisfactory.

We are impressed that there was testimony supporting the decree which, as has been pointed out, secures to Minerva J. Parrott a lien upon the premises for the money she paid as consideration for the deed to her.

The decree will therefore be affirmed, with costs to appellee.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

McCRILLES *v.* SUTTON.

SPECIFIC PERFORMANCE — CONTRACT MAKING FOSTER SON HEIR — CONSTRUCTION.

In proceedings against the heirs of plaintiff's foster mother for the specific performance of a contract between plaintiff and his foster parents, contract construed, and *held*, to support the finding of the court below that it was the intention of the parties that plaintiff should be an heir at law of both foster parents and have such portion of their property as an heir at law would take.

Appeal from Lenawee; Chester, J., presiding. Submitted June 3, 1919. (Docket No. 6.) Decided July 17, 1919.

Bill by Oliver J. McCrilles against S. Floyd Sutton and others for the specific performance of a contract.

For authorities passing on the enforcability of contract to give child share of estate in consideration of the surrender of the child to promisor, as affected by statute prescribing mode of adoption, see notes in 8 L. R. A. (N. S.) 1130; 46 L. R. A. (N. S.) 1134.

From a decree for plaintiff, defendants appeal. Affirmed.

Earl C. Michener, for plaintiff.

B. D. Chandler, for defendants.

OSTRANDER, J. The bill is filed for specific performance of a written contract, reading as follows:

"*Know all men by these presents*, that we, James R. McCrilles of the township of Medina, county of Lenawee, and State of Michigan, and Sarah Jane McCrilles, wife of said James R. McCrilles, parties of the first part, and Oliver J. McCrilles of the same place, party of the second part, have and do, this, the twenty-third day of August, in the year one thousand eight hundred and ninety-four, make and execute under our hands and seals the following agreement: for that, whereas, the said party of the second part was the son of a deceased sister of Sarah Jane McCrilles, one of the parties of the first part, herein, and whereas, said sister died when the party of the second part, herein, was but six weeks old, and was then at the time of his mother's death given by James Holliday, his father and husband of said deceased, sister to the parties of the first part, to be by them adopted as their own child and heir, and was by them, accepted as such in good faith, and given by them their family name, by which name, alone, he has been and is known and called; and whereas he has always been promised, by the parties of the first part, that he should have the same worth of property, in all respects, as their own son upon the death of James R. McCrilles, one of the said parties of the first part, herein, and whereas, in consideration of such promises, he has served the parties of the first part faithfully, which services the parties of the first part hereby acknowledge, and that they owe him a large amount of money. Therefore, and whereas, the parties of the first part had hitherto supposed that the party of the second part had by them been legally adopted under the laws of this State, but on examination no record of such action can be found.

"Now, therefore, in consideration of love and affection, and of the foregoing premises, and the promises and undertakings made by the parties of the first part to the party of the second part, and in consideration of the services performed by the party of the second part for the parties of the first part set forth in said premises, all of which the parties of the first part do hereby confess and acknowledge; have undertaken and promised and do hereby undertake and promise the party of the second part, that, at the death of James R. McCrilles, one of the parties of the first part, herein, he, Oliver J. McCrilles, party of the second part, shall have the same rights in all respects to the property, real, personal, and mixed, of the parties of the first part as he would have had if he had been duly and legally adopted by them, according to the law of this State. For the performance of which, the parties of the first part hereby bind themselves, their heirs, executors and administrators.

"And the party of the second part, relying on the promises and undertakings of the parties of the first part, as above set forth, has and does hereby relinquish all claims and demands whatsoever against the parties of the first part.

"In witness whereof, the parties hereto set their hands and seals the day and year first above written.

(Signed) "JAMES R. MCCRILLES (S).
"SARAH JANE MCCRILLES (S).
"OLIVER J. MCCRILLES (S).

"Signed and sealed in presence of
"J. C. SAWYER,
"T. L. SAWYER."

Defendants are heirs at law of Sarah Jane McCrilles, deceased. Nine of the defendants answered the bill, it was taken as confessed by one, and the others filed disclaimers. James R. McCrilles died April 1, 1904, and Sarah Jane died May 27, 1917. When the contract in question was executed, plaintiff was of full age. After the contract was made, and under date April 9, 1901, James R. McCrilles made a deed conveying to his wife certain lands in Michigan and Ohio, 120 acres in all, reserving to himself a

life interest therein, which deed was recorded May 14, 1904. When she died, Sarah Jane owned 40 acres of this land. This 40 acres is the only land described in the bill of complaint. On April 19, 1901, James R. and Sarah Jane deeded to plaintiff 440 acres of land, James R. reserving to himself a life use of a portion of it. It is not disclosed that at this time James R. McCrilles owned any other property, or that he died leaving property. It does not appear that at the date of executing the contract Sarah J. McCrilles had any property. When she died, she had, besides the 40 acres of land, personal property valued at $4,500. A decree passed for plaintiff for specific performance of the contract and that plaintiff take of the property of Sarah Jane McCrilles the same share and portion as a son and only child; that, after paying debts and funeral expenses, plaintiff is decreed to be owner of all property of which she died seised or possessed, and the probate court is directed to make an order assigning the estate accordingly. Nine defendants have appealed, and they contend that by the language of the contract no separate property of Sarah Jane McCrilles is involved, that the contract had been fully performed at the death of James R. McCrilles. When the contract was made, the law with respect to the descent of real property was that in the absence of children or the issue of children of the intestate it descended to all his other lineal descendants, the widow being entitled to dower therein.

Appellants point out in the contract the language in the preamble or inducement,—

"that he should have the same worth of property, in all respects as their own son *upon the death of James R. McCrilles,*"

—and in the body of the agreement the language,—

"that, *at the death of James R. McCrilles,* one of the parties of the first part, herein, he, Oliver J. McCrilles,

party of the second part, shall have the same rights in all respects to the property, real, personal, and mixed, of the parties of the first part as he would have had if he had been duly and legally adopted by them."

While the repeated reference to the death of James R. McCrilles as the date of accession of plaintiff to his rights under the contract has a tendency to support the interpretation placed on the contract by the appellants, we are satisfied that the general manifest intention to make of plaintiff an heir at law of both parties of the first part, and that he should have such portion of their property as an heir at law would take, is controlling of the meaning to be given to the contract.

This meaning supports the decree of the court below, which is affirmed, with costs to appellee.

BIRD, C. J., and MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred. FELLOWS. J., did not sit.

DETROIT LUMBER CO. *v.* OAKLAND CIRCUIT JUDGE.

DISMISSAL—NO PROGRESS—ABUSE OF DISCRETION—REINSTATEMENT.

Where after a chancery case was at issue it was placed upon the calendar and automatically went upon each succeeding term calendar and finally was transferred to the "no progress" list and dismissed by the court in pursuance of the judicature act (3 Comp. Laws 1915, § 12574), without being reached or ever having been called for hearing, because of stress of business and illness of the judge, although counsel were anxious to try said case and had so advised the court and clerk, its dismissal was premature and not within the discretion of the court.

Mandamus by the Detroit Lumber Company to compel Kleber P. Rockwell, circuit judge of Oakland county, to vacate an order denying a motion to reinstate a cause of action. Submitted June 3, 1919. (Calendar No. 28,436.) Writ granted July 17, 1919.

Berger & Milburn, for plaintiff.

Anderson, Wilcox, Lacy & Lawson, for defendant.

STEERE, J. On September 13, 1917, the then presiding judge of Oakland county circuit court dismissed for want of prosecution a chancery suit pending in that court, numbered 7155, entitled Detroit Lumber Company *v.* Wilson Construction Co., *et al.,* appearing upon the calendar of that term as a case in which no progress had been made for more than a year. On learning of this counsel for plaintiff moved to set aside the order of dismissal, which was denied and application was then made to this court for a writ of mandamus to compel defendant, now the judge of said court, to set aside the order of dismissal and reinstate said suit for hearing. To an order to show cause why a writ should not be granted, return and answer were duly filed presenting issues which resulted in the following order by this court:

"On reading the motion of Detroit Lumber Company, relator, in the above entitled cause, and the brief of said relator, and the answer and brief of respondent thereon, and due consideration thereof having been had by the court. It is hereby ordered and adjudged that issues be framed in said cause as follows:

"*First:* Did the clerk of the court, of the sixth judicial circuit, for Oakland county, Michigan, mail or deliver to the attorney or attorneys for the relator, a copy of the printed calendar of the September, 1917, term of said court at any time prior to the first day of said term of court?

"*Second:* Was the case of the Detroit Lumber Company, plaintiff, *v.* Wilson Construction Company, *et al.*, defendants, brought in the circuit court for the county of Oakland, in chancery, known as No. 7155 not heard and tried prior to its dismissal on September 13, 1917, by reason of the business of the court being such, prior to that time, that the same was not reached?

"*Third:* Did relator, its agents or attorneys, as plaintiff in the case of Detroit Lumber Company, complainant, *v.* Frank E. Carter, *et al.*, defendants (Case No. 7155, Oakland county circuit court in chancery), make diligent and proper effort to have said cause brought on for trial during its pendency?

"And it is further ordered that these issues be referred and sent down to the circuit court for the county of Lapeer, with directions to take testimony therein and report the same with findings thereon to this court."

Pursuant to this reference the circuit court of Lapeer county had a hearing, took testimony, made findings upon the three issues favorable to plaintiff's contention, and duly reported the same to this court.

The suit in question was begun by plaintiff in the circuit court of Oakland county by a bill of complaint for the enforcement of a mechanic's lien. Various intermediate steps were taken by the respective parties until pleadings were perfected. The case was finally fully at issue by February 29, 1916, although a note of issue was filed by plaintiff on November 20, 1915. It was placed upon the printed calendar of that court for the January term, 1916, and plaintiff's counsel requested the clerk in writing to notify them when the case would be brought on for hearing. It was the custom of the judge of that court during each term to weekly make up his call of cases and give a list of them to the clerk with directions to notify the attorneys representing cases on call that they were set for hearing. Plaintiff's counsel were familiar with that custom. No such notice was ever received by them.

On November 1, 1916, plaintiff's counsel wrote the clerk of the court asking what position the case occupied on the docket and "if possible also let us know about when we may expect it to be reached for trial, as both parties are anxious to have this matter tried and disposed of." To this the clerk replied on November 25, 1916, advising counsel to take the matter up with the judge of the court, who, he suggested, would give a definite date. The case appeared upon the calendar for the January, 1917, term of court and plaintiff's counsel, as suggested by the clerk, wrote the circuit judge on January 10, 1917, asking for a date of hearing, to which the judge replied, on January 21, 1917, stating that after examining the pleadings in the case he estimated it would take at least a week to hear it; that he did not find it profitable to deprive attorneys and clients of an opportunity to be heard in short cases for the sake of disposing of a long one, and in view of the number of cases ahead of it he thought the case would go over until the March term, concluding:

"If all the attorneys live in Detroit, I make the suggestion that you stipulate a transfer of this cause to Wayne county. With ten judges you might be able to get it heard earlier than I can dispose of it."

On receipt of this reply a copy was sent to opposing counsel who were not favorably impressed and offered the suggestion, "It would take more time to get a Wayne county judge to try this case than it would to try the case itself." On March 12, 1917, plaintiff's counsel replied to the judge's letter of January 21st, stating that the matter had been taken up with opposing counsel and the condition of business was such in the Wayne circuit court that they could not get the case on for trial as had been suggested, concluding:

"Therefore we trust you will set a date for trial

of this matter as early as you can conveniently do so and have your clerk inform us as to the time you set. We do not believe the case will take over two days to try, and will do our utmost to suit your convenience."

No reply to this letter was received and relying, as claimed, upon the known practice or custom of that court in making up weekly calls according to the condition of business, of which the clerk was directed to notify counsel, they did not press the matter further, awaiting the time when such case would be reached and notice given by the clerk. Not having as yet received any notice when the then judge's term of office expired, they wrote his successor in office calling attention to the case and expressing anxiety to have it disposed of as soon as convenient. In response they received notice from the clerk that the former judge had dismissed the case on September 13, 1917, pursuant to the provisions of the judicature act relative to cases in which no progress had been made for a period of one year, no progress having been made in their case since February 29, 1916.

Chapter 18 of the judicature act (3 Comp. Laws 1915, § 12573 *et seq.*) introduced a somewhat radical change from the former method of bringing cases pending in the circuit courts to trial or final disposition, and conferred not previously existing initiatory power on the courts in that particular. Formerly the courts were powerless to accelerate the progress of live cases or dispose of the accumulation of dead or dormant ones, except as counsel on one side or the other saw fit to initiate action by serving upon the opposite party notice of trial or hearing, or by some motion or other application to the court in relation to a pending case or proceeding. Under the sub-title "term calendar" of said chapter notices of trial and hearings are dispensed with and all pending causes

which are at issue, or in default, or appealed cases returned 14 days before the first day of any term are required to be placed upon the term calendar for disposition when reached in their order, and so placed at each succeeding term until disposed of, without note of issue or other notice except that at least five days before the first day of each term a copy of the printed term calendar is required to be mailed or delivered by the clerk to each attorney, or firm of attorneys, representing any case placed upon said calendar. The order of dismissal complained of purports to be made under authority of section 2 of said chapter (section 12574, 3 Comp. Laws 1915) which is as follows:

"SEC. 2. All causes in which no action has been taken or progress made for more than one year unless by reason of the business of the court the same shall not have been reached, shall be placed upon said calendar separate and apart from all other causes, under the following heading: 'Causes in which no progress has been made for more than one year;' and on the first day of each term, any cause appearing under this heading shall be dismissed by the court for want of prosecution, but without prejudice, at the cost of the party by whom it was brought into court, unless cause be then and there shown to the contrary."

In harmony with these new provisions of the judicature act, Circuit Court Rule No. 40 (substituted for former Rule No. 18) provides:

"Previous to each term, the clerk shall prepare a calendar of causes for the term. The same shall be made up in the following order: 1. Criminal cases. 2. Jury civil cases. 3. Non-jury civil cases. 4. Chancery cases. 5. Causes in which no progress has been made for more than one year. The latter shall appear under no other heading.

"Criminal cases shall have precedence. Jury and non-jury and chancery cases shall have precedence in the order of the respective dates of joining issue, or

in appeal causes, the respective dates of filing the appeal."

Supplementary to requirements expressly provided by the statute and rules promulgated by this court under statutory authority, various customs or rules are adopted by the circuit courts for convenient and efficient conduct of their work and the orderly disposal of cases found upon the calendar of each term. They vary somewhat in different circuits, but are of like purpose and familiar to the profession,—such as a preliminary call of the calendar and its rearrangement—providing for a peremptory call with reference to cases soonest for trial in their order, or as agreed—providing a call board where, during the term, a certain number of such cases are posted from day to day for imperative disposition when reached; and often, as was the custom in the Oakland court, with directions to the clerk to advise counsel so far as possible that their cases are on peremptory call. To what extent counsel can as a matter of strict legal right claim protection under such customs might, perhaps, be questioned, but need not be determined here. Counsel are, however, by statute entitled to receive from the clerk a copy of the term calendar containing cases for which their names appear of record. In this case, upon the issue framed, it was returned as a finding that counsel for plaintiff were not furnished a calendar for the term at which the case was dismissed. The correctness of this finding is denied by defendant and debated in the briefs of counsel, as are various other points raised by the respective sides which need not be considered as we view the controlling issue.

Though disputed, it may be conceded that in a legal sense no progress was made in this case for over a year before it was put upon the September, 1917, calendar of the court under the "no progress" heading

and dismissed; but the testimony is convincing that no progress was made during the preceding year by reason of the business of the court being such that the case was not reached in its order upon the calendar nor placed on call for hearing by the court. After the case was ripe for hearing it automatically went upon each succeeding term calendar until disposed of. The next regular step in its progress was to try it when reached in its order. Counsel had no control over that feature of its progress. Neither had the court arbitrary power to otherwise deal with and dispose of it until it was reached. When so reached plaintiff's counsel were entitled to have it tried as they had advised the court and clerk they were anxious to do. When reached and called for trial the court could, and usually would, hear the case, or dismiss it if no counsel responded to the call.

It was shown that the work of that court had recently much increased, that the then presiding judge was not in good health and the volume of business was such that outside judges were at times called in to assist, and many cases went over from term to term. The clerk testified they were never "able to clear up the docket" and that this case was never marked on his calendar or records as on call or reached for trial. Of his duties and the custom of the court in that particular, he said:

"Instead of having the office make up the call he (the judge) made up his own call week by week and handed the list over to me with instructions to notify them (the attorneys) with regard to their cases."

The case was prematurely placed upon the calendar under the "no progress" heading. After it was at issue ready for trial its place upon the term calendars was under its proper heading amongst chancery cases, "with precedence in the order of the respective dates of joining issue." It was entitled to be so continued

until reached in its order and duly called for hearing. Its transfer to the "no progress" list and dismissal were premature, and not within the discretion of the court.

The court having refused to retain jurisdiction, defendant's contention against the remedy invoked is not well founded. *Huddleston* v. *Amos & Co.*, 180 Mich. 253.

The writ will issue as prayed for.

BIRD, C. J., and OSTRANDER, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

SWAN *v.* MITSHKUN.

COVENANTS—BUILDING RESTRICTIONS—INJUNCTION.

In proceedings to restrain the erection of a garage in a residential district in violation of restrictions contained in defendants' deed, evidence *held*, to sustain the findings of the court below that the contemplated building was in violation of said restrictions, entitling plaintiffs to relief.

Appeal from Wayne; Tucker, J., presiding. Submitted June 11, 1919. (Docket No. 5.) Decided July 17, 1919.

Bill by Edward P. Swan and others against Mark Mitshkun and another to enjoin the violation of certain building restrictions. From a decree for plaintiffs, defendants appeal. Affirmed.

Charles Bowles, for plaintiffs.

Berger & Milburn (*P. J. M. Hally*, of counsel), for defendants.

The question as to whether garage or stable is within restrictive covenants in conveyance of real estate is discussed in a note in 34 L. R. A. (N. S.) 730.

STEERE, J. Plaintiffs' bill of complaint was filed in this case to restrain defendants from building a garage for business purposes fronting on Hamilton boulevard upon lots 814, 815, and 816, located at the northeast corner of Puritan avenue and Hamilton boulevard in the Medbury Park subdivision of a part of fractional sections 13 and 14, town 1 south, of range 11 east, in the village of Highland Park, in violation of the following restrictions contained in their muniments of title to said property:

"And in further consideration, that there shall not be erected on the front of said premises above described any building other than that for residence purposes only, and any building so erected shall conform to the following restrictions, viz.:

"Single, private residence; to be set back at least thirty (30) feet from the front lines of the lot, at least four (4) feet west of the east lot line, and to cost not less than $3,000. Plans for said building must be submitted to the first party for inspection before construction is begun."

The Medbury Park subdivision, which lies between Woodward avenue and Hamilton boulevard, was placed upon the market by the Hannan Real Estate Exchange and was platted and sold as a desirable, highly restricted residence subdivision, laid out to that end with the lots facing the east and west streets running through it, except the lots adjoining Woodward avenue which faced that thoroughfare on its west side with an alley at their rear and were not offered for residences, but designed for business property should business reach that section of the suburbs of Detroit. The subdivision, which is in the neighborhood of a half mile square, has 5 avenues running through it east and west extending from Woodward avenue to Hamilton boulevard. All lots in the subdivision were sold under building restrictions for residential purposes only, except the lots facing Woodward avenue. The re-

strictions differed somewhat on the various avenues in the different blocks, lots on Eason and Moss being restricted to bungalows. Those in the first block from Woodward were to cost no less than $3,500, in the second block $3,000 and in the third block $2,500. Puritan avenue lying to the south extends east and west about centrally through the subdivision from Woodward to Hamilton and has been built up as a high grade single residence street restricted to 2-story single residences to cost not less than $4,500 in the first block west of Woodward, $4,000 in the second and in the third $3,500. On Puritan avenue the size of building sites for a single residence was increased to a lot and a half and so sold with the restriction quoted.

At the time this litigation arose Eason and Moss avenues lying farthest to the north and away from the city of Detroit were about three-fourths built up and Puritan avenue over half. In the great majority of cases the buildings which had been erected upon this subdivision had cost from two to three times the minimum amount required by their building restrictions. It also appeared that at the time of the trial the greater part of the business property in the subdivision fronting on Woodward avenue was still unsold and unimproved, and there remained plenty of unrestricted vacant property on the west side of Hamilton boulevard in that locality.

When the subdivision was placed upon the market by the Hannan Real Estate Exchange these restrictions were emphasized and extensively advertised, and were included in all contracts and deeds given on lots sold in the subdivision for residential purposes. The property in question passed through several owners with these restrictions until purchased by defendants on March 21, 1918. The restrictions were plainly set out in the deeds, or contracts, received by them and

the testimony shows they were read and understood by the defendants.

Defendant Frisbie is shown to have been actively engaged in handling real estate in Highland Park, familiar with values, deals and developments in that section. In his real estate operations he had acquired four corners in the Medbury subdivision on Hamilton boulevard with the restrictions in his conveyances. He testified corners would be much more valuable for business than residence purposes; that he understood the restrictions "didn't amount to anything" and he had no intention of building residences on them. Of the garage which they started to erect, he stated it was to be 40 feet front on Hamilton and 90 feet deep with a show window in front, and they figured on leasing it for a tire salesroom and repair business.

Plaintiffs are property owners in the subdivision with their homes on Moss and Puritan avenues. Upon defendants commencing construction of the garage they filed this bill of complaint and obtained a temporary injunction restraining its erection.

Defendants made answer admitting that they were proceeding to construct a building as alleged, did not deny the restrictions contained in their conveyances, but claimed that owing to changed conditions and the development of business along Hamilton boulevard it had become a business street unsuitable for residence purposes, for which reason, in connection with alleged violations of the building restrictions in Medbury Park subdivision, they had become inoperative and it would be inequitable to enforce them against their property on Hamilton boulevard. The tenor of their answer is in many particulars similar to defendant's claims in *Moore* v. *Curry,* 176 Mich. 464.

The testimony is conclusive that on Eason, Moss, and Puritan avenues the building restrictions have been well observed, that they are strictly residential

streets built up with fine and attractive homes of a cost and quality far beyond the restrictive requirements imposed. The evidence fairly shows that not only would the attractive features of a strictly residential district and sentimental attributes of exclusive home environments be disturbed, but that the actual market value of the plaintiffs' property on those streets would be much depreciated by the violation defendants are attempting, and especially residences in the immediate vicinity. Concrete proof to that effect was produced as to different properties. Plaintiff Moore, whose home, worth $8,000, is next to the corner and back of the proposed garage and repair shop testified that he bought the property, built a residence and established his home there because of the restrictions imposed in that locality and would not without them have bought or built there. Experienced real estate men and builders testified that the proposed garage would depreciate the value of the Moore property by one-half. Plaintiff Peck, who bought and built his home costing $12,000 on lot 822, about 150 feet east of Hamilton boulevard, testified that the proposed violation would deteriorate the value of his property at least $3,000. But aside from and beyond that issue, those owning property in a restricted residential district or neighborhood, and especially those who have their homes there, and been led to buy or build in such locality by reason of restrictive covenants running with the land imposed upon the street, block or subdivision in which they have purchased, are entitled to protection against prohibited invasion regardless of how close business may crowd around them on unrestricted property, provided the original plan for a residential district has not been departed from in the restricted district, street or block, and the restrictive requirements have been generally enforced, or accepted and complied with by purchasers.

Upon hearing in the Wayne county circuit court, in chancery, the relief asked for by plaintiffs was granted and the temporary injunction made permanent. An opinion with findings was filed by the trial court, the material parts of which are as follows:

"The proposed garage complained of, if erected, will be a plain violation of the restrictions contained in the deed to, and was at the time of the purchase of the lot upon which it is to be erected, well known and understood by the owners. The claim is made that there have been other violations of the building restrictions of the subdivision at various points in the subdivision and that the character of Hamilton boulevard has so changed since the platting of the subdivision that the lots along that street are needed by the public for business structures.

"Medbury subdivision consists, as I recall it, of some 15 blocks lying between Woodward avenue and Hamilton boulevard and facing Eason, Moss, Puritan and Pilgrim avenues, in Highland Park, and is one of the fine additions to the city. All of the streets are quite fully built up with bungalows and other styles of family residences costing from $2,500 to $10,000.

"I have viewed the premises more than once, on the ground. Practically all of the buildings erected in the subdivision comply with the building restrictions, the requirements being somewhat different in the different streets. I can see nothing to the claim that there have already been violations of the building restrictions in the subdivision and that, therefore, others should be permitted. There is an abundance of vacant property along Hamilton boulevard in the general vicinity of this property, and therefore there can be no public necessity or demand for the use of this property for business purposes."

It would serve no beneficial purpose to further review at length the voluminous record of testimony introduced by the respective parties upon these issues. We think that the findings of the trial court are sustained by the evidence and the conclusions of law supported by authority. The case falls well within that

class where it is the policy of the courts of this State to protect property owners who have not themselves violated restrictions in the enjoyment of their homes and holdings, free from inroads by those who attempt to invade restricted residential districts and exploit them under some specious claim that others have violated the restrictions, or business necessities nullified them.

This case is controlled by the principles announced in *Schadt* v. *Brill*, 173 Mich. 647 (45 L. R. A. [N. S.] 726); *Moore* v. *Curry*, 176 Mich. 456; *Misch* v. *Lehman*, 178 Mich. 225; *Stewart* v. *Stark*, 181 Mich. 408; *Casterton* v. *Plotkin*, 188 Mich. 333; *Sherrard* v. *Murphy*, 193 Mich. 352; *Davison* v. *Taylor*, 196 Mich. 605; *Andre* v. *Donovan*, 198 Mich. 256; *Rosenzweig* v. *Rose*, 201 Mich. 681.

The case of *Windemere-Grand Improvement & Protective Ass'n* v. *American State Bank*, 205 Mich. 539, which defendants urge in defense of their position, does not relax the rule as declared in the above cases, nor is it analogous to the instant case in controlling facts. In that case the objection of the association was not to Woodward avenue lots in the subdivision being devoted to business purposes, which it favored, or to the erection of the proposed building on the lot in question. The building restrictions on that lot, which fronted Woodward avenue with Windemere as a side street, were not the same as those on Windemere. Plaintiff's contention under the restriction relied on was narrowed to a question of defendant's right to cut off 8 feet of the view along Windemere from Woodward by building that much nearer the street line. It was shown that the association had in certain instances sought to apportion the condition resting on that subdivision and assisted in lifting the restrictions from other lots on Woodward avenue in the subdivision so that they might be devoted to busi-

ness and had assumed to decide when the restrictions, or some portion of them, should or should not be enforced. No such fast and loose manipulation of restrictions is imputable to these plaintiffs, and no question of waiver or estoppel by conduct militates against their appeal for equitable relief.

The decree is affirmed, with costs to plaintiffs.

BIRD, C. J., and OSTRANDER, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

FORD v. BAILEY.

PLEADING—AMENDMENT IN AFFIRMANCE OF JUDGMENT.

In ejectment for a strip of land, where the case was tried upon the merits and no objection raised to the insufficiency of the description in the declaration until after judgment was entered for plaintiffs, the court properly allowed an amendment under 3 Comp. Laws 1915, §§ 12478, 12480, to correct the imperfection in affirmance of the judgment.

Error to Wayne; Mandell, J. Submitted June 6, 1919. (Docket No. 77.) Decided July 17, 1919.

Ejectment by Arthur W. Ford and others against Alfred Bailey. Judgment for plaintiffs. Defendant brings error. Affirmed.

Leon D. Barlow (*Walter Barlow,* of counsel), for appellant.

William H. Wetherbee and *Francis A. Hilton,* for appellees.

MOORE, J. This is an ejectment suit to recover possession of a strip of land 16 feet one way and 35 and a fraction feet the other, which is 10 feet in the rear of the Masonic temple in the village of Trenton. It is claimed by the plaintiffs that this land was included in the deed given to the plaintiffs in 1863. The declaration set out the receipt of this deed and the description contained therein of the land conveyed, and also contained the following:

"2. That the plaintiffs, by and through themselves and their predecessors in office, as such trustees of Trenton Lodge, No. 8, of Free and Accepted Masons, have continued in possession of, and claim the fee in said premises, since the said third day of April, A. D. 1863.

"3. That while the plaintiffs were so possessed the defendant on or about the 22d day of November, A. D. 1904, entered into said premises, or part thereof.

"4. That the defendant voluntarily withholds from the plaintiffs the possession thereof, or part thereof."

After the verdict and judgment a motion was made for a new trial for several reasons. The important ones are as follows:

"*Second:* Because said plaintiffs allege in their said declaration 'That the defendant voluntarily withholds from the plaintiffs the possession thereof or a part thereof,' which said description of said lands so alleged by said plaintiffs to be withheld from them by the defendant is so indefinite and uncertain as to render said declaration fatally defective under the provisions of the statute requiring the premises claimed in ejectment to be withheld from the plaintiffs by the defendant to be described in their said declaration with such sufficient certainty that possession of the premises claimed may be delivered.

"*Third:* Because said declaration does not accurately, particularly and specifically describe the lands claimed by the plaintiffs to be withheld from them by the defendant as required by the statute in such cases made and provided."

The judge made the following order:

"1. It is ordered that the said motion be and the same is hereby denied.

"2. And it appearing that there may be defect or imperfection in form in the description of the land in the plaintiffs' amended declaration filed and in the judgment entered herein, in that such description includes and embraces more than the land herein described upon which, the jury found at the trial, the defendant had actually entered, and claimed title to; and that the land herein described is part of and included in the land described in the declaration and it appearing to my satisfaction that the plaintiffs should be allowed to amend accordingly, so that the said judgment shall not be reversed or annulled on technical grounds.

"It is further ordered that the first paragraph of the plaintiff's amended declaration filed and the judgment entered herein, be and each of them is hereby amended, by striking out the description of land following the words 'described as follows' and ending with the words 'on the 27th day of February, 1869,' and substituting therefor the following description:

"Commencing on the southerly boundary line of said lot number 101, at a point sixty feet and eighty-three one hundredths of a foot from the southwest corner of said lot, thence northerly parallel with the western boundary line of said lot, in a straight line, thirty-five feet and seven hundredths of a foot, thence easterly parallel with southerly boundary line of said lot, in a straight line sixteen feet, thence southerly parallel with the westerly boundary line of said lot to the southerly boundary line thereof and thence westerly along the southerly boundary line of said lot to the place of beginning. The said described premises being part of the premises intended to be sold and conveyed, and in fact sold and conveyed by one Augustus Button and Sarah Button, his wife, to Harry Saunders, trustee, on the 3d day of April, A. D. 1863, and conveyed by the said Harry Saunders, trustee, to the late William Parks, Nathaniel C. Alvord and Elliott T. Slocum, deceased, and their successors in office as trustees of Trenton Lodge, No. 8, of Free and Accept-

ed Masons, the plaintiffs' immediate predecessors in office as such trustees, on the 27th day of February, 1869."

Counsel in this court say in overruling their motion there is reversible error in that the declaration was not sufficiently definite under 3 Comp. Laws 1915, §§ 13174, 13175, 13176, 13190, 13193, and 13194. The defendants cite in support of their contention *White* v. *Hapeman*, 43 Mich. 267, and *Bringhurst* v. *Railroad Co.*, 78 Mich. 570. We think it will be seen later that the cases cited are not controlling of the instant case.

No objection was made upon the trial to the reception of testimony on the part of the plaintiffs upon the ground that the description in the declaration was not sufficiently certain and definite. There was a full trial upon the merits as to the ownership of, and the occupancy of, the strip of land for which the parties were contending. Had objection been made upon the trial, if the description in the declaration had been defective and upon that point we express no opinion, the declaration could have been easily amended. As it was, nobody was misled. The several contentions of the parties were sustained by such evidence as they were able to offer. The issues were fairly submitted to the jury, and it was not until the motion for a new trial was made that the question was raised.

The amendment was made under sections 12478 and 12480, 3 Comp. Laws 1915, which read:

"(12478) SEC. 1. The court in which any action or proceeding shall be pending shall have power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance for the furtherance of justice, on such terms as shall be just, at any time before judgment or decree rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings, which do not affect the substantial rights of the parties.

"(12480) SEC. 3. After judgment rendered in any cause, any defect or imperfections in matter of form, contained in the record, pleadings, process, entry, returns or other proceeding, may be rectified and amended by the court, in affirmance of the judgment, so that such judgment shall not be reversed or annulled." * * *

We think the amendment was in furtherance of justice and is authorized by the statute. See *Portsmouth Savings Bank* v. *Gratiot Circuit Judge*, 83 Mich. 651; *St. Clair Tunnel Co.* v. *St. Clair Circuit Judge*, 114 Mich. 417; *Hoban* v. *Cable*, 102 Mich. 206; *Brown* v. *Brown*, 163 Mich. 337; *Miller* v. *Tanners' Supply Co.*, 150 Mich. 299.

The judgment is affirmed, with costs to the plaintiffs.

BIRD, C. J., and OSTRANDER, STEERE, BROOKE, FELLOWS, STONE and KUHN, JJ., concurred.

LEXINGTON STATE BANK *v.* ROSE CITY CREAMERY CO.

1. BILLS AND NOTES — PRINCIPAL AND AGENT — EVIDENCE — PAROL EVIDENCE — INTENT.

Between the immediate parties to a bill or note, parol evidence is admissible to show that the instrument was, to the knowledge of the parties, intended to be the obligation of the principal, and not of the agent, and that it was given and accepted as such.

2. SAME — MORTGAGES — FORECLOSURE — DEFICIENCY DECREE — PRINCIPAL AND AGENT.

Where the evidence shows that in the making of a mortgage by a corporation, certain of its directors indorsed the note given therewith in their official capacity, intend-

On the question of admissibility of parol evidence to show intention of the parties to indorsement as controlling liability, see note in 18 L. R. A. 35.

ing thereby to give validity to the instrument executed, the mortgagee, on foreclosure proceedings, is not entitled to a decree for deficiency against said directors personally.

Appeal from Ogemaw; Sharpe, J. Submitted June 10, 1919. (Docket No. 85.) Decided July 17, 1919.

Bill by the Lexington State Bank against the Rose City Creamery Company and others for the foreclosure of a mortgage. From a decree dismissing the bill as to all but defendant company, plaintiff appeals. Affirmed.

B. J. Henderson (*Harris & Chapin,* of counsel), for plaintiff.

William T. Yeo, for defendants.

This is an appeal by the plaintiff from a decree of foreclosure of a certain mortgage given to plaintiff by the defendant Rose City Creamery Company. The circuit judge refused to grant a decree for deficiency against certain individual defendants whom plaintiff sought to hold liable for the deficiency as indorsers of the promissory note to which the mortgage was collateral. The bill was dismissed as to these defendants.

On March 25, 1910, at a meeting of the stockholders of the Rose City Creamery Company, the following resolution was adopted:

"Whereas, there is considerable indebtedness outstanding from the Rose City Creamery Company, a corporation, to the bank of Bell, Niggeman & Company, for moneys had and received for the use of said creamery company to pay a deficit in operating the creamery plant for the past two years, amounting to the sum of eight hundred dollars.

"And whereas, there are no funds in the treasury of the Rose City Creamery Company to pay said indebtedness,

"Resolved, that the president and secretary be, and they are hereby authorized and empowered to execute

real estate and chattel mortgages in the name of the Rose City Creamery Company in amount not to exceed eight hundred dollars, payable in two years, at the rate of seven per cent. per annum, to the order of the bank of Bell, Niggeman & Company, or to the Lexington State Bank, or to whoever said bank of Bell, Niggeman & Company may suggest, to secure the aforesaid indebtedness. Said president and secretary being authorized and empowered to sign in the name of the Rose City Creamery Company a promissory note as evidence of said indebtedness, which will be secured by said mortgage."

It does not appear that all of the stockholders attended this meeting, nor even that all of the members of the board of directors were there present. The minutes simply state:

"Resolution adopted by the following votes: Ayes, unanimous. A majority of the stockholders being present."

No meeting of the board of directors was held to authorize the execution of the note and mortgages, but on the following day the president and secretary of the company signed a promissory note, of which the following is a copy:

"$800.00 ROSE CITY, MICH., March 26, 1910.

"Two years after date, for value received, I promise to pay to the order of Lexington State Bank, eight hundred dollars, at the Rose City Bank, Rose City, Michigan, with interest at the rate of seven per cent. per annum until paid. All indorsers, sureties and assignors severally waive presentment for payment, protest and notice of protest for nonpayment of this note, and all defense on the ground of any extension of time of its payment, that may be given the maker or makers thereof.

"ROSE CITY CREAMERY CO.,
"H. S. KARCHER,
"Secretary and Treasurer.
"F. B. ARTHUR,
"President.

"Secured by real estate and chattel mortgages."

At the date of the hearing of this cause the note bore the following indorsements:

"O. N. BARBER
"DEXTER SAMMONS
"WESLEY CHASE
"ALEX. FREEMAN } Directors.

"Pay to order of Lexington State Bank, Lexington, Michigan, without recourse,

"ROSE CITY STATE BANK, Rose City, Michigan,

"BELL, NIGGEMAN & CO."

The testimony indicates that the signatures of at least three of these four directors were obtained before delivery of the note. It also appears from the evidence that there were three other directors of the corporation who did not sign the note in any capacity. The president and secretary also executed, on behalf of the corporation, and under its seal, a mortgage collateral to the above note and bearing even date therewith, covering the creamery company's land in Rose City. This mortgage recites that it was executed,—

"by officers duly authorized by resolution of stockholders at a meeting held March 5th, 1910."

It is conditioned upon the payment of $800 two years from date, with interest at seven per cent. per annum, payable annually:

"According to a certain promissory note of this date executed by Rose City Creamery Co., *et al.*, to the second party."

Nothing was ever paid on either the principal or the interest of this note and mortgage, and on March 9, 1918, plaintiff filed its bill to foreclose the mortgage, praying, among other things, for a decree for deficiency against the defendants Oliver N. Barber, Dexter Sammons, Wesley Chase, and Alex. Freeman as indorsers of said note. The bill was taken as confessed by the creamery company, but the individual

defendants filed an answer, denying liability, it being their claim that they signed merely as directors in order to make the note valid as against the corporation, and that they did not sign as indorsers. As a further defense, they claim that the note is invalid because its execution was never legally authorized by the creamery company.

Over objection, the court allowed evidence to be introduced in explanation of the signatures of the defendants appearing on the back of the note. Among other things, it was claimed that the note in question was given to take up a prior note of the company, of which the following is a copy:

"WEST BRANCH, MICHIGAN, February 15th, 1909.

"Three months after date, for value received, I promise to pay to the Rose City Bank of Bell, Niggeman & Company, Rose City, Michigan, or order, six hundred dollars ($600), with interest at the rate of seven per cent. per annum after date. This note is given for the Rose City Creamery Company, by its officers and is binding upon both the individuals and the company.

"THE ROSE CITY CREAMERY CO.,
"Per F. B. ARTHUR, President.
"B. J. CORWIN, Vice-President,
"H. S. KARCHER, Sec'y & Treas.,
"WILLIAM CROZIER, Director,
"CHAS. E. KINYON, Director,
"L. M. MCLEES, Director,
"HENRY CAMPBELL, Director,
"OLIVER N. BARBER, Director,
"JOSEPH SCHNEIDER, Director."

There was some testimony to the effect that it was the original intention to secure the signatures of *all* the directors on the back of the note of March 26, 1910, in order to signify their assent to and authorization thereof, no formal meeting having been held; that the signatures were placed in a bracket followed by the word "directors" under the advice of their attorney,

Mr. Earl R. Chapin, who stated to Mr. Karcher that by signing in this way they would incur no personal liability. This, however, was denied by Mr. Chapin. After hearing the case, the trial judge filed an opinion, in part as follows:

"A corporation can only act through its officers and agents and the statute provides the agencies through which such action must be had. The legal entity, the corporation, owns the property and it can only be divested of title by action on the part of its board of directors, who are made its managers by the statute. While it would be eminently proper for the directors to call a stockholders' meeting and be governed by their advice and action, yet to bind the corporation, the directors must themselves act. The record fails to show any such legal action on the part of the corporation. It does not even show that the meeting of the stockholders was legally called nor that a majority of the stock was represented at the meeting. There seems to be no way in which the action had can be treated as that of the corporation.

"The individual defendants are proceeded against under a statute which makes them liable only for deficiency. They are clearly entitled to raise the defense of a want of liability on the part of the company. While not strictly guarantors, the relation is so nearly akin to it as to permit them to raise any defense which their principal might make.

"This disposes of the case, but in view of an appeal, I feel constrained to consider the other defense raised. It presents an interesting legal question as well as one of fact. Counsel for the plaintiff insist that the word 'directors,' written after the signatures of the indorsers, is merely surplusage and in no way affects their liability. There is apparently much conflict in the authorities as to the effect of such a word of limitation following a signature. The signature of the proper officers to bind the corporation are appended. It was not necessary for the directors to sign to create a corporate liability.

"But where suit is brought by the payee, I think the great weight of authority holds that parol evidence is admissible to establish the fact as to whether

or not it was the intention of the parties that the directors should be individually liable. Mr. Mechem in his work on Agency, § 443, quoted in *Keidan* v. *Winegar*, 95 Mich., at page 432 (20 L. R. A. 705), says that while it is true, as a general rule, that parol evidence is not admissible to exonerate an agent from a contract, where the paper bears on its face some reference to a principal, the preponderance of authority warrants the statement of the rule that:

"'Between the immediate parties to a bill or note, parol evidence is admissible to show: * * * that the instrument was, to the knowledge of the parties, intended to be the obligation of the principal and not of the agent, and that it was given and accepted as such.'

"Let us now examine the proofs bearing on this question. All of the defendants swear that they did not intend to render themselves individually liable. Mr. Karcher says he told them they must sign in order to make the company liable and that he did this on the advice of their attorney. Mr. Bell says there was nothing said to him about it. It must be borne in mind that this transaction occurred more than eight years ago and the recollection of the witnesses as to what was said may well be hazy. There are, however, certain undisputed facts which stand out as landmarks, which, in my opinion, control in determining this question.

"1. The former note given to Bell, Niggeman & Co. was signed by certain of the directors as 'directors' and it expressly provided that they, as well as the president and secretary, should be liable individually as well as officers of the corporation. At that time it was evidently the understanding of the parties that such provision was necessary to create individual liability. It may also be noticed that neither the president, Mr. Arthur, nor the secretary, Mr. Karcher, indorsed the note in question, though liable on the other note.

"2. These defendants all have lived in the immediate vicinity of Rose City since this note was executed. Mr. Bell has also lived there all of that time. He had this mortgage in his possession as an officer of the bank since its delivery. No demand has ever been

made on any of the defendants for the payment of either principal or interest and the first intimation the defendants had of claimed liability on their part was when this suit was begun.

"3. The lack of action on the part of the board of directors can only be accounted for by the understanding of the parties that if all of the directors signed, as it was understood they would, this would amount to action authorizing the loan on the part of the board.

"These facts satisfy me that there was no intention to hold the defendants individually liable when they signed."

Pursuant to this opinion, a decree was entered dismissing the bill as to the individual defendants, but granting foreclosure of the mortgage and a decree for deficiency against the Rose City Creamery Company.

KUHN, J. (*after stating the facts*). The learned trial judge came to the conclusion that the question as to whether the defendants who signed the obligation as directors, signed for the purpose of binding themselves individually, or simply to legalize the action of the stockholders' meeting, became, under the circumstances of this case, a question of fact. We are of the opinion that, under the authorities relied upon by the trial judge in his opinion above set forth, he arrived at a correct conclusion with reference thereto, and after a careful reading of the record we are also satisfied that he correctly determined the question of fact therein presented, for the reasons set forth in his opinion, which we hereby adopt as our own.

The creamery company not being a party to this appeal, and having been defaulted, and because of the conclusion that there is no individual liability on the part of the other defendants, it becomes unnecessary for us to determine the other interesting question passed upon by the trial judge, as to whether or not

the defendant corporation was legally bound by the action of its stockholders as shown by the corporate records produced on the trial.

The decree of the court below is affirmed, with costs to the appellees.

BIRD, C. J., and OSTRANDER, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

In re VANDEN BOSCH'S ESTATE.

VANDEN BERG *v.* VOS VERCADE.

1. WILLS—HEIRS—ASSIGNEE OF INTEREST—RIGHT TO CONTEST.
   Assignees, grantees, and donees of an heir have no such interest in the will of the testator as will enable them to contest its validity, nor is the right of action itself assignable or the subject of conveyance.

2. SAME—POWER OF ATTORNEY TO CONTEST—REVOCABILITY.
   A power of attorney to contest a will, accompanying an assignment by an heir of his right in testator's property, which conveyed no interest, cannot be said to be coupled with an interest rendering it irrevocable.

Error to Ottawa; Cross, J. Submitted June 3, 1919. (Docket No. 24.) Decided July 17, 1919.

Albert Vanden Berg presented for probate the last will of Maartje Vanden Bosch, deceased. On petition of Maggie Vos Vercade, as assignee and attorney of William Thiel, said will was certified to the circuit court. Proponent then filed a motion to dismiss the

The question as to who may contest will, is discussed in a note in L. R. A. 1918A, 447.

petition. Judgment for proponent. Contestant brings error. Affirmed.

Lillie, Lillie & Lillie, for appellant.

Diekema, Kollen & Ten Cate and *Louis H. Osterhous,* for appellee.

KUHN, J. On February 21, 1918, a petition was filed in the probate court for Ottawa county for the probate of the will of Maartje Vanden Bosch, deceased. William Thiel was described therein as one of the heirs at law of the said Maartje Vanden Bosch. On April 8, 1918, William Thiel, as such heir at law, made and executed and delivered an assignment of all his right, title, and interest in and to all the property of Maartje Vanden Bosch to Mrs. Maggie Vos Vercade. On the same day William Thiel also executed a power of attorney to said Maggie Vos Vercade, both the assignment and the power of attorney being duly signed and acknowledged, and witnessed by two witnesses. On April 9, 1918, Maggie Vos Vercade, as assignee, and with power of attorney from William Thiel, filed objections to the probate of the will in writing, and on April 30, 1918, as such assignee and attorney-in-fact, she filed a petition asking the probate court to certify the matter to the circuit court, and, having filed a proper bond, the same was so certified. On the 5th of July, 1918, William Thiel attempted to revoke the said power of attorney by an instrument in writing which was duly acknowledged. Thereafter a motion was made in the circuit court to dismiss the cause and the objections to the probate of the will and to certify the same back to the probate court. Attached to the motion was the affidavit of Louis H. Osterhous, and in opposition thereto there were filed affidavits of Walter I. Lillie and Cornelius Roosenraad. After hearing the motion, the trial judge

filed his finding in the matter and determined that Maggie Vos Vercade was not a person entitled to contest the will of Maartje Vanden Bosch, granted the motion, and certified the proceedings to the probate court for further proceedings in the estate in accordance with the statute.

Whether or not William Thiel could legally assign his right as heir at law of the deceased, Maartje Vanden Bosch, to contest her will, is the first meritorious question before us for consideration. Under the common law, the buying of a bare litigious interest was severely frowned upon, and while the rule has been somewhat relaxed from time to time, still the courts have always been loth by their decisions, on the ground of sound public policy, to give encouragement to this practice. The following is found in 5 Corpus Juris, p. 858:

"The practice of purchasing from prospective heirs, devisees, or legatees interests in property which have no present existence, either actual or potential, but which such persons expect to acquire by descent or by will, is known as 'Catching bargains with heirs,' and has given rise to a great diversity of judicial decisions as to the validity of such transactions.

"Under the general rule of the common law against the validity of the assignment of a mere possibility or right which has no present existence either actual or potential, the assignment by a prospective heir or devisee of his expectancy of acquiring an estate by descent or by will, is void at law."

Also the following in 40 Cyc. p. 1243:

"Assignees, grantees, and donees of an heir have no such interest in the will of the testator as will enable them to contest its validity. Nor is the right of action itself assignable or the subject of conveyance."

Thompson on Wills, § 518, p. 453, states the following:

"But persons without any interest cannot maintain an action to contest a will. Thus it has been held that a creditor of the testator has no such interest as will authorize him to maintain the action, nor has the donee of an heir at law such an interest as will entitle him to contest the will."

See, also, *In re Evans' Will,* 72 N. Y. Supp. 495, 65 App. Div. 100, affirmed in 171 N. Y. 645 (63 N. E. 1116); *Ransome* v. *Bearden,* 50 Tex. 119. We are of the opinion that the weight of authority is that a donee of an heir at law cannot acquire such an interest as to enable such donee to contest a will, and therefore conclude that the learned trial judge was correct in holding that Maggie Vos Vercade had no authority to prosecute the contest of the will.

It is next urged that in the instant case the power of attorney was coupled with an interest in the subject-matter thereof and therefore irrevocable without the consent of the person to whom the power was given, and a number of cases are reviewed and argued in the brief of counsel upon this question. However, this question need not concern us for the reason that, having determined that Mrs. Vos Vercade did not receive any interest by the assignment in the property, it cannot be said that there was any interest coupled with the power of attorney which brought it within the rule, or rather the exception to the rule, that such a power of attorney is irrevocable.

Some question is raised as to whether or not the will is properly executed, but that question is not before us at this time and will probably be disposed of by the proper court on the petition for the probate of the will, when finally heard.

We are of the opinion that the trial judge reached a proper conclusion, and his order is therefore hereby affirmed.

BIRD, C. J., and OSTRANDER, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

BEACH *v.* HAYNER.

WATERS AND WATERCOURSES—INLAND LAKE—RIPARIAN OWNERS—RIGHT TO USE WHOLE OF SURFACE.

Where there are several riparian owners to an inland lake, such proprietors and their lessees and licensees may use the surface of the whole lake for boating and fishing, so far as they do not interfere with the reasonable use of the waters by the other riparian owners.

Appeal from Livingston; Collins, J. Submitted June 6, 1919. (Docket No. 75.) Decided July 17, 1919.

Bill by Hiram G. Beach against James Hayner and others to enjoin a trespass. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Louis E. Howlett, for plaintiff.

Francis J. Shields, for defendants.

KUHN, J. This bill was filed to enjoin the defendants from entering upon waters covering lands claimed to be owned by plaintiff, located in the township of Hamburg, Livingston county, Michigan, and trespassing thereon contrary to his orders and request.

Silver Lake is an inland lake without visible outlet or inlet, covering about 100 acres of land. It is surrounded by hard banks on all shores except at the southwest. It is the claim of the plaintiff that he owns all of the land covered by the waters of the lake, except two small parcels at the northwesterly corner thereof and three or four small parcels at the southerly and southwesterly corner of the lake. Being located in the center of the section, the lines of the various subdivisions of land at these points extend into the water, so that at the northwesterly corner of

the lake four or five acres of the land of the Root estate is covered by water. Mr. M. R. Bennett, who owns the adjoining farm, has three or four acres covered by water. In the southwest part of the lake the Napier farm covers three or four acres, and the Featherly farm, now owned by Rosier, covers about six acres; on the south end the Hankins farm about half an acre, and the Rice farm about two and a half acres, making a total of approximately 20 acres. In the center of the lake the plaintiff owns all the land between the two shores. During the last ten or twelve years cottages have been built upon the lands above referred to and have been rented to various occupants. At the time of the filing of the bill of complaint the defendants were tenants of the owners of these cottages and were occupying the same and spending the summer, or a portion of the same, at these cottages. When the defendants were not occupying the cottages, they sublet them to various people. The defendants, together with their families, guests, subtenants and patrons, to whom they rented their boats, were claiming the right to travel at will over the lake, wherever they desired. The circuit judge dismissed the bill, alleging his reasons as follows:

"The court, however, is of the opinion that where there are several riparian proprietors of an inland lake, that all such proprietors and their lessees may use the surface of the whole lake for boating, fishing, and fowling purposes, if access is gained to the lake from their own or leased land; and that no one riparian proprietor can exclude another riparian proprietor from the exercise of these rights; and that neither can one riparian proprietor exclude the lessees of another riparian proprietor from the exercise of these rights."

Some claim is made with reference to the plaintiff's title to a 25-acre parcel, the controversy with reference to which was before this court before, and is re-

ported in the case of *Beach* v. *Rice,* 186 Mich. 95. We there held that the title to this 25 acres should be determined in an action of ejectment and that the question of plaintiff's title to the land should not be determined in the chancery suit. The trial judge, relying upon this decision, again held in this case, and we think correctly, that the plaintiff cannot maintain this action in the chancery side of the court, as he has not by ejectment proceedings established his ownership and possession of said lands, and properly dismissed the bill as to the 25 acres.

The real question in controversy seems to be, as stated by counsel for plaintiff and appellant in his brief, as follows:

"The important legal question involved in the case is whether or not, where more than one person owns the bed of an inland pond with neither outlet nor inlet, can one owner exclusively use and control his property against the trespass of the public who claim to have a license from the other owners of land in the lake, to go thereon?"

This exact situation has not been before this court. The case of *Giddings* v. *Rogalewski,* 192 Mich. 319, involved a small, unmeandered, shallow, and disconnected sheet of water wholly upon the premises of a private owner, and which could only be reached by invading private premises. It was held that such a lake is not navigable, and that every unauthorized intrusion upon the private premises of another is a trespass, and the owner was protected in his exclusive rights to the use of this water. But it was distinctly said in that opinion:

"The right of the people to fish in navigable or meandered waters where fish are propagated, planted, or spread, and to which they have lawful access by land or water, even though such waters may superimpose the subaqueous lands of a private owner, is not decided nor involved here."

In the recent case of *Winans* v. *Willetts*, 197 Mich. 512, which is relied upon by the appellant as sustaining the principle of his contentions, Mr. Justice OSTRANDER, in writing the majority opinion, said:

"As I understand the record, however, plaintiff has not shown himself to be the owner, or lessee in possession, of all the land covered by the waters of the lake. In such case, of course, defendants might prove a license to fish in the lake, and it would then be a question for decision whether, possessing such a license, the licensee could fish in any part of the lake. No such question is presented upon this record."

We do not understand that it is the claim of counsel for the plaintiff that they have any property rights in the fish in the lake, which are *feræ naturæ*, and so far as any right of property in them can exist, it is in the public or in common to all until they are taken and reduced to actual possession, but it is his contention that licensees of riparian owners have no right to enter upon the waters covering the lands of the plaintiff for the purpose of fishing or boating. In the case of *Inhabitants of West Roxbury* v. *Stoddard*, 7 Allen (Mass.), 158, the following general rule was announced by the court:

"Fishing, fowling, boating, bathing, skating or riding upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, are lawful and free upon these ponds, to all persons who own lands adjoining them, or can obtain access to them without trespass, so far as they do not interfere with the reasonable use of the ponds by others, or with the public right, unless in cases where the legislature have otherwise directed."

In this State, in the case of *Sterling* v. *Jackson*, 69 Mich. 488, it was held that a man had the exclusive right of fowling upon his own land, whether it is upland or land covered by water, but a distinction

seems to be made in the majority opinion of the court between fowling and fishing. In the dissenting opinion of Mr. Justice CAMPBELL the following was said:

"It is the law of this State that the riparian owner of any kind of water has presumptively the right to such uses in the shores and bed of the stream as are compatible with the public rights, if any exist, or with private rights, connected with the same waters. In rivers the theoretical line of ownership is in the middle thread or line of the stream, unless changed by islands or some other cause of deflection. If the stream is crooked, the curves must be adjusted so as to save all the rights of the different owners. But lakes have no thread, and, while there is usually no difficulty in fixing equitable bounds near the shore, it cannot be done, by any mathematical process, over any considerable extent of the lake; and if—which does not often happen—there is any occasion for making partition of the surface, it can only be reached by some measure of proportion requiring judicial or similar ascertainment and not by running lines from the shore. Small and entirely private lakes are sometimes divided up for such purposes as require separate use; but for uses like boating, and similar surface privileges, the enjoyment is almost universally held to be in common. This was held by the house of lords in *Menzies* v. *Macdonald*, 36 Eng. Law & Eq. 20. It was there held that for all purposes of boating and fishing, the whole lake was open to every riparian owner; while for such fishing as required the use of the shore, each was confined to his own land for drawing seines ashore, and the like uses."

This reasoning seems to be appealing. To hold with the plaintiff and appellant in this case would cause the establishment of a rule very difficult in its application. All riparian owners and their licensees would have a clear right to enter upon certain portions of the surface of the lake, and it certainly would be very difficult to establish definite lines of demarcation along the property lines of the various owners. As the

question of fowling upon the waters is not presented by the bill and is not in issue here, it will be unnecessary to determine that question, but we are of the opinion that the judge was right in holding that where there are several riparian owners to an inland lake, such proprietors and their lessees and licensees may use the surface of the whole lake for boating and fishing, so far as they do not interfere with the reasonable use of the waters by the other riparian owners.

Some contention is made that the defendants Meyers and Dupper did not occupy land adjoining the lake and therefore cannot claim to be riparian owners and for that reason entitled to privileges upon the lake. The record discloses that they both testified that they had received permission from riparian owners and therefore were licensees of such owners, and under the ruling of the trial court, with which we agree, they therefore could not be said to be trespassers.

We conclude, therefore, that the decree of the court below dismissing the plaintiff's bill should be affirmed, with costs.

BIRD, C. J., and OSTRANDER, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

In re GOLDINGER.

HABEAS CORPUS—CUSTODY OF MINOR—FITNESS OF PARENT.

On certiorari to review *habeas corpus* proceedings by the father against the grandmother for the custody of a minor son, where the respondent failed to show that the father is not a fit person to have the care and custody of his son, the order of the trial judge awarding custody to the grandmother will be vacated, and an order entered awarding permanent custody of the child to the father.

Certiorari to Wayne; Mayne, J., presiding. Submitted June 26, 1919. (Docket No. 106.) Decided July 17, 1919.

Habeas corpus proceedings by George C. Goldinger against Emma Gignac for the custody of an infant. From an order awarding the infant to defendant, plaintiff brings certiorari. Reversed, and judgment entered for plaintiff.

Frank C. Sibley, for appellant.

Daniel P. Cassidy, for appellee.

KUHN, J. In this proceeding a review is sought by writ of certiorari of an order made and entered on February 21, 1919, awarding the custody of Robert G. Goldinger, born March 18, 1916, the minor child of the petitioner, George C. Goldinger, to Emma Gignac, the respondent. It appears that petitioner married the daughter of respondent October 8, 1914, and that they made their home with the respondent from the date of the marriage until the death of petitioner's wife, and thereafter petitioner with the child remained at the respondent's home for an additional six months. He thereupon married his present wife and removed from the respondent's home, leaving the child, however,

with the respondent. The child was nine days old at the time of his mother's death, and from that time the respondent has taken care of the child and it is undisputed that she has bestowed upon it all the tender care and affection of a mother. After the remarriage of the petitioner it appears that he called once or twice a month to see the child and later took it to his home for the period of a week or ten days. In March, 1918, it was brought to the attention of the respondent that the petitioner intended to take permanent possession of the child, which she refused to permit him to do, which resulted in *habeas corpus* proceedings being brought. This matter was brought on before the Hon. Frederick W. Mayne, acting as circuit judge for Wayne county, and several days were consumed in taking testimony. The court thereupon delivered an opinion, in which he indicated that the custody of the child should be divided between the parties. No formal order was entered upon the said opinion, and the court intimated that he would leave the order, in some particulars, largely to counsel. On January 19, 1919, the petitioner obtained possession of the child, being then about three years of age, and claims to have discovered that the child was being neglected by the respondent and that she was not giving it that proper care and attention which, in his opinion, it ought to have, because of the limited facilities that the respondent had, living in a small house, which was illy provided with sanitary facilities. He thereupon, through his counsel, advised respondent that he intended to keep possession of his child. On February 21st a formal order was presented to the court by counsel, giving the entire custody, possession, education and control of said child to the respondent until the child shall attain the age of 14 years, upon condition that the father may visit his son only once in every two weeks. At that time the

petitioner filed a written motion and petition to the court asking a denial of the proposed order, which motion was denied by the court, and the following order was thereupon duly made:

"This cause having come on to be heard upon petition for writ of *habeas corpus*, the writ issued thereon, and the return of the respondent; and the court having heard the testimony offered by the respective parties, and the argument of counsel thereon, and the said parties being again before the court on the 21st day of February, A. D. 1919, the petitioner being represented by his attorney, Frank C. Sibley, and the respondent being represented by her attorney, Daniel P. Cassidy, and it being admitted by the said counsel for said parties that the divided custody and possession of the child, Robert G. Goldinger, by the parties to this proceeding, as heretofore recommended by the court, has not proved satisfactory, and has not proved to be for the best interest and welfare of said child, Robert G. Goldinger, and it also being admitted by the said counsel for the said parties that the said petitioner recently obtained possession of said child, Robert G. Goldinger, and still has the possession of said child, Robert G. Goldinger, and that he refuses to deliver said child to the possession and custody of the respondent, therefore this court, by virtue of the authority in it vested, does order:

"*First:* That the custody, possession, education and control of said child, Robert G. Goldinger, is hereby placed in and awarded to Emma Gignac, the respondent, until said Robert G. Goldinger attains the age of fourteen (14) years, upon the condition only, that the said petitioner, George C. Goldinger, may visit the said child, Robert G. Goldinger, at the home of the respondent, every other Saturday and Sunday, or may on said days, take said child with him to his home, but not outside of the county of Wayne, and said petitioner shall return said child, Robert G. Goldinger, to the home of the respondent not later than 8:00 o'clock P. M. on the Sundays when said child shall be in his possession, pursuant to this order.

"*Second:* That said petitioner, George C. Goldinger, shall forthwith deliver to the respondent at her home

in the city of Detroit, the said child, Robert G. Goldinger.

"*Third:* This order is entered without prejudice to the right of petitioner for a modification thereof as to matters that may have arisen since the original hearing of this case."

Various reasons are alleged by counsel for petitioner and plaintiff in certiorari why the court was in error in overruling the motion made by petitioner's counsel, the principal reason relied upon being:

"That the court having found that the petitioner is a competent and qualified person and suitable to have the care and custody of the child, under said finding it was error, as a matter of law and equity, to deprive the petitioner of the possession and custody of said child."

At the time that the court heard the testimony and filed his opinion, the learned trial judge found:

"On the part of the petitioner, he is a young man at present enjoying a fairly good salary, honest and of good reputation, he is healthy and able to work and possessed of no bad habits. He has, however, not been above criticism in the past in this, that he has to a large extent neglected the child; he has not given it that affection one would expect of a parent; he has permitted the grandparents to do many things that he should have done. I attribute this more to the fact that he and the grandparents were on good terms, and he saw that the child was being attended to, the fact that it was free from danger and that he did not consider his own special duty in the matter. However, that should be charged against him at the present time.

"Now, the question presents itself, as I said, as to what the future of this child demands, and its future demands differ nothing from that of any other American child. I believe that every boy who has a father who is susceptible should be under the custody of their father, and should associate with him as much as possible. I have no sympathy with the idea that our boys should be under the direction and control of

women. In this case, his grandmother's home and his surroundings are ideal at present, there is no doubt about that, but there comes a time when he must go out and get in touch with the world and as time progresses, the ability of the grandparents to meet this situation decreases, and the ability of the father increases, so that in ten years from now the situation will be largely changed if this young man, the father, progresses as he is doing now. He has got beyond the age when his good habits are liable to change, and if he is industrious and regards the best interests of the child, his influence will be felt in the forming of the character of the child, assisting him to become to be a man, honest and upright.

"Under the circumstances, all the interests of this child demand that he have an opportunity to associate with his father in the future. It is necessary for the proper development of his character. As to the stepmother,—I am not much in sympathy in giving children to stepmothers. This woman has shown a good deal of common sense on the witness stand. She could not take care of the child at the present time as well as the grandmother, but she says he is my husband's child, and if the custody is awarded to my husband, I shall do my best to take care of that child and love him. She makes no extreme profession."

This court said, in the most recent case on this subject, *Martin* v. *Benzie Circuit Judge,* 200 Mich. 549, at page 552:

"The courts should, and have always had in mind, in the determination of the vexing questions arising concerning the custody of a child, the best interests of the child and also the natural and humane feelings and sentiments of the parents."

In the case of *In re Gould,* 174 Mich. 663, at page 670, the following general rule was stated:

"The power of parental control, though recognized as a natural right and protected when properly exercised, is by no means an inalienable one. When the 'right of custody' is involved between respective claimants for a child, the courts, though in the first

instance recognizing *prima facie* rights of relationship, in the final test are not strictly bound by demands founded upon purely technical claims or naked legal rights, but may and should, in making the award, be governed by the paramount consideration of what is really demanded by the best interests of the child. *Corrie* v. *Corrie*, 42 Mich. 509 (4 N. W. 213); *In re Heather Children*, 50 Mich. 261 (15 N. W. 487); *Chapsky* v. *Wood*, 26 Kan. 650 (40 Am. Rep. 321); *Richards* v. *Collins*, 45 N. J. Eq. 283 (17 Atl. 831, 14 Am. Dec. 726)."

We are unable to find, however, that this court has ever said, or interpreted the rule to mean, that a father would be deprived of the possession of his child where it clearly appears that he is a man of good habits, honest, and well able to provide for his child. The only charge that can be made against the petitioner in this case is that during the time immediately after the death of the mother of the child, he did not bestow upon it that affection that might be expected of a parent, but, as the learned trial judge found, this might be explained by the fact that he knew the grandparents would do many things for it that he should have done and that he saw that the child was being attended to. However, he never relinquished the right of the custody of his child, and it was only a short period after his second marriage that he requested its possession. It may be true that the respondent is as much attached to the child as the parent and that she is as suitable to have its custody and as able to provide and care for it, but nevertheless, unless it clearly appears that the parent is for some reason unfit to have its possession, the rule is well established in our law that the parent is entitled to the possession of his child against all others. The reason for this rule is very aptly stated by the court in *Weir* v. *Marley*, 99 Mo. 484 (12 S. W. 798), cited by counsel for petitioner in his brief, from which opinion the following is quoted:

"In all civilized countries, in which the family is regarded as the unit of social organization, its minor members must and ought to be subject to the custody and control of those who are immediately responsible for their being, for the reason that by nature there has been implanted in the human heart those seeds of parental and filial affection that will assure to the infant care and protection in the years of its helplessness, to be returned to the parents again when they in their turn may need protection, in their years of helplessness and of their child's strength and maturity. The law, at the birth of an infant, imposes upon the parents the duty of such care and protection, to the performance of which the instincts of nature so readily prompts, and clothes him with the right of custody, that he may perform it effectually, upon the presumption that such custody, being in harmony with nature, is best for the interest, not only of the parent and child, but also of society; conceding, however, that the primary object is the interest of the child, the presumption of the law is that its interest *is to be in the custody of its parent.* The law has made provision, in two instances, whereby this presumption may be overcome; in the statutes providing for the adoption and apprenticing of children, when, *for their interest,* this right of custody is permitted to be transferred to another. In regard to all other contracts by parents, for the custody of their children, this presumption must obtain; and, while the parent may, by his inability or failure to discharge properly his duty towards his child, forfeit his right to its custody, because the interest of the child demands it, yet, upon the trial of an issue, involving such a forfeiture, he is entitled to the benefit of such presumption; and, unless the interest of the child does demand it, such forfeiture cannot take place. He cannot deprive himself of this right of custody, which is the concomitant of a personal trust imposed upon him by the law of nature, as well as by positive law, and essential to the discharge of the duties of that trust, by contract *per se,* otherwise he might deprive his child and society of the benefits which the law contemplates will inure to each by the personal discharge of his parental duties."

The respondent having failed to show that the father, George C. Goldinger, is not a fit person to have the care and custody of his son, it follows that the order made by the learned trial judge must be vacated and an order entered awarding the permanent custody of his child to the petitioner. No costs.

BIRD, C. J., and OSTRANDER, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

COMMON COUNCIL OF THE CITY OF DETROIT *v.* ENGEL.

1. MUNICIPAL CORPORATIONS—DETROIT CHARTER—BONDS.
   By amendment to section 41, chap. 7 of the "old charter," in effect November 27, 1916, *held*, that the common council of the city of Detroit, with the consent of the board of estimates, had authority to issue bonds for the erection of buildings for hospital purposes.

2. SAME—BONDS—APPROVAL BY BOARD OF ESTIMATES.
   Where the common council of the city of Detroit allowed and approved a certain sum to be raised by taxation for the recreation commission fund, for the purchase of lands and buildings thereon for use as a play center, and the board of estimates refused the same as a tax item but passed it as a bond issue, as park and boulevard bonds, subject to the approval of the council, which body thereafter concurred, *held*, valid, although it would have been more orderly for the council to have acted first.

3. SAME—BONDS WRONGLY NAMED—VALIDITY.
   Held, that bonds wrongly named are not therefore necessarily invalid, since it will be presumed that the proceeds of said bonds will be applied as legally authorized.

4. SAME—SEWER PURPOSES—AUTHORITY TO BOND.
   Under the charter of the city of Detroit previous to its revision under the "home-rule law," the common council had power to raise by taxation for sewer purposes in one year $200,000 and also to bond for "such sums of money as shall be deemed necessary and expedient," provided the gross debt limitation was not exceeded.

5. SAME—BONDS—ILLEGAL PURPOSE.
   There being no authority in said charter of the city of Detroit or in any special act authorizing the purchase of real estate "for extension of public service," bonds authorized for the purchase of certain frontage at the harbor line, *held*, invalid.

6. SAME—AMENDMENT OF CHARTER—VALIDITY OF BONDS.
   Where the charter of the city of Detroit (Charter 1883, as amended) empowered the common council by and with the consent of the board of estimates annually to provide a public sewer fund, a public building fund, and a fund for the purchase or construction of public utilities, and to issue bonds therefor, and all necessary steps were taken under said authority to issue certain bonds for said purposes, without being submitted to vote of the people, *held*, that said bonds were valid although before said bonds were sold a new charter under the provisions of the home-rule act (Act No. 279, Pub. Acts 1909) went into effect requiring "approval by three-fifths of the electors voting thereon."

7. SAME—DETROIT CHARTER—BONDS—ORDINANCE—RESOLUTION.
   The contention that action looking to the issue and sale of bonds should have been taken by ordinance rather than by resolution, *held*, not sustained, in view of title 6, chap. 1, § 6, of said charter.

8. SAME—BONDS—MUNICIPAL BONDS—SCHOOL BONDS.
   Held, that the school bonds and library bonds of the city of Detroit are not to be included in the two per cent. limit of indebtedness for municipal purposes specified in the charter.

9. SAME—DETROIT CHARTER—CONSTRUCTION—REPEALING CLAUSE—SAVING CLAUSE.
   Held, that, in the adoption of the new charter, construing the "repealing clause" and the "saving clauses" together, it was not the intention to abate the right to carry out the sale of bonds authorized under the old charter.

10. SAME—ANNUAL EXPENSES—CAPITAL EXPENDITURES.

Under title 6, chap. 7, § 5, of the "new charter," bonds may be issued to meet "capital expenditures" so-called, as distinguished from ordinary annual expenses of a department for the coming year.

Certiorari to Wayne; Hunt, Codd, and Hosmer, JJ. Submitted July 2, 1919. (Calendar No. 28,841.) Decided July 17, 1919.

Mandamus by the common council of the city of Detroit to compel George Engel, controller, to prepare and execute certain bonds. From an order granting the writ, defendant brings certiorari. Affirmed.

Walter Barlow, for appellant.

Edmund Atkinson, for appellee.

STONE, J. This case is here upon certiorari to review proceedings had in the circuit court for the county of Wayne on the petition of the common council of the city of Detroit, for a writ of mandamus commanding George Engel, controller, to prepare bonds of the city and to cause them to be duly executed and recorded in the books of his office and transmitted to the city treasurer for delivery to the parties to whom they have been awarded, incident to an effort to effect their sale. In the petition of the plaintiff to the circuit court there is not only a presentation of its contentions in support of the validity of the bonds under consideration, but a full presentation of the reasons upon which the controller based his refusal to prepare the bonds. In his answer and return the defendant admits all the facts presented, but he denies that from said statements any inference should be drawn that the bonds mentioned should be by him, as controller, prepared and transmitted to the treasurer of the city of Detroit for delivery to the persons

to whom they have been awarded, until their validity has been adjudicated, and his duty in the premises determined. And because of the matters which appear from said petition he denies that plaintiff is entitled to the writ of mandamus. The case was heard below before circuit judges George S. Hosmer, George P. Codd and Ormond F. Hunt sitting *en banc.* Judge Hunt was designated to prepare a written opinion. That opinion, signed by all of the judges who heard the case, appears in the record. It presents so clearly and thoroughly the questions involved and decided, and the conclusions reached are so in accord with our views, that we insert the same here:

"The contention in this case involves the validity of certain bonds authorized by the common council of the city of Detroit and about to be issued, but which respondent refuses to prepare, record and deliver in compliance with the provisions of the city charter respecting his official duties, on the ground that said bonds cannot be lawfully issued. It is conceded and it is manifest that if the bonds involved herein are valid, the preliminary proceedings relative thereto, and all of which were had previous to June 27, 1918, must conform in substantial respects to what is commonly known as the old charter of the city of Detroit as amended and also to the provisions of the new charter. Under authority of section 7, chapter 11 of the Detroit city charter, the common council by resolution authorized and the board of estimates of the city approved, except as hereinafter stated, the issuance of bonds as follows:

"*A. $100,000 Tuberculosis Hospital Bonds.*

"In the early part of 1917 and prior to the ensuing fiscal year beginning July 1, 1917, the common council and the board of estimates authorized and approved in the public health fund to be realized by the sale of bonds denominated 'public building bonds,' an aggregate sum of $1,070,000, of which $1,000,000 was, and still is, contemplated to be expended from time to time in the erection of a tuberculosis hospital. $100,000 of the above bonds are involved in this suit, said

bonds having been sold to the National City Company of New York and Detroit in December, 1918.

"*B. $250,000 Receiving Hospital Bonds.*

"In the early part of 1918 and prior to the ensuing fiscal year beginning July 1, 1918, the common council and the board of estimates authorized and approved in the poor commission fund to be realized by the sale of bonds denominated 'public building bonds,' the sum of $250,000 to be expended from time to time in an additional unit to the receiving hospital. The entire $250,000 of bonds are involved in this suit, said bonds having been sold to the National City Company.

"*C. $165,000 Park and Boulevard Bonds.*

"In the early part of 1918 and prior to the ensuing fiscal year beginning July 1, 1918, the common council allowed and approved the sum of $165,000 to be raised by taxation, and to be expended as an item in the recreation commission fund for the purchase of land and buildings thereon for use as a play center; the board of estimates refused to allow the above item as a tax item, but passed it and allowed it as a *bond* item adopting a resolution whereby, subject to the approval of the common council, bonds in said sum of $165,000, to be known as 'park and boulevard bonds,' were authorized to be issued; the common council thereafter adopted the resolution of the board of estimates authorizing the above bonds in the above amount to be issued, and they are involved in this suit, said bonds having been sold to Matthew Finn in January, 1918.

"*D. $988,000 Public Sewer Bonds.*

"In the early part of 1918 and prior to the ensuing fiscal year beginning July 1, 1918, the common council and board of estimates authorized and approved in the public sewer fund to be realized by the sale of bonds denominated 'public sewer bonds,' an aggregate sum of $7,615,000 to be expended in building sewers; $988,000 of these bonds are involved in this suit, said bonds having been sold to Merrill, Oldham & Company, Boston, in November, 1918.

"*E. $200,000 Public Building Bonds.*

"In the early part of 1917 and prior to the ensuing fiscal year beginning July 1, 1917, the common council and board of estimates authorized and approved in the public building fund to be realized by the sale of

bonds denominated 'public building bonds,' the sum of $258,000 'to cover the cost of purchasing frontage of 172.17 lineal feet of ground at the harbor line to be used for the extension of public service.' See common council proceedings, April 24, 1917, p. 503. See record of action of common council proceedings, April 24, 1917, pp. 524-25. See record of board of estimates approval and common council proceedings, May 1, 1917, pp. 587-8.

"On June 25, 1918, the qualified voters of the city of Detroit adopted a home rule charter framed under the provisions of Act No. 279 of the Public Acts of 1909, as amended, and this charter became effective June 27, 1918.

"It appears by the petition in this case that all proceedings authorizing the above bonds were taken under the charter of 1883 as amended by the legislature and later by the electors under the home rule bill; further that none of said bonds were submitted to the electors for approval; that the above bonds were sold several months after the new charter became effective and they have not been issued and delivered to the purchasers, some of said purchasers having refused to accept said bonds because of objections to the legality of bonding powers and bonding proceedings.

"There are two classes of objections which may be raised to the validity of the above proposed issues; the first class relates to the law and facts of the individual case; the second class relates to certain fundamental objections which are applicable to all the bonds. These objections may be briefly summarized as follows:

"1. The several above bonds are not legal inasmuch as they have not been submitted to and approved by three-fifths of the qualified electors of the city of Detroit as required by subdivision (*e*) of section 5 of Act No. 279, Pub. Acts of 1909, as amended, under which said act the city of Detroit adopted its home rule charter effective June 27, 1918; said subdivision (*e*) reading as follows:

"'SEC. 5. No city shall have power * * * (*e*) * * * to authorize any issue of bonds except special assessment bonds, refunding bonds, and emergency bonds, as defined by this act, and bonds which it is annually authorized to issue, unless

approved by three-fifths of the electors voting thereon at any general or special election.'

"The relator claims that the bonds in suit are bonds which the city of Detroit is annually authorized to issue.

"2. That all proceedings taken in the matter of the authorization and approval of the above bonds up to June 27, 1918, also all proceedings in the matter of the sale of above bonds, including the proceedings taken in January, 1918, were so taken by resolution instead of by ordinance as provided by section 17, chapter 1, title 3, of the new charter effective June 27, 1918.

"3. That if library taxes and bonds, and school taxes and bonds heretofore issued (*i. e.*, prior to June 27, 1918), authorized to be issued in lieu of taxation must be included within the city tax limit of two per cent., then a part if not all of above bonds are illegal, because the total of city taxes and bonds authorized to be issued in lieu of taxation, together with the library and school taxes and bonds exceed said tax limit of two per cent. See petition, pp. 11 and 12.

"4. That the 'saving clause' in the new charter is not sufficient to continue in force proceedings taken before the adoption of the new charter, under which it is contemplated to issue the bonds involved herein. See petition, p. 12.

"5. That the authorization of $165,000 public improvement bonds to be issued for recreation purposes did not originate in the common council; that the common council did pass the above item as a tax item and that thereafter the board of estimates approved the item as a bond item, which approval was subsequently concurred in by the common council, and that this proceeding is so irregular in itself as to invalidate the issue of bonds based thereon.

"An examination of the provision of the old charter and amendments discloses that in the absence of a special authorization therefor by special act, the general power of the common council to issue bonds is defined and limited by the charter, section 7, chapter 11, as amended, and so far as the same is applicable to the facts in the instant case, the same reads as follows:

"'SEC. 7. The common council shall also have power by and with the consent of the board of estimates to provide for the public sewer fund for the construction of trunk or public sewers, and a public building fund and a fund for the purchase or construction of public utilities, by borrowing upon the faith and credit of said city and upon the best terms that can be made, such sums of money as shall be deemed necessary and expedient, and to issue the bonds of the city therefor in lieu of raising the same by taxation,' etc.

"*A. $100,000 Tuberculosis Hospital Bonds.*

"*B. $250,000 Receiving Hospital Bonds.*

"The above proposed issue of bonds is considered together because the source of authority to issue them, and the limitations thereon, and the proceedings taken thereunder are governed by the same provisions of law. The original authority in the old charter to issue these bonds was contained in section 41, chapter 7 of the charter, which, among other things, provides:

"'SEC. 41. The common council shall have power * * * to establish, organize and maintain an almshouse, and a hospital; to purchase the necessary grounds, and erect and provide for erecting the necessary buildings therefor, either within or without the city limits, and to use, control and regulate the same as fully as though located within such limits; and for such purchase of hospital grounds, and for the erection of hospital buildings, the said common council shall have power to expend and appropriate out of the contingent fund of said city, a sum not exceeding fifteen thousand dollars.'

"In interpreting and construing the above provisions of said section 41, it seems clear that the power of the common council was limited to an expenditure out of the contingent fund to a sum not to exceed $15,000; the provisions of said section do not authorize the common council to issue bonds in any sum whatsoever, and in 1905 by Act No. 404, Local Acts 1905, the legislature authorized the city of Detroit to issue bonds in the sum of $100,000 for the purpose of erecting and equipping a hospital for contagious diseases. The common council exercised this power by an issue of bonds to that amount, and having exhausted its power under said local act, the common council was remitted to the power over hospitals as outlined in said section 41.

"In 1914 the common council, without having obtained further authority or power relative to hospitals, attempted to authorize under the guise of public building bonds $695,000 for hospital site and buildings. This attempted exercise of power by the common council came before the Supreme Court in the case of *Detroit Common Council* v. *Engel*, 187 Mich. p. 88, and a discussion of the hospital bonds appears in said opinion at pp. 98-101. In commenting upon the hospital bond proposition the Supreme Court notes an objection at page 99 as follows:

" 'That buildings for which public building bonds may be authorized and sold by the common council are public buildings, within the meaning of the charter, which does not include garbage plants or hospitals. Not only is a garbage fund and a hospital fund "otherwise provided for" in the charter, which at least raises a doubt as to the intent to include those subjects in the section relating to a public building fund, but the legislative interpretation of the council's authority in that connection makes plain that it does not, as subsequently shown.

" 'It is to be borne in mind that the provisions referred to are a part of the city charter granted by the legislature to Detroit before the constitution of 1909 gave cities the power, through the legislature, to adopt, revise, and amend their charters, and, as just pointed out, said charter remains in force until the city sees fit to change it. Before the common council could issue bonds to erect and equip a hospital for contagious diseases, it was found necessary to obtain authority to do so from the same power which granted the charter (Act No. 404, Local Acts 1905), and in like manner an amendment of the city charter was obtained (Act No 670, Local Acts 1905) to authorize the common council to issue bonds to the extent of $100,000 to provide a garbage and refuse plant. While it is now within the power of the city to amend its charter and authorize the council to issue further bonds for that purpose, we do not discover that it has done so, and, until it does, that authority does not rest in the council.

" 'The "public building bonds" proposed to be sold, and involved here, total $678,000. Exclusive of garbage reduction plant and hospital site and buildings, $625,000 public building bonds were originally authorized. It is to be assumed that the proceeds of any bonds sold will be applied as legally authorized.

" 'It follows from the foregoing that the writ of mandamus granted by the circuit court cannot be sustained in its entirety.

"'Distinct determinations of the circuit court as to different proposed issues of bonds are involved and presented for review in this proceeding. The legal and illegal matters are independent of each other and plainly ascertainable. This court may therefore quash or correct such parts as are illegal and affirm as to those which are legal.

"'We accordingly conclude, for the reasons stated, that the order for a writ of mandamus be affirmed as to the $200,000 public sewer bonds and the public building bonds to the previously authorized amount of $625,000 (deducting the excess from either the 30-year or 10-year issue as relators may elect), and reversed as to the other proposed issues, which are hereby held illegal; this without costs to either party.'

"The Supreme Court in the above opinion having determined that hospital bonds were not public building bonds within the meaning of the charter, and that the attempted authorization of such hospital bonds were illegal, thereafter an amendment to section 41 of chapter 7 of the old charter was proposed in the common council and thereafter adopted, the same was submitted to the electors and adopted November 7, 1916, in effect November 27, 1916, which, among other things, provides:

"'SECTION 41. The common council shall have power to purchase real estate for use of the said corporation * * * ; also make appropriations, to be met either by direct tax levy or bond issue, for the purchase of hospital grounds either within or without the corporate limits of the city and for the erection of necessary hospital buildings and the maintenance thereof; provided, that no such bonds shall be issued without the consent of the board of estimates of said city.'

"It will be noted that in this amendment to section 41, the $15,000, the sum limited in the original section as above quoted, is eliminated, and in its stead, among other things, appears the phrase as aforesaid, 'also make appropriations, to be met either by direct tax levy or bond issue.'

"The resolution adopted by the board of estimates authorizing the bonds for the erection of a tuberculosis hospital appears as Exhibit 3 attached to the petition, and, among other things, appears the following:

"'Resolved, that by and with the consent of the board of estimates bonds of the city of Detroit in the amount of $1,680,000,

which shall be denominated "public building bonds of the city of Detroit," be issued under authority of section 7, chap. 11, of the Local Acts of 1883, approved June 7, 1883, being an act entitled, "An act to provide a charter for the city of Detroit, and to repeal all acts and parts of acts in conflict therewith, as amended, and all the other relevant provisions of the charter of the city of Detroit," etc. * * *.

" 'Resolved, that this board does hereby approve of the several items in the estimates of the public health fund hereinafter set forth, and does hereby approve of, consent to and authorize the issue of public building bonds as hereinbefore appears to have been determined upon by said common council in the sum of $1,070,000 to be applied as follows:

" 'Nurses' Home $65,000
" 'Tuberculosis Hospital, one unit..... 1,000,000'

"As above stated, all these proceedings were had in 1917 and prior to the ensuing year beginning July 1, 1917.

"The proceedings as already stated authorizing $250,000 receiving hospital bonds were had in 1918 and prior to the ensuing fiscal year beginning July 1, 1918. It is to be noted, however, that the appropriation was made for these bonds in the poor commission fund, while bonds for the tuberculosis hospital was made in the public health fund. They are both, however, classed as public building bonds.

"Relative to the proceedings, however, we find and determine as stated by the Supreme Court in its opinion in *Detroit Common Council* v. *Engel,* 187 Mich. at p. 100, 'it is to be assumed that the proceeds of any bonds sold will be applied as legally authorized.'

"We further find and determine that both the appropriations for the tuberculosis hospital and for the receiving hospital are not invalidated because of any objections raised in said *Detroit Common Council* v. *Engel, supra,* the same having been authorized by the above amendment to section 41. Other objections to the validity of these bonds and which are likewise applicable to all the bonds in question, will be considered later in this opinion.

"*C. $165,000 Park and Boulevard Bonds.*

"As to these bonds, as above stated, early in the year 1918 and prior to the fiscal year beginning July

1, 1918, the common council and board of estimates authorized, allowed and approved the sum of $165,000 to be raised by taxation to be expended as an item in the recreation commission fund for the purchase of lands and buildings thereon for use as a play center.

"As above stated, the common council allowed and approved the above sum to be raised *by taxation* and the same was duly referred to the board of estimates. This board refused to allow the above as a *tax item,* but passed it as a *bond issue,* adopting a resolution subject to the approval of the common council that bonds in the sum of $165,000 be allowed as park and boulevard bonds, and thereafter the common council concurred in the action of the board of estimates and the validity of all these bonds is involved in this suit.

"The above proceedings were taken in pursuance of an amendment to the charter of the city of Detroit adopted November 3, 1914, which went into effect November 14, 1914. This is a new chapter for the purpose of providing for a commission to be known as 'the recreation commission.' Provision was made that the commission should consist of ten members, five citizens of Detroit appointed by the mayor, together with the superintendent of schools, the park commissioner, the librarian of the public library, the police commissioner and the commissioner of public works.

"Section 4 of said amendment is as follows:

"'SECTION 4. The said city of Detroit shall raise by annual tax the necessary funds to provide for the establishment and extension of a recreation system under the commission through the use of facilities already owned by the city, and may raise moneys by annual tax in such sums or issue of bonds of said city for the acquirement of additional property or for the erection of necessary buildings for the further extension of the recreation system under said commission.'

"We find and determine that while it would have been more in accordance with orderly procedure for the common council to have originally authorized the appropriation and the same thereafter allowed and adopted by the board of estimates, still we are of the opinion that the proceedings by the common council and the board of estimates, as above stated, are not fatal to the validity of the issue.

"We likewise find and determine that the name of the bonds, to-wit, park and boulevard bonds, even if wrongfully so denominated is not fatal to their validity, adopting the reasoning of *Detroit Common Council* v. *Engel,* 187 Mich. at p. 100, to the effect that it is to be assumed that the proceeds of any bonds sold will be applied as legally authorized.

"This disposes of the special objections relating to this issue; the objections which are applicable to all the bonds will be considered later in this opinion.

"*D. $988,000 Public Sewer Bonds.*

"As above stated, in the early part of 1918 and prior to the ensuing fiscal year beginning July 1, 1918, the common council and board of estimates authorized and approved in the public sewer fund to be realized by the sale of bonds denominated 'public sewer bonds,' an aggregate of $7,615,000 to be expended in public sewers, and the above sum of $988,000 of these bonds is involved herein.

"Section 1 of chapter 11 of the old charter of the city of Detroit, among other things, provides:

"'SECTION 1. The revenues and moneys of the corporation shall be divided into the following funds, viz.: * * *

"'*Eight.* Public sewer fund, to defray the expenses of constructing and maintaining public sewers in said city;

"'SECTION 4. The common council shall also have power annually to levy, assess and collect taxes, not exceeding two hundred thousand dollars, on the assessed value of all the real and personal estate in said city, made taxable by the laws of this State, in order to defray the expenses of constructing sewers, and for the purpose for which the sewer fund is constituted as above.

"'SECTION 7, as amended. The common council shall also have power by and with the consent of the board of estimates to provide for the public sewer fund for the construction of trunk or public sewers, and the public building fund, and a fund for the purchase or construction of public utilities, by borrowing upon the faith and credit of said city, and upon the best terms that can be made, such sums of money as shall be deemed necessary and expedient, and to issue the bonds of the city therefor in lieu of raising the same by taxation: *Provided, however,* That the gross debt of the city, after deducting the means in the sinking fund of said city and not including bonds already issued by the

board of water commissioners (but bonds hereafter issued by said board of water commissioners shall be included) or bonds issued against special assessments, shall never exceed four *per centum* of the assessed value of all the real and personal property of said city and all bonds or other indebtedness issued or credit created in excess thereof shall be void. Bonds issued by authority of this section shall be respectively denominated "public sewer bonds," "public building bonds" and "public utility bonds," and shall mature in not more than thirty years from the date of issue, and bear interest at a rate not exceeding five *per centum* per annum.'

"We find no irregularity in the proceedings either of the common council or board of estimates relative to the authorization, appropriation or allowance of the above item.

"The first serious question is whether or not section 7 authorizes the common council to issue bonds in excess of the amount which may annually be raised by taxation as provided in section 4.

"Insofar as the levying and assessing of taxes is concerned, the common council by the provisions of section 4 is limited to the sum of $200.000 a year, and if the words in section 7, to-wit, 'to issue the bonds of the city therefor in lieu of raising the same by taxation' are given the ordinary construction, then all bonds for sewer purposes under the provisions of section 7 must be limited to $200,000 for any one year.

"We have examined the definitions of 'in lieu of' in both the general and law dictionaries and can find no definitions except 'in place of,' 'in room of,' or 'instead of.'

"We have called this to the attention of the assistant corporation counsel who made the oral argument in support of the petition, and he has conceded that unless 'in lieu of' is construed as meaning 'in addition to,' then and in that case the $200,000 limit in section 4 governs the instant case.

"If this were a new case we should have no hesitancy in giving the words the ordinary meaning, but we are confronted with the decision of the Supreme Court in *Detroit Common Council* v. *Engel,* 187 Mich. pp. 88-101, and find that the Supreme Court there affirmed the decision of the Wayne circuit court as to the authorization of $200,000 public sewer bonds which

were a part of an authorization of $503,000 for public sewers. See opinion of Mr. Justice STEERE, p. 90.

"We also find from an examination of the proceedings of the common council of the city of Detroit for a great many years past that it has been the habit of the common council of authorizing and issuing bonds in excess of $200,000 in individual authorizations and approvals.

"While we do not think that a practical construction ought in all cases to be controlling, we are disposed in the instant case to give such practical construction, together with the decision of the Supreme Court in the last case above cited, great weight, and, accordingly hereby overrule the objection made in the instant case, contenting ourselves with the observation that if it had not been so practically construed, both by the municipal authorities and the Supreme Court in both cases, we would be constrained to decide otherwise.

"Objections applicable to all the bonds will be considered later in this opinion.

"*E. $200,000 Public Building Bonds.*

"As above stated, in the early part of 1917 and prior to the ensuing fiscal year beginning July 1, 1917, the common council and board of estimates authorized and approved in the public building fund to be realized by the sale of bonds denominated 'public building bonds,' the sum of $258,000 'to cover the cost of purchasing frontage of 172.17 lineal feet of ground at the harbor line to be used for the extension of public service.'

"We have examined the record of the action of the common council proceedings and the record of the board of estimates approvals and find that the purpose of the purchase was as above stated.

"We have discovered no special act authorizing the purchase of real estate 'for the extension of public service.'

"If these bonds are authorized it must be in pursuance of section 7, chapter 11, which limits the powers of the common council to issue bonds in lieu of raising the same by taxation, 'to provide for the public sewer fund for the construction of trunk or public sewers, and the public building fund, and a fund for the purchase or construction of public utilities.'

"It nowhere appears in the record that this land is for any of the purposes mentioned in said section 7, and the purpose being mentioned in the resolution itself, there being no authorization in the charter for any such purpose, we find and determine that the authorization and approval of this purchase was invalid and, accordingly, the attempted issue of $200,000 public building bonds in this case is void.

"*Objections Applicable to All the Bonds Involved Herein.*

"1. The several above bonds have not been submitted to and approved by three-fifths of the qualified electors of the city of Detroit as required by subdivision (*e*) of section 5 of Act No. 279, Pub. Acts 1909, as amended, under which said act the city of Detroit adopted its home rule charter effective June 27, 1918; said subdivision (*e*) reading as follows:

"'SECTION 5. No city shall have power (*e*) * * * to authorize any issue of bonds except special assessment bonds, refunding bonds and emergency bonds defined by this act, and bonds that it is annually authorized to issue, unless approved by three-fifths of the electors voting thereon at any general or special election.'

"It is conceded that none of the above bonds are 'special assessment bonds,' 'refunding bonds' or 'emergency bonds,' and if the above issues are valid, they must be bonds which the city 'is annually authorized to issue.'

"It will be noted that said section 5 is not a delegation of power to the city to issue bonds, but is a limitation upon that power, and after a careful search of the charter provisions relative to conferring such powers we find no other general power except what is contained in section 7, chapter 11 of the charter aforesaid.

"In *Detroit Common Council* v. *Engel,* 187 Mich. 88, we find that this same objection is made against the validity of the bonds involved in that suit, and at page 96 Mr. Justice STEERE, who delivered the opinion, among other things, says:

"'As before stated, the course prescribed by section 7, chap. 11, of the charter, was followed in authorizing and issuing these

bonds, but it is urged that, with this limit fixed by a popular vote amending the section in question, bonds not exceeding the limit cannot be lawfully authorized and issued in compliance with the provisions of said section unless each issue is approved by a three-fifths vote of the electors at a general or special election, in compliance with subdivision "*e*" of section 5 of the home rule act of 1909, as amended by Act No. 203, Public Acts 1911. As amended said subdivision provides:

"'"No city shall have power * * * to * * * authorize any issue of bonds except special assessment bonds, refunding bonds, and emergency bonds as defined by this act and bonds that it is annually authorized to issue, unless approved by three-fifths of the electors voting thereon at any general or special election."

"'As originally enacted, the subdivision does not contain this restriction. Without it the authority of the common council and board of estimates to exercise the powers conferred and previously exercised under said section 7, chap. 11, of the charter, cannot be seriously questioned.'

"We are constrained to find that Mr. Justice STEERE, who delivered the opinion, erroneously stated above 'as originally enacted, the subdivision does not contain this restriction.'

"We find from examination of the original enactment that the restriction was therein contained. What might have been the decision of the Supreme Court without this assumption we are unable to state. But in any view of the case, as already referred to, the bonds for public sewers and the municipal court building were approved.

"While not free from doubt, we are constrained to hold that bonds which are from time to time authorized to be issued in lieu of taxes and which may be annually levied, are bonds which the city 'is annually authorized to issue,' or, in other words, bonds which the city under annual recurring authority to tax may be issued in lieu of taxation.

"2. That all proceedings taken in the matter of the authorization and approval of the several issues of bonds were so taken by resolution instead of in the form of ordinances.

"As provided by section 17, chapter 1 of the new charter, effective June 27, 1918, said section 17 of chapter 1, page 24, is as follows:

"'SECTION 17. All matters of legislation shall be presented, considered and enacted by the council in the form of ordinances. The style of all ordinances shall be "It is hereby ordained by the people of the city of Detroit." No ordinance shall embrace within its provisions more than one object. No ordinance shall be revised, altered or amended by reference to its title only, but the section or sections of the ordinance altered or amended shall be re-enacted and published at length. No ordinance shall be passed by the council within five days of its introduction, except in the case of a public emergency involving the peace, health, or safety of the people of the city, and no ordinance shall take effect, except in the case of such an emergency, until the thirtieth day after its approval, including the date of approval, but not the date of taking effect: *Provided*, that a two-thirds vote of all members elect shall be required to pass any ordinance within the period of five days herein prescribed or to give an ordinance immediate effect in the case of an emergency.'

"The above objection, if valid, relates not to matter, but to form, which form was entirely proper under the provisions of the old charter which governed at the time that the preliminary proceedings were had herein. The administrative proceedings under the new charter relative to the certification and issue of the bonds we do not consider ordinances proper at all, and the objection to the validity of the bonds upon this ground is hereby overruled.

"3. That if library taxes and bonds, and school taxes and bonds heretofore issued (*i. e.*, prior to June 27, 1918), authorized to be issued in lieu of taxation must be included within the city tax limit of two per cent., then a part if not all of above bonds are illegal, because the total of city taxes and bonds authorized to be issued in lieu of taxation, together with the library and school taxes and bonds exceed said tax limit of two per cent.

"At the outset it must be determined whether or not the city of Detroit as a municipal corporation which concededly exercises functions relative to schools and libraries in so performing its duties, is acting as a State agency, or, in other words, under our system, Are the control and management of schools and libraries, or either of them, State functions or municipal functions?

"This question came squarely before the Supreme Court in the case of *Attorney General* v. *Thompson*, 168 Mich. 511-527, and the validity of the bond issues in that case was directly involved by the charter limitation on the city's indebtedness. See opinion, p. 513.

"At page 518, Mr. Justice STEERE, who delivered the opinion of the court, among other things, says:

"'The limit of the gross debt of the city of Detroit for strictly municipal purposes was and is fixed by the charter at 2 per cent. of the assessed valuation, and under the Constitution and home rule act it can only be changed by a general revision of the city charter made pursuant to the provisions of the home rule act.

"'We then come to the question: Must the school and library bonds be included in computing and limiting the gross indebtedness of the city of Detroit as contemplated by its charter?

"'With reference to the library and school bonds, the same laws and rules of construction apply.'

"The learned Justice then reviews the various decisions of the court up to that time, and at page 526 concludes as follows:

"'Guided by the foregoing considerations, we are constrained to hold that the school bonds and library bonds of the city of Detroit were not intended to be, and are not, included in the 2 per cent. limit of indebtedness for municipal purposes specified in the charter.'

"The above opinion was handed down February 16, 1912. Since then the city of Detroit has extended its boundaries under the home rule bill, and in several cases the Supreme Court has held that an amendment under the home rule bill extending the boundaries of a city has no effect upon the boundaries of a school district within such system. *MacQueen* v. *Port Huron City Commission*, 194 Mich. 328; *Collins* v. *City of Detroit*, 195 Mich. 330; *Board of Education of Grand Rapids* v. *Bacon*, 196 Mich. 18.

"In 1915 the legislature passed Act No. 323 (Local Acts 1915), entitled 'An act to authorize the common council of the city of Detroit to borrow money for the purpose of completing the erection and equipping of the new main library in the city of Detroit.' Thereafter proceedings were had to issue bonds for the pur-

pose authorized, and the validity of these proposed library bonds was passed upon by the Supreme Court in the case of *Common Council of Detroit* v. *Engel,* 202 Mich. p. 544. (Opinion filed July 18, 1918.)

"The Supreme Court held that said Act No. 323, Local Acts 1915, was a valid piece of legislation, and further that the authorization of the bonds by the municipal agencies was proper and that the bonds involved were valid.

"Neither in the prevailing opinion nor in the dissenting opinion filed by Mr. Justice FELLOWS, is any reference made to the case of *Attorney General* v. *Thompson,* 168 Mich. 511, nor do we find any decision of the Supreme Court limiting or modifying the doctrine announced therein, and without detailing all the decisions of the Supreme Court relative to the subject-matter, we are constrained to adhere to the doctrine announced in said opinion and decision, and we hereby hold and determine that school and library taxes and bonds should be excluded in determining the 2 per cent. limit of indebtedness for municipal purposes specified in the charter.

"4. That the 'saving clause' in the new charter is not sufficient to continue in force proceedings taken before the adoption of the new charter, under which it is contemplated to issue the bonds involved herein.

"We frankly state that it would have been better had the new charter contained this 'saving clause.' However, we must consider the entire situation. Preliminary proceedings of various kinds had been taken under the provisions of the old charter, and it was not to be supposed that the new charter necessarily invalidated such action if it conformed substantially to the provisions of the new charter. We think that, taking all the surrounding conditions into consideration with the observation of the Supreme Court in the case of *Attorney General* v. *Marx,* 203 Mich. 331, at p. 335, '2 Lewis' Sutherland Statutory Construction (2d Ed.), § 490,' is applicable:

"'Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice; to favor public convenience, and to oppose all prejudice to public interests.'

"Mandamus will issue in favor of relator against respondent for all the bonds involved herein, excepting $200,000 issue of public building bonds embraced in paragraph 'E' of this opinion."

Referring to the subject of the public sewer bonds, the validity of which was sustained below, we are impressed with the following argument of plaintiff's attorney:

"The circuit judges sustained the validity of these bonds, but, in so doing, placed unnecessary stress, it seems to me, on what has been done heretofore, as a matter of practical construction. I have conceded and do concede that 'in lieu of' means 'in place of,' 'in room of,' or 'instead of.'

"We are not dealing with a case in which there was authority to tax in a sum not to exceed $200,000, and authority to bond for a sum not to exceed $200,000, in lieu of taxation. We have a case in which there was authority to *tax* in a sum not to exceed $200,000, and authority to *bond for 'such sums of money as shall be deemed necessary and expedient,' in lieu of 'taxing for such sums of money as shall be deemed necessary and expedient.'* In other words, under the 'old charter' we could raise *by taxation,* for the purposes of the public sewer fund, no more in any one year than $200,000, but, for the same purposes in the same year we could bond 'for such sums of money as shall be deemed necessary and expedient.' "

We invite attention to the further discussion of plaintiff's attorney on this subject, in the brief, which we think justifies the conclusion that there was thus power to tax in a sum not exceeding $200,000, and *also* power to bond for "such sums of money as shall be deemed necessary and expedient," provided the gross debt limitation be not exceeded—all a part of the annual appropriation scheme, of the scheme for bonds which a city "is annually authorized to issue."

It is urged that it was because of this that the "public sewer bonds" were sustained in *Detroit Common Council* v. *Engel,* 187 Mich. 88, and *Attorney General* v. *Thompson,* 168 Mich. 511.

Upon the subject of the $200,000 public building bonds "to cover the cost of purchasing frontage of 172.17 lineal feet of ground at the harbor line to be used for the extension of public service," we agree with the views expressed and the conclusion reached by the circuit judges, in holding this attempted issue invalid.

The circuit judges did not discuss the question whether under the "revised charter," bonds may be issued to meet "capital expenditures," so-called, as distinguished from ordinary annual expenses of a department for the coming year. We are of opinion that section 5, chapter 7, title 6 (p. 136) of the "new charter" is broad enough to cover this expenditure, and that the question should be answered in the affirmative.

Should the things done by resolution of the common council, looking to the issue and sale of these bonds, have been done by ordinance? We think not. While section 17 of chapter 1 of title 3 of the "revised charter" provides that "all matters of legislation shall be presented, considered and enacted by the council in the form of ordinances," an examination of the other provisions of the charter shows that the power to make appropriations and issue bonds is conferred by title 6 (p. 108). It is in this title (see chapter 5, § 1, p. 125) that we find this provision:

"The common council may provide for public improvements and for refunding the public debt by borrowing upon the faith and credit of the city and upon the best terms that can be made, such sums of money as shall be deemed necessary and expedient, and issue the bonds of the city therefor, in lieu of raising the same by taxation."

It is in this title that all provisions of the charter are found concerning "finance and taxation." Nowhere in it is there a requirement that anything by it authorized is required to be done by ordinance—

in fact the contrary appears. In section 6 of chapter 1 of this title (p. 109) is the following:

"Each statement shall show the fund or purpose for which the amounts therein specified are to be raised, which statements, after having been adopted in the form of a *resolution* or *resolutions*, by a majority vote of all the members of the council, shall be, respectively, the basis for the levy and collection of taxes, and for the *issue of bonds*, for the purposes therein named."

Manifestly, there is no practicable way of working out all the incidents of a city's scheme of taxation and finances by resort necessarily to ordinances. Such evidently was not the intention of the framers.

Did the "repealing clause" of the "revised charter" operate in abatement of the right to carry out the sale of the bonds, authorized under the "old charter"; or did the "saving clauses" of the "revised charter" preserve the right?

While the repealing clause, standing alone, is quite sweeping, it must be read in connection with the "saving clauses," and all, taken together, must be interpreted from the standard of the end sought by their enactment.

"In construing statutes of doubtful meaning, courts are authorized to collect the intention of the legislature from the occasion and necessity of the law—from the mischief felt, and the objects and remedy in view—and the intention is to be taken, or presumed, according to what is consonant to reason and good discretion." *Sibley* v. *Smith*, 2 Mich. 487.

For the "saving clauses" see sections 2 and 3, title 10 (p. 152).

It is inconceivable that it was the design of the "revised charter" that these appropriations should abate, and the city be bankrupt on July 1st, and during all of its fiscal year under the new charter. Authority to collect taxes after July 1st abated, if authority to

sell bonds after that day abated. They must stand or fall together.

The situation is not controlled by *City of Detroit* v. *Chapin,* 108 Mich. 136 (37 L. R. A. 391).

On account of the great length of this opinion we refrain from further discussion of the questions involved. We are content with the conclusions reached by the learned circuit judges, and the judgment below is affirmed.

BIRD, C. J., and OSTRANDER, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

CHAMBERS *v.* CHAMBERS.

1. TRUSTS—ENFORCEMENT—EQUITY—JURISDICTION.
   A trustee having accepted the trust is bound to execute it faithfully, and a court of equity has power to enforce its execution in behalf of the *cestui que trust.*

2. SAME—FIDUCIARY RELATION—GOOD FAITH.
   Where a testator bequeathed in trust to his brother, to be disposed of by him to the two children of another brother, deceased, "all the property, or its equivalent, I received under the last will," of said deceased brother, leaving the determination of said amount entirely to the judgment and discretion of said trustee, a "determination" by him that said amount was the sum of one dollar, *held,* to be in bad faith, where at the time it was made the courts had already determined that it was a substantial sum.

3. SAME—ENFORCEMENT—DETERMINATION—EQUITY.
   Where the record shows that the trustee is deceased and no new determination can be made by him, the duty rests upon the court of equity to dispose of the question.

Appeal from Mackinac; Shepherd, J. Submitted June 6, 1919. (Docket No. 71.) Decided July 17, 1919.

Bill by William Chambers and another against Catherine Chambers, surviving executrix of the last will of Patrick Chambers, deceased, and another, for a construction of said will. From a decree for plaintiffs, defendants appeal. Affirmed.

C. S. Reilley, for plaintiffs.

Prentiss M. Brown (*Henry Hoffman*, of counsel), for defendants.

STONE, J. The bill of complaint herein was filed to obtain a construction of the will of Patrick Chambers, deceased, and prays, among other things, to have set aside the so-called "determination" of Michael Chambers, under said will. The plaintiffs are, respectively, the nephew and niece of said Patrick Chambers, deceased. The defendant Catherine Chambers is the surviving executrix of the last will of said Patrick Chambers, deceased, and defendant John Rhoades is the executor of the estate of Michael Chambers, deceased. Both of the defendants are properly before the court.

John Chambers, Patrick Chambers and Michael Chambers, all now deceased, were brothers, and formerly lived at St. Ignace, where they were partners in business. John Chambers, deceased, was the father of the plaintiffs. He made a will naming his brothers, Patrick and Michael, as his executors—both deceased at the time of the filing of this bill of complaint. John Chambers died December 19, 1891. His will was duly admitted to probate. The accounts of his executors in said estate will be referred to later in the opinion of the circuit judge. Patrick Chambers

died December 24, 1916; his estate is in process of being probated. His will was duly admitted to probate. That portion of his will, which bears date February 14, 1908, of which construction is prayed, reads as follows:

"All the property, or its equivalent, I received under the last will of my brother, John Chambers, deceased, I give and bequeath in trust especially, to my brother, Michael Chambers, to be disposed of by him to the two children and heirs of my said brother John, deceased, being William and Vivian Chambers, and at such time or times, or manner as he may deem fit, and my said brother Michael Chambers is to be the sole judge of the amount or quantity of said property I so received from my said brother John's estate, and from his determination and decision regarding the same there shall be no dispute or appeal; everything to be left to his judgment and decision, and this shall pertain to whatever he may deem necessary to deed as real estate, or give as personal property, or both, to account for my interest that came to me from my said brother John's estate."

The will named his brother, Michael Chambers, and his sister, Catherine Chambers, as residuary legatees under said will, to share and share alike as joint tenants, "and as such words imply, to go to them or the survivor absolutely." The will also appointed said Michael Chambers and Catherine Chambers, or the survivor of them, as the executors or executor of said will.

Michael Chambers died October 16, 1918; and previous to his death he attempted, by a so-called "determination," to deprive and dispossess plaintiffs of all interest in excess of one dollar, in the estate of Patrick Chambers, deceased. Said "determination" was filed in Patrick Chambers' estate on November 26, 1918, and after Michael's death. That "determination" reads as follows:

"Whereas, the will of my late brother, Patrick Chambers, heretofore filed in the Mackinac county probate court, provided that I was to make a determination of what property or its equivalent, if any, he received from the estate of our brother, John Chambers, and turn the same over to the children of John.

"And, whereas, I am informed by counsel that it is necessary that I make a determination of what amount was so received, I do hereby make the following determination:

"The account of John Chambers' estate was kept by my said brother, Patrick. A statement of account, based on Patrick's books was signed by him and myself as co-executors of John's estate and filed in the Mackinac county probate court. This account showed that the estate was indebted to us as co-executors for overpayments to the widow and children of John in the sum of upwards of five thousand dollars. Credits gained by the estate in the final disposition of the rents then were originally charged, by charging my brother and myself interest on the balance in our hands at five instead of three per cent. and compounding the same annually, and by refusing compensation to us as executors. My determination is that the amount of property or its equivalent received by my brother, Patrick, from the estate of John Chambers, was the sum of one dollar ($1) and that this is the amount that I determine to be turned over to the said children of John Chambers, William Chambers and Vivian Chambers.

"MICHAEL CHAMBERS."

This "determination" was duly signed and witnessed, and acknowledged on October 14, 1918, as appears by the record. According to the order on the final account in the estate of John Chambers, deceased, as affirmed on appeal from the probate court to the circuit court, the interest of Patrick Chambers therein was one-eighth of the real estate and the sum of $2,832.04 in personal property. This amount was so adjudged before the filing of said so-called "determination."

The record discloses that the plaintiffs herein caused their uncles, Michael and Patrick Chambers, to account to them in a somewhat bitter contest waged in the probate court, from which contest in the estate of John Chambers, deceased, Michael appealed to the circuit court. At the time of the attempted "determination" made by Michael Chambers, aforesaid, the circuit court had determined the exact interest Patrick Chambers had in the estate of John Chambers, deceased, and it is the contention of the plaintiffs that the amount or quantity of property to be turned over to the plaintiffs having been determined by the court, Michael Chambers had no authority or power over the same by way of disposition. The effect of the "determination" as made by Michael Chambers, if allowed to stand, will deprive these plaintiffs of the entire legacy (save one dollar) mentioned in, and given them by, the will of Patrick Chambers, deceased; and it is the claim of the plaintiffs that that would amount to a false determination of the value of the legacy, and would be fraudulent, untrue and unjust.

The learned circuit judge who heard this case filed an opinion in which he stated, among other things, the following:

"John Chambers, Patrick Chambers and Michael Chambers, all now deceased, formerly lived at St. Ignace, and were partners in business, known as Chambers Brothers. John Chambers died first, his two brothers, Patrick and Michael, were named as his executors, they continued the partnership, using and commingling the moneys derived from the income from estate of John Chambers in the business, both personal and partnership, made no final accounting in said estate for twenty-three years, and when ordered to make an accounting claimed that the estate was indebted to them in a large amount, to wit, $6,776.26. After a contest in probate court, and in the circuit court to which it was appealed in the year 1917, they were called upon to account to plaintiffs and their

mother in cash for the sum of $7,500, which they paid. By reason of their alleged neglect and conduct, they were charged compound interest on the moneys found to be in their hands from time to time, charged large amounts for rents of property they had occupied, and because of maladministration were allowed no compensation. * * *

"The finding of the probate court and the decree entered, state the interest of Patrick Chambers in the estate of John Chambers as follows:

"Real estate: Undivided one-fourth to Patrick and Michael Chambers.

"Personal estate: To Patrick and Michael, one-half of remainder, $5,664.09.

"The interest in the real estate mentioned above is estimated to be of considerable value. * * *

"Whether or not the facts, as above stated, present grounds that would warrant the court in construing Patrick Chambers' will, or, in other words, whether any construction is required, it appears clear to me that a case is presented which calls for equitable interference, and calls for a remedy, where an adequate remedy may be had only in a court of equity.

"A *cestui que trust* may invoke the aid of a court of equity to have wrongful acts of the trustee affecting the trust property set aside. 39 Cyc. p. 512.

"When the execution of a power in trust shall be defective in whole or in part, its proper execution may be decreed in equity in favor of the trust. Section 11649, 3 Comp. Laws 1915.

"The statute granting to probate courts jurisdiction over testamentary trusts in certain cases, carefully and fully reserves to courts in chancery the powers previously possessed by them over trustees and trust estates. Section 14094, 3 Comp. Laws 1915.

"It is elementary that a person to whom a power or a trust is confided is bound to execute the same fairly, equitably and in good faith. These requirements are particularly imperative when the trustee is required to decide between conflicting claims or interests of himself and his beneficiary.

"It must be presumed that in making this devise, Patrick did not make use of idle words. When he provided for the payments to the children of his de-

ceased brother of the property that himself had been given by their father, he must have believed it to have been of substantial value, or he would not have mentioned the matter at all. This is gathered also from the provision in regard to the time or times of payment to them provided for in the will.

"If this devise was not a naked trust, it is because the determination of the amount of the bequest and the time of enjoyment by the beneficiaries were left uncertain. Before Michael undertook to exercise a power of determination of the amount or extent of the property devised, that amount had been determined by a court of competent jurisdiction having before it all the parties interested. It was determined just as certainly and definitely as court could have fixed and determined a line between adjoining parcels of land, and the amount so fixed then became vested in the plaintiffs. For the trustee to deviate from that finding to his own advantage, was a legal fraud upon plaintiffs.

"He acquiesced in that finding and paid the amount so awarded. In making his own determination, he ought to have followed that finding, and following a well-known maxim of equity, we must consider that he did so.

"His power of deciding as to the time or times of payment died with him, and the administration of his estate should be conducted by the probate court and the executors of his will on the basis of that finding.

"A decree may be made accordingly with costs to the plaintiffs."

The decree was entered in accordance with this opinion, and directing that a certified copy thereof be filed in the estate of Patrick Chambers in said probate court, and that distribution be made accordingly. Costs were awarded to the plaintiffs. The defendants have appealed, and it is their contention that the testator's desire was clearly expressed in Patrick Chambers' will, and that it is the duty of the court to carry it out. It is further claimed that the opinion of the circuit judge was based upon evidence which was im-

material and should not have been considered at all in the case; that the testator created a power in Michael Chambers, granting him the right to dispose of the property in the manner in which he has disposed of it by the "determination" made; and many authorities are cited and reviewed by counsel in support of their claim, that Michael Chambers was made donee of the power. Such authorities are not controlling of the meritorious question here.

We are of the opinion that there was material evidence to support the finding of the circuit judge, and that such evidence warranted the conclusion reached by him. While, technically speaking, the bill of complaint was filed to obtain a construction of said will, there are sufficient facts alleged which, together with the prayers for relief, including the general prayer, justified the court in holding the case, and in entering the final decree therein.

It is elementary doctrine that a trustee, having accepted the trust, is bound to execute it faithfully; and a court of equity has power to enforce its execution in behalf of the *cestui que trust.* 3 Story's Equity Jurisprudence (14th Ed.), §§ 445, 446; *Sands* v. *Codwise,* 4 Johns. (N. Y.) 536.

Where a trustee has accepted the trust, equity, so long as it is possible for it to do so, will not permit the trustee to defeat the trust by his wrongful act, and will afford relief by a faithful execution of the trust for the preservation and enforcement of rights depending upon and derivable from it. The trustee is called upon to exercise a proper and honest judgment considering the nature and object of the trust. The trustee must act for the beneficiaries and not for himself in antagonism of the interests of the beneficiaries. He is prohibited from using the advantage of his position to gain any benefit for himself at the expense of the *cestui que trust,* and from placing himself in

any position where his self-interest will, or may, conflict with his duties as trustee.

The evidence of the surrounding circumstances existing when Patrick Chambers made his will, all indicate that he knew he had received from the estate of his brother, John Chambers, a substantial amount of property. That amount had been determined by a court of competent jurisdiction before the so-called "determination" of Michael was made. Michael was one of the residuary legatees under Patrick's will; he knew that every dollar which was taken from the plaintiffs out of said estate would enhance his own legacy, as such residuary legatee.

A fair construction of the bill of complaint and its prayers is, that plaintiffs are here seeking to cancel, or have set aside, the so-called "determination" of Michael Chambers. That instrument, itself, is very significant in its language. Taken as a whole, it shows that he sought to justify his conduct by reason of the courts having already decided that he and his co-executor had not properly administered the estate of John Chambers, and the court had charged them with compound interest and refused them compensation, and he gives this as his reason for his "determination." Such reason was strong evidence of his bad faith. It is apparent upon its face that the reasons which he gave did not justify him in making such "determination"; that the said "determination" was not made in good faith—that good faith which he, as trustee, was bound to exercise, but was an arbitrary and unjust attempt to divert and dispose of the interest which plaintiffs were entitled to receive from Patrick's estate. This conduct of Michael in that regard was such as naturally to shock the conscience of the chancellor, and we are not surprised that the court found that Michael Chambers abused his fiduciary relation to these plaintiffs. The record shows that Michael Cham-

bers is deceased, and no determination can, of course, be made by him now, and that duty rests upon a court of equity to dispose of the question involved.

The decree of the circuit court is affirmed, with costs to the plaintiffs.

BIRD, C. J., and OSTRANDER, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

CHALKER *v.* DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

1. CARRIERS — RAILROADS — PERSONAL INJURIES—SNOW AND ICE—NEGLIGENCE—QUESTION FOR JURY.

   In an action against a railroad company for personal injuries alleged to have been caused by plaintiff's slipping upon ice and snow on the step of the car and falling to the ground as she was about to alight, the disputed question of fact as to whether the ice and snow had accumulated during the trip, and since the train left its starting point in the morning, was properly submitted to the jury.

2. SAME—TRIAL—INSTRUCTIONS.

   Even if the ice and snow had accumulated during the trip, still if it rendered the steps dangerous to pass over, a duty was imposed upon defendant to warn and assist plaintiff in alighting, and where it is admitted by the brakeman that he did neither, failure of the court to instruct the jury in this respect was reversible error.

3. SAME.

   Uncontradicted evidence that the train did not stop at the station platform, that the distance from the last step to the ground was about 20 inches, that the ground was so slippery that a stool could not be kept in place and so was

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On duty of carrier of passengers to keep steps of cars free from snow and ice, see note in 15 L. R. A. (N. S.) 523; 35 L. R. A. (N. S.) 592.

thrown aside, and that passengers were compelled to step to the slippery ground, rendered it the duty of defendant to warn and assist plaintiff, and where it is conceded that it did not do so, the court below was in error in neglecting to instruct the jury that if defendant's failure in these respects contributed to her injuries and increased her damages she would be entitled to recover therefor.

Error to Shiawassee; Collins, J. Submitted June 12, 1919. (Docket No. 26.) Decided July 17, 1919.

Case by Orpha L. Chalker against the Detroit, Grand Haven & Milwaukee Railway Company for personal injuries. Pending the trial, plaintiff died, and the case was continued by her administrator. Judgment for defendant. Plaintiff brings error. Reversed.

Albert L. Chandler, for appellant.

Harrison Geer (*W. K. Williams,* of counsel), for appellee.

BIRD, C. J. On the 8th day of February, 1917, Orpha L. Chalker and her husband were passengers on defendant's morning train from Owosso to Durand. When the train arrived at Durand it stopped about 300 feet east of the station platform and the passengers were advised to alight. Mr. and Mrs. Chalker got up and passed out of the car and onto the platform, Mr. Chalker leading the way. He reached the ground in safety but Mrs. Chalker slipped on the ice and snow deposited on the first step and fell to the ground, striking on her stern and back, seriously injuring her, the distance from the platform to the ground being about five feet. She was assisted to her feet by Mr. Chalker and the brakeman and taken to a nearby hotel where she received medical aid. She brought suit against defendant to recover her damages. The substance of her complaint was that defendant did not furnish her a reasonably safe exit

from the car, and did not furnish her a safe place to alight. A trial resulted in a substantial verdict in her behalf. Subsequently a new trial was granted by the trial court and before the case was retried Mrs. Chalker died. At the second trial she was represented by her administrator. The second trial resulted in a verdict for the defendant. Plaintiff has brought the proceedings to this court by writ of error, assigning several errors thereon.

The contention of appellant amounts to this: That Mrs. Chalker was not furnished reasonably safe facilities for leaving the car, nor was she furnished a reasonably safe place to alight. That the steps were coated with ice and snow which made them dangerous to pass over, and that she was neither advised of their dangerous condition nor was she assisted in alighting, and further, that no platform was provided on which to alight and that no box or stool was substituted therefor, as is sometimes the case.

Defendant contends that the cars were free from ice and snow when they left Grand Haven, its western terminus, and that whatever ice and snow were on the steps at Durand were due to prevailing weather conditions, and that under the holding in *Meyer* v. *Railroad Co.*, 180 Mich. 516, it was not bound to remove the snow and ice which collected in such manner until it reached its eastern terminus, which was Detroit.

1. The trial court took defendant's view and charged the jury in accordance therewith. The proofs bearing upon this question were in conflict, and we think the trial court was right in submitting the question to the jury.

2. The trial court in his instructions took no notice of the other complaints of plaintiff and gave no instructions whatever to the jury concerning them. Conceding that the snow and ice had accumulated since

leaving Grand Haven or Grand Rapids, still if the steps were dangerous to pass over on account of the ice and snow, when the train arrived at Durand, it imposed upon the defendant the added duty of warning Mrs. Chalker of the danger, and also the duty of assisting her to alight in safety. The brakeman admitted that he did neither. The defendant's duty, under such circumstances, is stated in Ruling Case Law:

"The duty of the carrier to provide safe and convenient means of entering and leaving its vehicle includes the exercise of due care in the construction and keeping in at least a reasonably safe condition of the steps of cars and other appliances for enabling passengers to board and alight from its cars. * * * So also it may be the carrier's duty under certain circumstances to provide a stool or box for the use of a passenger entering or leaving its car, as, for instance, where the steps of such cars are inconveniently high, or where the car has been stopped at a point where there is no platform. * * *

"While there are cases that seem to hold as a matter of law that no duty rests upon carriers of passengers by rail to assist persons entering or getting off their cars, the usual rule is that though it is generally not the duty of a carrier's employees to assist passengers to board or alight from its vehicle, such duty may and frequently does arise, the obligation of a carrier in this respect depending largely upon the nature of his vehicle, the facility with which access may be had without assistance, and similar circumstances, and that the question is one for the determination of the jury upon a consideration of all the circumstances in the particular case. It would clearly appear to be the duty of a railroad company stopping its train at a place at which passengers cannot easily board or leave the train, to assist them to do so. While the duty to furnish a safe platform, and a step or stool whenever the same is necessary to make it safe, does not necessarily include the duty to assist alighting passengers, it has been held to be the duty of a railroad company which furnishes a box for passengers to alight upon at a point where there is no platform,

at least to render such assistance to passengers as to make the box as safe as a platform would have been." 4 R. C. L. p. 1233, and cases cited.

See, also, *Cartwright* v. *Railway Co.*, 52 Mich. 606.

The plaintiff was entitled to a charge covering this phase of her case.

It was shown, without contradiction, that the train did not stop at the station platform, that the distance from the last step to the ground was about 20 inches, that the ground was so slippery that a stool could not be kept in place so it was thrown aside by the brakeman and the passengers were compelled to step to the slippery ground. These conditions also made it the duty of the defendant to warn and assist plaintiff. It was said in *Cartwright* v. *Railway Co.*, *supra:*

"If a car in which there were passengers was not standing where it would be safe for them to alight without assistance, it was the duty of the company to provide assistance or give warning, or to move the car to a more suitable place."

Plaintiff was entitled to have the jury instructed that if defendant's failure in these respects contributed to her injuries and increased her damages, she would be entitled to recover therefor.

For the errors pointed out the judgment will be reversed and a new trial granted. The plaintiff will recover her costs in this court.

OSTRANDER, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

PEOPLE v. DETROIT UNITED RAILWAY.

1. STREET RAILWAYS—DEFINITION—PRIVATE RIGHT OF WAY.
   A railway company operating its line on a private right of way cannot be said to be a street railway company in the ordinary meaning of that term.

2. SAME—MUNICIPAL CORPORATIONS — REASONABLE REGULATION — POLICE POWER.
   Municipal regulations of the use of streets by a street railway are an exercise of the police powers of the city, and will be upheld if reasonable.

3. SAME—ORDINANCES.
   An ordinance of the city of Detroit requiring "all cars carrying passengers operated upon any line of street railroad" in said city to "come to a full stop immediately before crossing any street or avenue in said city whenever signaled to stop by any person desiring to take passage thereon or to alight therefrom," *held*, not unreasonable.

Certiorari to recorder's court of Detroit; Jeffries, J. Submitted June 10, 1919. (Docket No. 102.) Decided July 17, 1919.

The Detroit United Railway was convicted of violating an ordinance of the city of Detroit, and sentenced to pay a fine of $50. Affirmed.

Bernard F. Weadock, for appellant.

Clarence E. Wilcox, Corporation Counsel, and *Thomas P. Penniman* and *Paul T. Dwyer,* Assistants Corporation Counsel, for the people.

MOORE, J. This is certiorari to review the finding of defendant guilty of violating a city ordinance. We quote sufficiently from the opinion of the trial judge to indicate the questions involved as follows:

"This is a complaint against the Detroit United Railway charging a violation of a city ordinance on the 11th day of September, 1917, in that it did not stop its cars at the crossing or intersection of Woodward avenue and Chamberlain avenue in the city of Detroit when hailed and signaled so to stop by certain persons who desired to become passengers thereon, one such person being T. Frank Hooley, the complainant in this case.

"The city ordinance of the city of Detroit, chapter 245, section 19-*a*, page 600 of the Compiled Ordinances of the city of Detroit of 1912, provides as follows:

"'SEC. 19-*a*. All cars carrying passengers operated upon any line of street railroad in the city of Detroit shall come to a full stop immediately before crossing any street or avenue in said city whenever signaled to stop by any person desiring to take passage thereon or to alight therefrom; and all cars operated on any such line or lines shall be brought to a full stop before crossing any street or avenue at which any two lines of street railway intersect.'

"The court finds the facts in this case to be,

"*First*, that the Detroit United Railway, the defendant herein, owns and operates a street railway line running over the streets and avenues within the limits of the city of Detroit, and especially upon Woodward avenue and across and by Chamberlain avenue where it intersects Woodward avenue as described in this complaint. That for some time the intersection of Woodward avenue and Chamberlain avenue, as above described, and where complainant stopped and hailed said car has been a regular stop marked by the company with a sign indicating that it was a proper place for its cars to stop, to take on and let off passengers.

"*Second*, that the complainant on the day mentioned in the complaint was at the said intersection of Woodward and Chamberlain avenues as above described, and hailed or signaled for the stopping of car number ——, operated by the said railway company, and that the said car refused to stop upon the signal and hailing of the said complainant.

"*Third*, that Chamberlain avenue intersecting Woodward avenue, the point mentioned in said complaint,

is in the city of Detroit, and within the provisions of the said ordinance.

"*Fourth*, that this part of the city has greatly developed in the past few years, and within it are hundreds of families requiring the service of the said street railway company, and that the local service rendered by the said company is inadequate; that while there is local service on said line on Woodward avenue at the intersection of Chamberlain avenue, this is very frequently changed to limited service where the cars run by, and refuse to stop for passengers at said point, at such times rendering local service wholly inadequate. That people are required to walk from twelve to fifteen hundred feet across some three or four other street crossings intersecting Woodward avenue to get cars marked 'limited' run by said company on said streets; and in a modern city in keeping with the desire and necessity for rapid transit, such distances to walk to take a car are an unreasonable burden upon the public.

"*Fifth*, that Hooley is a resident of Royal Oak, and that when attempting to take the car mentioned in said complaint, he was about to go to his residence in Royal Oak, beyond the city limits, and that Chamberlain avenue intersecting Woodward avenue, as described in the complaint was a proper place under the ordinance of the city of Detroit to wait and board said cars, either local or limited for transportation, either in or outside of the city of Detroit.

"There is no evidence in this case to indicate that the section of the said ordinance providing for the stopping of cars in and upon the streets of the city of Detroit is unreasonable. In fact, the ordinance has stood for many years, and this is the first time it has ever been questioned by the defendant which has been operating cars in the city of Detroit for a great number of years. There is nothing in the original grant to the Detroit United Railway over the property described in the complaint before becoming part of the city of Detroit, to indicate any limitation upon the powers of the city of Detroit, to regulate its traffic within the city limits, as here sought by said ordinance.

"It was indicated in the argument of counsel that

the stopping of limited cars at street crossings in the city of Detroit as designated by the city ordinance, is a burden upon express or rapid transportation, and that people outside of the city of Detroit are entitled to the use of rapid transit as well as those who live within the city limits. If this contention is right, then the Detroit United Railway may mark all of its cars or any number of its cars "express" and may run them from one central part of the city of Detroit through the entire city, across any number of streets, without stopping to take on or let off passengers. It is just as much a convenience for a passenger to be able to take a limited car at convenient places upon the streets of the city of Detroit, as it is that they should have rapid transit from a certain point of the city to the city limits. * * *

"Therefore this court finds that it is such a convenience to the public of the city of Detroit, for passengers coming in and going out of this city to other parts of the State to have the convenience of boarding these cars, either local or limited, at such street or avenue as they may be conveniently at.

"Therefore I find this defendant guilty and the sentence of the court is that it be fined the sum of fifty dollars."

Testimony on the part of the defendant indicates as follows:

"Summary of cars operated on respective dates.

July 31st.

North bound...	86 Locals	9 Limiteds	30 Expresses
South bound...	86 Locals	9 Limiteds	27 Expresses

August 13th.

North bound...	82 Locals	9 Limiteds	34 Expresses
South bound...	88 Locals	9 Limiteds	26 Expresses

August 17th.

North bound...	82 Locals	9 Limiteds	30 Expresses
South bound...	84 Locals	9 Limiteds	28 Expresses

August 22d.

North bound...	81 Locals	9 Limiteds	26 Expresses
South bound...	89 Locals	9 Limiteds	27 Expresses

August 28th.

North bound...	54 Locals	9 Limiteds	29 Expresses
South bound...	69 Locals	9 Limiteds	30 Expresses

September 17th.

North bound...88 Locals 9 Limiteds 40 Expresses
South bound...92 Locals 9 Limiteds 36 Expresses"

Only local cars were stopped at Chamberlain street intersection.

The counsel for defendant presents many contentions. Those requiring consideration here are stated in the brief of counsel as follows:

"This respondent maintains that such ordinance is unreasonable, invalid and inoperative in the present instance as a matter of law. Because

"(*a*) The ordinance is not a proper exercise of the police power.

"(*b*) The city is without express or implied authority for its enactment.

"(*c*) The ordinance is not of such a character as to be embraced within the police power of the city.

"(*d*) The ordinance is contrary to the public policy of the State.

"(*e*) The enforcement ordinance deprives the respondent of its property without due process of law and is violative of the Constitutions of the United States and State of Michigan.

"(*f*) The ordinance is an interference with interstate commerce. * * *

"Being a common carrier with the duties to perform as stated above it is empowered by common law to make and enforce all reasonable rules and regulations that may be necessary to best serve the public, meaning by public, the whole public, not a part or parcel but the public in its entirety.

"The operation of the cars in question is an exercise of an obligation which cannot be either put aside by the company nor destroyed by a part of the public. (Citing authorities.) * * *

"It is the contention of this respondent that the establishment of the express and limited service by rule and regulation is a subject within its province as a carrier and is presumed to be reasonable until conclusively proven otherwise. In the instant case it is shown that this locality has more express stops than

any other along the line. The testimony shows that there is an express stop approximately 1,300 feet to the north and also approximately 1,200 feet to the south. These distances do not exceed two city blocks. The express cars operate on a thirty-minute headway, and the local cars on a thirty-minute headway, except during certain hours of the day when the service is more frequent so that at the mile roads the combined service is fifteen minutes and better."

Counsel insist that *Township of Ross* v. *Railways Co.*, 165 Mich. 28, is controlling. A reference to that case will show it was a mandamus proceeding where the field of operations was a sparsely settled village and not a great city.

An examination of the authorities cited by counsel for appellant show that nearly all of them relate to the operation of steam railroads and are not applicable here. The case cited by defendant of *Village of Excelsior* v. *Railway Co.*, 108 Minn. 407 (122 N. W. 486), is more in point. The railway company, however, was operating its line on a private right of way and cannot be said to be a street railway company in the ordinary meaning of that term. Counsel also cite *Residents of Albany* v. *Schenectady R. Co.*, P. U. R. 1916C, 62. That case did not involve the violation of an ordinance.

The following appears in 28 Cyc. p. 727:

"Municipal regulations of the use of streets by a street railroad are an exercise of the police powers of the city and will be upheld if reasonable. The power of municipalities to regulate the running of cars or railways, standard, street, or interurban, within the corporate limits has been sustained by numerous decisions."

The ordinance in the instant case appears in that part of the opinion of the trial judge which we have quoted. Section 28 of article 8 of the State Constitution reads:

"No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authority of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor, from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships."

There is nothing in the record to indicate that the common council for the city of Detroit has been asked to except from the provisions of the statute interurban cars.

In 36 Cyc. p. 1458 appears the following:

"As to movement and speed of cars. It is also within the power of the legislature or municipal government to make reasonable regulations relative to the movements of street cars, as by requiring cars to stop at specified places, such as before crossing intersecting streets; or before reaching a railroad crossing, and not to proceed until it has been ascertained that the way is clear."

In *Bly* v. *Railway*, 67 N. H. 474 (32 Atl. 764, 30 L. R. A. 303), the court used the following language:

"The charter does not give the defendants the exclusive use of the portions of streets occupied by their tracks. If it did, there would be ground for inferring that the legislature intended to exempt them from the limitation, for in such case no one could lawfully occupy a position in which he would be exposed to the danger of collision with their cars. The public generally have a right to use those portions of the streets, but in a manner and to an extent modified by the use which the defendants make of them. People may pass across or along the tracks when cars are not passing. The rights of the public and of the defendants are in a great measure common. *Middlesex Railroad Co.* v. *Wakefield*, 103 Mass. 261, 263; *Concord* v. *Railroad*,

65 N. H. 30, 36 (18 Atl. 87). By the charter, the legislature authorized a new use of streets, which is a source of a new and great danger to other travelers. The driving of cars over steel or iron rails is attended with greater danger to others using the streets than the driving of ordinary vehicles over their uneven surfaces. As cars are heavier than ordinary vehicles, and as there is less resistance to their motion, their momentum is not so easily controlled, and causes more serious consequences when they come in collision with objects. Being confined to a fixed track, they cannot be turned aside to avoid collision. They have a tendency to frighten horses, especially when propelled by steam or electricity. The legislature were aware of these facts, and they are competent evidence upon the question of the legislative intent expressed by the charter. They show that there is greater necessity for limiting the speed of cars than for limiting that of ordinary vehicles. In view of this necessity it is highly improbable that the legislature intended to release the defendants from all restraint as to speed, even temporarily. If the general law does not apply to the defendants, they may drive their cars at any rate of speed, however great, until the mayor and aldermen establish regulations for their government, while a person riding upon horseback or in a carriage cannot drive across, along, or in the vicinity of their tracks at a swifter pace than five miles an hour without subjecting himself to liability to be fined or imprisoned. Such inequality would be arbitrary and unreasonable.

"The speed at which the defendants may drive cars without endangering the safety of other travelers depends somewhat upon the width and character of the streets and the extent and nature of travel over them. Recognizing this fact, and the further fact that the mayor and aldermen, from their knowledge of the streets and travel, are well qualified to judge of the speed allowable within the limits of safety, the legislature delegated to them authority 'to make all such regulations as to rate of speed and the mode of use of the railway as the public safety and convenience may require.' *Commonwealth* v. *Temple*, 14 Gray (Mass.), 69, 74. This is in accordance with a policy

adopted in this State when the first street railway charter was granted, and which has been generally adhered to in the enactment of later charters. Laws 1864, chap. 3030, § 5; 1878, chap. 118, § 4; 1881, chap. 251, § 4; 1889, chap. 178, § 3, chap. 218, § 4, chap. 241, § 3; 1891, chap. 258, § 5, chap. 293, § 5; 1893, chap. 250, § 4. 'This control is given to these municipal officers, not as representing a conflicting interest, but as independent bodies charged with the duty of protecting the rights and promoting the convenience of the whole public. *Union Railway Co.* v. *Cambridge*, 11 Allen (Mass.), 287, 292; *Cambridge* v. *Railroad Co.*, 10 Allen (Mass.), 50, 57. The legislature intended that the mayor and aldermen should take the subject up where they left it, that is, with the general law in force and applicable to the defendants. If the mayor and aldermen find that no additional or different regulations are required, they need not act; but if they find that the public safety and convenience require that the defendants shall run their cars at a less rate of speed than five miles an hour, or that they shall take precautions of any kind to avoid injury to travelers, they are authorized to make regulations accordingly. After the adoption of regulations, the defendants would be governed by the statute as modified by the regulations. Cooley Const. Lim. p. 198; 1 Dillon, Mun. Corp. § 368; *Rogers* v. *Jones*, 1 Wend. (N. Y.) 237; *State* v. *Welch*, 36 Conn. 215; *State* v. *Clarke*, 54 Mo. 17; *State* v. *Hayes*, 61 N. H. 264; *School District* v. *Prentiss*, 66 N. H. 145, 146 (19 Atl. 1090)."

The case of *Cape May, etc., R. Co.* v. *City of Cape May*, 59 N. J. Law, 404 (36 Atl. 678, 36 L. R. A. 657), involved the violation of an ordinance similar to the one before us. In disposing of the case the court used the following language:

"The power therefore is undoubted to make reasonable regulations to reasonably control the operation of electric street railway cars, within the city, in many respects. *Trenton Horse R. Co.* v. *Trenton*, 53 N. J. Law, 132 (20 Atl. 1076, 11 L. R. A. 410). The power to reasonably regulate the operation of these street railways is implied from the authority conferred upon the city council by the city charter.

"The franchise or privilege is granted by the municipality, and a reasonable regulation of the enjoyment of the franchise is not a denial of the right; for corporations which are to be regarded as inhabitants of a city are subject to its ordinances to the same extent as natural persons. The power is a police power, and one which is constantly exercised in prescribing regulations for the good of the community, and such regulations can be enacted by the legislative body of the municipality without notice to the parties who may claim to be interested, provided the regulations are made according to and in the manner prescribed by, the charter of such municipality. The exercise of this power is legislative in its character. *Trenton Horse R. Co.* v. *Trenton, supra; Consolidated Traction Co.* v. *City of Elizabeth,* 58 N. J. Law, 619 (34 Atl. 146, 32 L. R. A. 170); *Frankford, etc., R. Co.* v. *City of Philadelphia,* 58 Pa. St. 119; *North Hudson County R. Co.* v. *Mayor, etc., of City of Hoboken,* 41 N. J. Law, 71; Booth, St. Ry. Law, § 222.

"Ordinances passed by virtue of an implied power conferred upon municipal corporations must be reasonably consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State. 1 Dillon, Mun. Corp. (4th Ed.) § 319. There is much discretion left to the municipal corporation in the exercise of their general and implied powers, and the exercise of this authority will not be judicially interfered with unless its exercise has been manifestly unreasonable and oppressive, and is an invasion of private rights. No private right is invaded by the ordinance in question, and the presumption is in favor of its validity. The unreasonableness of the ordinance is not apparent on its face, and the burden of proof is on the prosecutor to show wherein it is arbitrary, unjust or oppressive. Booth, St. Ry. Law, § 224, and cases cited in notes.

"Regulations may be made requiring street railway cars to stop at designated places, in order to accommodate passengers and prevent unnecessary obstructions to public travel, as well as to avoid danger of accidents to others in the ordinary use of the streets and other public places. *North Birmingham St. R. Co.* v. *Calderwood,* 89 Ala. 247 (7 South. 360). Street railways are a great public convenience, and they are

to be properly protected in the exercise of their franchise; but they are not entitled to a monopoly of the street, nor even to the exclusive use of that part covered by their tracks. They must exercise their rights in harmony with the rights of the traveling public.

"The ordinance in question is presumed to be a valid ordinance. It does not appear on its face to be unreasonable or oppressive under the circumstances of the case. Neither does it otherwise appear in purpose or effect to be unreasonable. Electric street railway cars can be propelled at a very rapid rate of speed along the streets and over the crossings and intersections thereof, and other public places, with great danger to those using such crossings. In view of these dangers, incident to the operation of this class of street railways, it is incumbent upon the companies owning and operating them to exercise a degree of care and caution to avoid accidents commensurate with the risks involved. This degree of care is a reasonable one in view of the probabilities of danger, and the exercise of this care for the protection of the general traveling public can be enforced by ordinance. A regulation that the cars shall stop at every street before crossing is a reasonable one, which does not interfere with the franchise of the prosecutor, and would appear to be necessary to protect the public from the dangers incident to the crossing.

"The proceedings of the city council and the ordinance must be affirmed with costs."

In the case before us the defendant is found guilty of violating an ordinance of a great city having from three-quarters of a million to a million of people. The trial judge found as a fact that the service at the point indicated was inadequate to properly serve the public. Woodward avenue is one of the great arteries of this large and growing city. The summary of the frequency of the running of the street cars which we have before stated gives some idea of its congested condition. We may well take notice that even more passengers are conveyed up and down and across Woodward avenue in automobiles than find transit in the street cars.

Counsel for defendant insist these large interurban cars should be allowed to make runs of a half mile or more without stopping and to cover more mileage in a given time than the ordinary street car. The common council might well regard the doing of this as a menace to the rights of others who have equal rights upon the street with the defendant.

The municipal authorities are in a situation to know local conditions much better than are the courts, and while we should not hesitate to declare an ordinance unreasonable if it was shown that it was clearly so, we think upon this record we should decline to so hold.

The judgment is affirmed, with costs.

BIRD, C. J., and OSTRANDER, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

McDUFFEE *v.* COLWELL.

1. LANDLORD AND TENANT—LEASE—SPECIFIC PERFORMANCE—COVENANT TO HEAT—INTERFERENCE OF WAR REGULATIONS.

   On a bill for the specific performance of an agreement in a lease to heat a store building, and for damages for failure to perform, defendant is liable if he failed to make use of the fuel available in heating said building, although because of fuel regulations it was impossible for him to keep the temperature up to the standard required by the contract.

2. SAME—DAMAGES—CERTAINTY—LIABILITY.

   Because of the difficulty in establishing with certainty the extent of plaintiff's damages, defendant should not be allowed to escape all liability growing out of his wrong, where the evidence shows that there was a loss.

For authorities discussing the question of duty and liability of landlord of apartment as to heating, see note in 37 L. R. A. (N. S.) 1213.

Appeal from Wayne; Mayne, J., presiding. Submitted June 3, 1919. (Docket No. 32.) Decided July 17, 1919.

Bill by Charles S. McDuffee against Daniel L. Colwell for the specific performance of a contract, and damages for failure to perform. From a decree for plaintiff, defendant appeals. Affirmed.

Henry H. Wait, for plaintiff.

Schmalzriedt & Toms (*Ezra H. Frye,* of counsel), for defendant.

MOORE, J. In May, 1916, the plaintiff entered into a five-year written lease for two store buildings with defendant, who was, as part of the consideration, to heat the buildings. Plaintiff claims defendant did not heat the stores as he agreed and filed this bill to compel the specific performance of the agreement to furnish heat in the premises covered by the lease. Plaintiff also claims damages resulting from loss in his business in December, 1917, and January, 1918, by reason of the refusal of defendant to furnish reasonable heat. The trial court decreed specific performance and allowed plaintiff $200 damages. The case is brought here by appeal.

We quote from the brief of appellant:

"Under these facts the following legal questions arise:

"(1) Can there be liability on the part of the landlord for alleged damages arising from the acts of third persons not under his control or acting without his consent, and particularly for acts of the municipal police, acting under the fuel administrator in the exercise of war powers?

"(2) If the landlord is liable under such circumstances, what is the correct measure of damages?

"(3) Can damages be recovered for loss of probable profits based upon speculative and uncertain sales?

"1. We submit that this court should take judicial notice of the fuel stringency in Detroit and vicinity in the winter of 1917 and 1918. *Konieczny* v. *Railway Co.*, 164 Mich. 66; *Inglis* v. *Driving Ass'n*, 169 Mich. 311, and the state of war in which this country was at that time; the unusual cold temperatures of December, 1917, and January, 1918, in Detroit and vicinity; the conduct of local fuel administrators during this winter acting under powers vested in the President of the United States by congress. Fed. Stat. Ann. (2d Ed.) p. 181, § 1 (Supp. of 1918, Act of August 10, 1917).

"It is undisputed that the defendant had provided upwards of 500 tons of good fuel for the purpose of heating plaintiff's stores during the winter of 1917-1918, which fuel was taken from him by government authority, and the trial court also found that defendant was obliged to use fuel not adapted to the particular furnace used in heating the stores in question."

There is a very learned discussion of the subject of "Subsequent Impossibility of Performance as Affecting Contractual Obligations" in volume 17, Mich. Law Review, p. 689, but we do not think that subject is important here. In the instant case the trial judge who heard and saw the witnesses stated in part in his opinion:

"The court finds that the defendant did not make use of said fuel in heating such building to the extent that it was possible for him to do. That the building could have been kept to a higher degree of temperature than it was kept although not possibly up to the standard required by the contract.

"The court finds that there was a falling away in the sales for the month of December and January from that of previous months and in comparison with those months, and the court finds that it can be traced to insufficiency of heat, and that the defendant is responsible under the terms of his contract for this loss. In other words that he is not excused by reason of the acts of the fuel administration in seizing the coal and making use of it otherwise.

"The court determines that specific performance may be decreed and the damages of the plaintiff assessed at the sum of $200.

"I am making allowance somewhat in this petition for the fact that even under the most favorable circumstances it might not have been possible to have kept the heat to normal. Therefore I do not hold the defendant responsible for the full damages, * * * and I allow such a percentage of profits as will amount to $200."

A reading of the record justifies the conclusion of the trial judge that defendant might have done much better in heating the premises than he did. It is probable that if rents had not so advanced that the stores occupied by the plaintiff for which he was paying a rental of $85 a month would rent for $125 a month, there would have been less trouble about the heat.

Groups two and three may be considered together. It is claimed that the proof of damages based upon profits is too speculative and uncertain to warrant a verdict for any substantial amount. The plaintiff produced in court the original entries of each day's sales and the bank book showing deposits for comparative months in 1916, 1917 and 1918. There was a decrease in December, 1917, from December, 1916, of $771; likewise in January, 1918, from January, 1917, of $308, making a total of $1,079 decrease for the two months in question, while in every other comparative month there was an increase in gross receipts of plaintiff's business, except the month of August, 1917. He also introduced testimony tending to show that instead of a decrease in the gross receipts as above set forth during this holiday season there should have been an increase of at least $4,000; that he was equipped to handle the increased business; that his overhead expenses would be practically the

same therefor and that the average profit on the gross receipts was 33 1/3 per cent.

17 C. J. p. 910, reads as follows:

"As has already been stated, profits cannot be recovered as an element of damages where they are speculative, contingent or uncertain. Hence there must be reasonable proof of their amount, and for this purpose, actual past profits and receipts in the particular business or undertaking, where not too remote from the injury or wrong complained of, and although they may vary from time to time, may be shown, although they cannot be taken as exact measure of future profits; and the various contingencies by which they would probably be affected should be considered and given such weight as they are entitled to in the sound discretion of the jury."

The cases of *Allison* v. *Chandler*, 11 Mich. 542, and *Moss* v. *Railway Co.*, 188 Mich. 1, are in point.

In the instant case the defendant should not be allowed to escape all liability growing out of his wrongdoing because of the difficulty in establishing with certainty the extent of the damages.

The decree is affirmed, with costs to the plaintiff.

BIRD, C. J., and OSTRANDER, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

CRAWFORD *v.* MICHIGAN CENTRAL RAILROAD CO.

RAILROADS—PEDESTRIANS—PERSONAL INJURIES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad company for personal injuries caused by plaintiff's being struck by defendant's train while backing over a street crossing, where the evidence as to defendant's negligence and plaintiff's contributory negligence was very conflicting, the issue was for the jury, under proper instructions.

Error to Kalamazoo; Weimer, J. Submitted June 5, 1919. (Docket No. 65.) Decided July 17, 1919.

Case by William Crawford against the Michigan Central Railroad Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Stewart & Stewart (*Victor M. Gore,* of counsel), for appellant.

Claude S. Carney, for appellee.

MOORE, J. Plaintiff was struck by one of defendant's trains at the North West street crossing in the city of Kalamazoo, on the 15th day of April, 1916. His leg was severed below the knee. At a trial of the cause a jury returned a verdict in his favor for $5,000. The case is brought here by writ of error.

An order of the Michigan railroad commission required the gates at this crossing to be operated 24 hours of each day. The train which caused the injury consisted of a tender and locomotive which were running backwards, pulling a train of cars. A tower was located some distance west of this crossing, from which tower the gates maintained at the North West

street crossing and the Kalamazoo avenue crossing were operated.

The general charge of the trial judge to the jury covers nearly 19 pages of the printed record. We quote from it sufficiently to indicate the questions involved:

"The burden is upon the plaintiff to establish by such preponderance of the evidence, the greater weight of the evidence: *First,* the negligence of the defendant. *Second,* that that negligence was the proximate cause of the accident. *Third,* that the plaintiff himself was free from contributory negligence, that is, free from an ordinary want of care and caution, on his part, which contributed to the accident. Just as the defendant was required in the premises to exercise ordinary care and caution, that degree of care and caution which I have just described to you, so on the other hand, the plaintiff, for his own safety, is required by the law to exert the same degree of care and caution, namely, that which an ordinarily prudent man would exercise under the same or similar circumstances. * * *

"A little further with reference to the question of contributory negligence. It may be defined as some act or omission by a person injured which an ordinarily prudent man would not have done or would not have left undone under the same circumstances, which directly aided in causing or contributing to the injury. The rule of prudence binding on any person in any circumstances must be that which under just such circumstances would restrain a man of ordinary prudence. If the mind of an ordinarily prudent man would be impressed with a belief of danger he has no right to incur that danger. If the danger would not be apparent he is not negligent in acting upon that assumption.

"Every person is supposed to use his senses of sight and hearing in self-protection, whenever and wherever there may be reasonable cause to apprehend danger. Absent mindedness of a person injured is no excuse for going into danger. Every person must use ordinary care to protect himself, and if he neglects

such duty he cannot claim damages for an injury happening or in part happening from a neglect of his duty. * * *

"It is the theory and claim of the plaintiff in this case that the defendant was guilty of negligence in several respects, namely:

"1. That defendant failed to give warning of the approaching train either by lowering the gates timely or by blowing the whistle from the engine or ringing the bell.

"2. That the defendant carelessly obstructed the view of the main line to the east (that is east of West street) by a number of freight cars on the siding.

"3. That the defendant operated the train which struck the plaintiff at a greater speed, an unreasonable, imprudent and careless rate of speed, particularly at a rate of speed greater than ten miles an hour, in violation of the ordinance of the city of Kalamazoo.

"4. That the defendant failed to lower the gates one minute before the train passed the crossing in violation of the ordinance of the city of Kalamazoo.

"It is the claim of the plaintiff that such negligence or some of it, was the proximate cause of the accident and of his injuries. That he himself was free from negligence, contributing to the injury; that he looked as he approached the crossing and observed that the gates were up and proceeded on the sidewalk, or the sidewalk line, on the west side of West street, and that he saw some freight cars on the siding and that his view of the main track was obscured by them, so that he did not and could not see the moving train approaching.

"It is his claim that he was upon the highway, that is, within the confines of the highway; by that I mean, he was between the sidewalk lines. It is claimed he was on the sidewalk or where the sidewalk would be if there was a sidewalk. In other words, that he was where he had a right to be; that he was in the public highway; that he was not outside of the highway line, that is, he was not upon the defendant's property, to the west of the highway, when he was struck. * * *

"It is the claim of the defendant:

"1. That the gates were lowered properly and timely. At such time as was reasonably necessary under all the circumstances to give sufficient warning to the public to protect the public.

"2. That warning was given by the bell, that the bell was rung, as required, that is continuously as it approached the crossing until after the train passed the crossing.

"It is not claimed that the whistle was sounded, but it is claimed that there was no requirement, and that is true. * * * Its failure to sound the whistle would not as a matter of law constitute negligence on its part, so you will disregard the question of the whistle.

"It is the theory and claim of the defendant that the bell was rung continuously as it approached and passed the crossing.

"3. That there were no cars standing upon the siding to obstruct the view. Perhaps that might be stated another way, at any rate, the cars if there were any, did not obstruct the view. * * *

"It is the theory and claim of the defendant that the speed of the moving train was not excessive or unlawful or careless or negligent, or an imprudent speed, that it was a moderate, prudent, careful speed that was being maintained. That the train was just starting, just getting under way, that it had shortly before that come to a full stop and was then starting.

"It is the theory and claim of the defendant that the plaintiff was not upon the highway, that he was as a matter of fact on the contrary on the defendant's right of way, on its private property, in other words, that he was a trespasser and that the defendant owed him no duty, that is, not such a duty as would entitle him to recover in this case. I will explain the duty in a moment, that railroads owe to trespassers; but that is not the duty that is claimed to have existed in this case.

"For the purposes of this case if you find that the plaintiff was on the defendant's right of way when he was struck he would not be entitled to recover.

"It is the claim of the defendant that the plaintiff's injuries were not caused or sustained by reason of any negligence on its part, but on the contrary, by

reason of his own negligence. That the plaintiff was not upon the sidewalk but upon the right of way of the defendant railroad company, and that there was a clear view of the main track to the east, and that if the plaintiff had looked he must have seen the train moving.

"It is the theory and claim of the defendant if he did not see the train it was because he did not look; that that is a physical fact from the evidence, that it was where he could see it if he had looked, that in short, the plaintiff did not exercise that degree of care for his own safety that men of ordinary prudence would have exercised under the same or similar circumstances, and that his failure to do so contributed to produce his injury. Those are the two theories and claims as I understand them substantially as made by the pleadings and the testimony.

"The defendant railroad company owed a duty to the public to lower the gates at that crossing timely upon the approach of trains, and failure to do so would as a matter of law, constitute negligence on the part of the defendant.

"It was the duty of the defendant company to lower its gates upon the approach of trains at such time as would be fairly and reasonably necessary to protect the public, to give warning to the public and persons about to cross the right of way; not at any particular time or any particular moment, but at such time as under all the circumstances in this case would be a timely lowering, not necessarily ten minutes, or five minutes, or three minutes, nor one minute, notwithstanding there is an ordinance to that effect. You must take into consideration the ordinance; the ordinance requires one minute. It is for the jury to say whether or not the ordinance is reasonable, if it is valid, and it is reasonable and valid it may then be considered by you as evidence of negligence if valid. A violation of it does not necessarily constitute negligence on the part of the company. * * *

"It was the duty of the defendant company, its employees and agents upon the train to ring or cause the bell to be rung and to be rung continuously on approaching and passing the crossing, and its failure to do so would constitute negligence, because it is re-

quired by State law; the lowering of the gates is required by State law. For that reason as I have already stated to you, failure to lower them timely would constitute negligence. It would not necessarily follow that that negligence caused the injury, but it would be negligence, and it is for you to say whether or not that was the proximate cause of the injury or whether something else was. * * *

"It is claimed as we have noted, that the plaintiff was a trespasser. If he was the defendant owed him no duty while he was on its private right of way except not to wantonly or wilfully injure him after discovering he was in a place of danger, if it was so discovered. * * *

"So, as I have already stated to you, under the evidence in this case, under the theory upon which the case has been tried, and under the evidence that has been offered to support the theories of the plaintiff, if the plaintiff was not on the public highway, was not within the limits of North West street, if, on the contrary he was west of the sidewalk line, was on the Michigan Central private right of way, he cannot recover. * * *

"It is incumbent upon the plaintiff to show and he must show to your satisfaction by a preponderance of the evidence that the defendant not only carelessly and negligently obstructed the view of the plaintiff when he was crossing the defendant's tracks by causing a number of freight cars to be and remain standing on the sidetrack or sidetracks so he could not see the train approaching, but he must also show it was through such negligence in placing such freight cars that he was injured, as he alleges on the sidewalk within the limits east and west of North West street, without contributing to the injury himself.

"The plaintiff in order to recover, must also show not only that the defendant did not lower the gates on the approach of the train in question, but that it was because of the failure of the defendant to lower the gates seasonably and timely that he became injured, without negligence on his part contributing to it. If the plaintiff suffered an injury on defendant's grounds then in that case it is of no consequence whether the gates were up or down. * * *

"It was the duty of the plaintiff as I have already stated to you in a general way, to use that degree of care and caution for his own safety, as men of ordinary prudence would have used in the same or similar circumstances. To use his senses of sight and hearing. Not only to use his senses of sight and hearing at the time he was outside of the gates, before he used the gates but afterwards. There was more than one track, there were several tracks, and after he proceeded across the tracks it was still his duty to use his senses of sight and hearing in the same manner and to the same extent as men of ordinary prudence under the same or similar circumstances would do. A railroad track is in itself a warning of danger and any pedestrian about to go upon it should look and listen before attempting to cross, and a failure to do so is negligence. So strongly has this rule been enforced that even where there is a clear view of the track for only a very short distance and the approach of trains could have been seen by stopping, looking and listening before crossing the track, a traveler in the highway has been held guilty of contributory negligence as a matter of law when injured in such a case, unless of course, he was misled by the flagmen or the acts of the trainmen on the train or gates.

"Where gates or a flagman are maintained the public have a right to presume that they will perform their duty. A traveler is not then required to stop, look and listen before crossing the track. When the gates are up it is usually, as in this case, a question for the jury to determine whether or not under all the facts and circumstances the pedestrian was deceived in assuming that the way was safe. Of course, a man may not rely upon the gates if he has knowledge of the train; if he in fact knows that a train is moving on the track he is not then deceived in relying upon the gates; but in the absence of notice to the contrary, where there is a regular gateman, or where there is a regular flagman or gates ordinarily operated, usually and customarily operated, as in this case, it is for the jury to say in what manner and to what extent the traveler is deceived in relying upon those gates, whether under the particular and peculiar circumstances of the case under consideration he is deceived. Whether

or not he was negligent depends in a measure upon whether or not he had a right to rely under the circumstances upon the position of the gates and whether or not he did in fact rely upon that. It is not the law of this State that under all circumstances it is absolutely necessary for a person approaching a railroad crossing to look both ways and listen for approaching trains. It is generally required. That is the general rule as I have already stated to you. If there were no gates at all at this crossing then that rule would apply; but in cases where there are gates or where there is a flagman, that rule does not always apply. As I stated to you, it is generally required but it is not a rule of universal application. Every case must depend upon its own circumstances. A traveler in every case is only required to take such precautions as an ordinarily prudent man would under like circumstances, and whether or not he did use such care is generally, as in this case, a question for the jury. * * *

"It is for you as jurors to say whether or not under the circumstances the plaintiff had a right to rely, and if he had such right then in fact how far did he rely upon the position of the gates, or any signal of danger performed as an assurance of safety. If an ordinarily prudent man would have done the same as the plaintiff did under the circumstances and you find that the defendant was guilty of negligence causing his injury, then of course he should recover.

"If you find that the plaintiff as I have just stated to you had the right to rely and did in fact rely upon the position of the gates, that is, that they were up, before and at the time of entering upon the northermost track then, in order for the plaintiff to recover you must also find that he crossed in a southerly direction towards the main track—west bound track—and that his view of the approaching train was obscured by the freight cars, for the reason that although he in the first instance, upon approaching the first track to the north, might have been and was deceived in relying and did in fact rely, upon the position of the gates, namely, that they were up, still, if as he proceeded to the south towards the main line his view of the approaching train was not obscured

by standing cars, and there was nothing to prevent him from seeing the train had he looked as he traversed the distance from the north track to the main track, he would be guilty of contributory negligence as a matter of law in failing to see the train in time to avoid the accident.

"Perhaps that should be stated in this way: If those freight cars were not standing there, as he claims, on that siding then, although the gates were up when he crossed, although you find they should have been down, they were up, still he would be guilty of contributory negligence for as he passed from the north track he failed to see the approaching train."

There are several assignments of error but the contention of appellant which is important is tersely stated by counsel in the supplemental brief as follows:

"Crawford's own story proves him guilty of contributory negligence:

"*First.* The record shows that he exercised no care whatever for his own safety; and that if he had, he would have escaped injury.

"*Second.* The entire absence of care or attention by plaintiff renders the issue one of law, as the claim that the gates were up cannot and does not excuse contributory negligence.

"We submit it must be held in this case, as a matter of law, that the neglect of plaintiff to observe that active watchfulness which ordinarily prudent men would exercise under like circumstances bars his recovery. The question was, therefore, not one for the jury. The evidence leaves no doubt or room for doubt, that if Crawford had made any use of his senses he could have both seen and heard in due season 'the approaching train.' *Blount* v. *Railway Co.*, 61 Fed. 375.

"It cannot be stated too often that the plaintiff was a pedestrian, having quick control of his own movements, whose casual use of his senses afforded complete assurance of his personal safety. In order even to avoid seeing this train coming across this wide street, it was necessary for plaintiff to have his eyes riveted on his toes or else his back toward the train; either attitude was negligent." Citing *Detroit Southern R. Co.* v. *Lambert*, 150 Fed. 559, and other cases.

A reference to *Blount* v. *Railway Co., supra,* will show that it is not controlling. In that case Mr. Blount had he looked could have seen an approaching train from the porch where he was visiting, and all the way from the time he left the porch until he was finally struck.

Judge Taft speaking for the court said:

"In this case Blount had stood at Hoy's porch where he could see the track for 800 feet. From Hoy's gate for 60 feet he walked towards the track, while the train was in full view but 300 feet away, and was getting nearer and nearer each second. As the train passed the ice house at a speed of 15 miles an hour, its roar must have been heard by any one giving the slightest attention, who was not 100 feet away. When he was 6 feet from the track, the train was only 30 feet from him and in full sight, and yet he did not halt or hesitate but rashly stepped in front of it. It was a quiet night. There was no confusion at the crossing. There were no other trains in sight. There was nothing to distract Blount's attention from the oncoming train except a self-absorption which in approaching a railway crossing is gross negligence. On these facts can reasonable men fairly reach any other conclusion than that Blount was wanting in due care in not observing his danger?

"We have no wish, in expressing this conclusion, to weaken at all the obligation upon the railway company to lower its gates when trains pass, and we freely concede that such a failure is to be regarded as an invitation to the traveler to cross the track in safety. *Northeastern R. Co.* v. *Wanless,* L. R. 7 H. L. 12-15. The extent to which the traveler may rely on such an invitation, and omit the ordinary precautions of looking and listening is usually a question for the jury. This case, however, we think to be exceptional in its facts which permit only one inference."

In the instant case it was claimed and there was testimony to sustain the claim that plaintiff's view was cut off by cars on the sidings until he got nearly upon the main track.

The question involved is not a new one in this State. In *Richmond* v. *Railway Co.*, 87 Mich. 374, Justice MORSE, in speaking for the court, said in part:

"We do not think from the testimony produced by the plaintiff that Sherwood could have seen the cars approaching from the south, after he left the crossing of the Lake Shore & Michigan Southern Railway, until he came within about 20 feet of the crossing. If he had looked then, he would have undoubtedly seen these cars in time to have stopped and avoided a collision. And it is pretty apparent—almost absolutely certain from the plaintiff's own showing—that he did not look south within said 20 feet, until his horse was upon the track.

"Whether he was negligent depends in a great measure upon whether or not he had a right to rely, under the circumstances, upon the absence of the flagman, and the lack of any signal of danger from him.

"It is claimed by defendant's counsel that the obstruction of the view to the south, and the absence of the watchman from his post called upon Sherwood to have stopped, and looked and listened before he attempted to pass this crossing. This claim would be correct if at this street crossing no flagman had been stationed to give warning. But the testimony shows that a flagman had been kept at this point for three or four years, whose duty it was to signal by a flag in the street the approach of trains. It is not the law of this State that under all circumstances, it is absolutely necessary for a person approaching a railroad crossing to look both ways and to listen for approaching trains. It is generally required, but it is not a rule of universal application. Every case must depend upon its own circumstances, and it would be unreasonable to apply such rule, under all circumstances, without regard to the condition of things at the time. *Cooper* v. *Railway Co.*, 66 Mich. 266. Nor is a traveler compelled, under all circumstances to stop before crossing, if his view is obstructed from one way. He is only required to take such precaution as an ordinarily prudent man would under like circumstances, and whether or not he did use such care is generally a question for the jury. See *Guggenheim* v. *Railway Co.*, 66 Mich. 157, 158, and cases cited.

"Plaintiff's counsel contend that, it appearing that the defendant had stationed a flagman at this crossing, whose duty it was to warn parties about to cross of approaching trains, it was for the jury to say whether the deceased, in keeping his eyes directed to the flagman for the very purpose of observing a signal at the earliest moment that it could be given, was not exercising due care. They cite the following cases in support of this contention: *French* v. *Railroad,* 116 Mass. 537; *Sweeny* v. *Railroad Co.,* 10 Allen (Mass.), 377; *Chicago, etc., R. Co.* v. *Hutchinson,* 120 Ill. 592 (11 N. E. 856); *Pennsylvania Co.* v. *Stegemeier,* 118 Ind. 305 (20 N. E. 843); *Glushing* v. *Sharp,* 96 N. Y. 676; *Cleveland, etc., R. Co.* v. *Schneider,* 45 Ohio St. 678 (17 N. E. 321); *State* v. *Railroad Co.,* 80 Me. 444 (15 Atl. 39); *Central Trust Co.* v. *Railway Co.,* 27 Fed. 159; *Tyler* v. *Railroad Co.,* 137 Mass. 238; *Pittsburgh, etc., R. Co.* v. *Yundt,* 78 Ind. 373.
* * *

"The defendant asked the court to instruct the jury in substance, that the absence of the flagman from his post did not in the least excuse Sherwood from exercising his senses of sight and hearing to ascertain whether the train was approaching; and that, if the deceased Sherwood, by looking up the track in the direction of the approaching train, could have seen it in time to avoid the injury, his omission to do so was such negligence as would prevent plaintiff's recovery. This was refused, and it will be seen that the court left it to the jury to determine whether, under the circumstances, Sherwood had a right to rely and how far, upon the absence of the flagman from his post of duty, and the want of any signal of danger from such watchman, as an assurance of safety; and they were instructed that, if an ordinarily prudent man would have done the same as Sherwood did under the same circumstances the plaintiff could recover. I find no errors in the charge on the subject of negligence."

In *Tobias* v. *Railroad Co.,* 103 Mich. 330, it was said:

"With these facts appearing plainly upon this record it is evident that the deceased, if he had looked,

might have seen the train in time to avoid the accident, and the fact that he drove upon the track would be conclusive evidence that he did not look; and the court should have directed the verdict in favor of the defendant, but for the question of the maintenance of an electric bell there. The court was expressly asked to charge upon this point, by the plaintiff's third request, that if the deceased did not know of any fault in the condition of the bell, this fact might be taken into consideration, with other facts in the case, as bearing upon the question of deceased's contributory negligence. This request should have been given. It cannot be said that the deceased would have no right to rely upon the ringing of this electric bell to warn him of the approach of the train. If the electric bell had rung, it would have given him warning. That he expected it to ring might make him less cautious in looking for the coming of a train. The case is somewhat similar in principle to *Richmond* v. *Railway Co.*, 87 Mich. 374. In that case it was said substantially that it was almost absolutely certain, from plaintiff's own showing, that he did not look south when within 20 feet of the tracks, and that whether he was negligent depended in a great measure upon whether or not he had a right to rely, under the circumstances, upon the absence of the flagman, and the lack of any signal of danger from him. The cases upon that question are collected, and upon the whole case it was held that the circumstances were such that it became a question for the jury whether the plaintiff was guilty of contributory negligence. So we think in this case that under proper instructions from the court, that question should go to the jury, in connection with plaintiff's third request, which should have been given."

In the recent case of *Coston* v. *Railroad Co.*, 201 Mich. at page 241, it is said:

"This intersection of the railways was on the main thoroughfare between Owosso and Corunna, the county seat of the county in which both were located. Defendant's line approached it from the south on a curve and crossed it diagonally; it was within the power of the railroad commission to make this order, and

when the system was installed with an alarm bell to give warning of an approaching train which all approaching the crossing could hear, it cannot be said that it was not intended to and did not mean anything to that portion of the public using the highway on foot or by private conveyance. Such warning bells are not required or customary at ordinary highway crossings and when installed are inevitably a notice to the general public that the ordinary means of warning at a highway crossing are inadequate for that particular place, which would naturally tend to divert the vigilance of those regularly using the highway from the ordinary methods of warning. This bell had been maintained by defendant at the crossing where the accident occurred for several years. How it came to be installed, the manner in which it operated, the extent to which it was kept in working order, deceased's knowledge of its condition and the extent to which he in the exercise of reasonable caution and prudence might and did rely upon it were, under the *Tobias Case*, questions for the jury."

In the instant case the testimony was very conflicting. Of the 19 written requests preferred by counsel for defendant, 14 were given. We have already seen that the trial judge gave a very long, general charge in which he attempted to cover every phase of the case. The parties had able counsel and the case was carefully tried. We find no reversible error.

The judgment is affirmed, with costs to the plaintiff.

BIRD, C. J., and OSTRANDER, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

PEOPLE v. WHEATON.

CRIMINAL LAW—OPENING STATEMENT—PRIOR OFFENSE—EVIDENCE —CREDIBILITY OF WITNESS.

In a prosecution for hunting and trapping for game without a hunter's license, an assertion in the prosecutor's opening statement that defendant had been guilty of the same offense five days previously, and the admission of testimony of said offense, *held*, to be error, which was not cured by the court's instruction that said testimony was admitted solely as affecting defendant's credibility, since the statement was made and the testimony admitted before it was known that defendant would be a witness

Exceptions before judgment from Muskegon; Vanderwerp, J. Submitted June 12, 1919. (Docket No. 96.) Decided July 17, 1919.

George Wheaton was convicted of hunting and trapping without a license. Reversed.

Willard G. Turner, Jr., for appellant.

Alex. J. Groesbeck, Attorney General, *Christian A. Broek*, Prosecuting Attorney, and *Harry W. Jackson*, Assistant Prosecuting Attorney, for the people.

MOORE, J. This case is here on exceptions before sentence. The respondent was convicted of hunting and trapping for game without having a hunter's license, the hunting not being upon his own inclosed land. The alleged unlawful hunting and trapping is charged to have taken place on the 27th day of February, 1918.

We quote from the brief of counsel for respondent:

"The propositions urged for reversal are divided into four parts as follows:

"*First.* Errors in allowing the prosecuting attorney to make assertions in his opening statement to the jury which were incompetent, and only served to prejudice the respondent in the eyes of the jury.

"*Second.* Errors in allowing the prosecution to present proof of an entirely incompetent character, and particularly evidence which was connected solely with the commission of another offense, five days previous to the one on which the alleged offense in question occurred.

"*Third.* Error in ruling out the photographic copies of treaties between the United States and Chippewa tribes, of which the respondent was a member, certified as true copies by the assistant commissioner of Indian affairs.

"*Fourth.* Error in the instruction of the court to the jury in the charge made."

As to the third proposition the alleged copies of the treaties do not appear in the record, and we are unable to say whether this rejection is reversible error.

The other assignments of error may be considered together.

We quote from the opening statement of the prosecuting attorney:

"The testimony will show further, as bearing upon whether or not on this day in question he was hunting and trapping, the testimony will also show that on the 22d, five days prior to this time, Mr. Weilhamer met Mr. Wheaton in Muskegon township, and at that time Mr. Wheaton was actually spearing muskrats.

"*Mr. Turner:* If your honor please, I move that that be stricken out. This man is not being tried for something that happened five days prior to this offense.

"*The Court:* That is true.

"*Mr. Turner:* It can't but prejudice him in the eyes of the jury.

"*The Court:* It may, however, be material.

"*Mr. Broek:* If the court please, in the statement I attempted to show how we will connect it up with this offense on the 27th, as bearing upon the question of whether or not at this time he was hunting and trapping, because he was not caught in the act of

hunting and trapping at that time, and our proof will show—if I am permitted to say to the jury—our proof will show that on the time we allege he was violating this law he had exactly the same implements of hunting and trapping that he did have on this day five days prior, when he was caught in the act of spearing muskrats.

"*Mr. Turner:* I would like to object to that again, your honor, to get it on the record.

"*The Court:* The record will show your objection. Proceed.

"*Mr. Broek:* We will also show, gentlemen of the jury, that he was on the 22d, at this time having those same implements and tools and weapons, or whatever you want to call them, he was brought into justice's court and pleaded guilty to trapping and hunting without a license and was fined—

"*Mr. Turner:* I object to that also.

"*Mr. Broek:* —and then, five days later he was caught again in the same way, and that is the case you are to try now. We are not attempting to show that this first conviction on the 22d is an indication of his guilt, and we are not going to ask you to do that except as bearing upon his credibility as it might develop later in the trial, but we propose to show it, gentlemen of the jury, because the circumstances were the same as on the 27th and it might have a bearing upon the question of whether or not he was guilty at the time as charged on the 27th."

The people were allowed to give testimony against respondent's objection in keeping with the statement of the prosecutor which we have quoted.

The trial judge in his charge to the jury referred to this testimony as follows:

"Now, gentlemen, that has been introduced and has been admitted for the sole purpose of affecting the credibility of the respondent as a witness for himself, and as bearing upon the purpose for which he had with him on the days in question, that is, the 27th day of February last, the bag, spear and hatchet. He is not being tried for any other offense that he may have committed, but only upon the charge contained in the

information, to which I have already called your attention. You have the right to consider the testimony regarding the former hunting for game, the former arrest and conviction of this respondent, for the purpose for which it has been introduced and for no other purpose."

The opening statement of the prosecutor was made and the testimony was admitted before it was known that the respondent would be a witness. If it had not been admitted he might not have been sworn. It will be observed that the trial judge did not limit the use that might be made of this testimony to its bearing upon the credibility of the respondent.

In Tiffany's Criminal Law (4th Ed.), p. 529, it is said:

"Another general rule is, that the evidence offered must correspond with the allegations, and be confined to the point in issue. This rule supposes the allegations to be material and necessary. Surplusage, therefore, need not be proved. Where no criminality is alleged against a defendant, none can be proved. Nor is it competent for the prosecution to give evidence of facts tending to prove another distinct offense, for the purpose of raising an inference that the prisoner has committed the offense in question.

"Thus, in a trial for burglary, evidence that the defendant broke and entered the same house a few months previous to the breaking charged in the indictment, was held inadmissible as having no tendency to prove anything but the earlier offense, for which the defendant was not on trial. There being no connection between the two crimes, proving one had no tendency to prove the other. The admission of such testimony must manifestly prejudice the jury against the prisoner, while he cannot be expected to have made any preparation to meet such irrelevant charges. The rule of exclusion is more important in criminal than in civil cases, because the consequences of its violation are more serious, and the danger of conviction on irrelevant matter is more direct.

"The general rule in criminal cases is well settled that the commission of other, though similar, offenses

by the defendant cannot be proved for the purpose of showing that he was more likely to have committed the offense for which he is on trial, nor as corroborating the testimony relating to the principal offense."

We think the opening statement and the testimony of the commission of a previous offense were reversible error.

The conviction is set aside, and a new trial ordered.

BIRD, C. J., and OSTRANDER, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

WOODRUFF v. VENIA.

ADVERSE POSSESSION—QUIETING TITLE—EVIDENCE—SUFFICIENCY.

On a bill to quiet title to land, testimony of plaintiffs *held*, to show such an open, notorious, continuous, exclusive, distinct, and hostile possession to the land in question as to make out a title by adverse possession.

Appeal from Monroe; Gilday, J. Submitted June 11, 1919. (Docket No. 14.) Decided July 17, 1919.

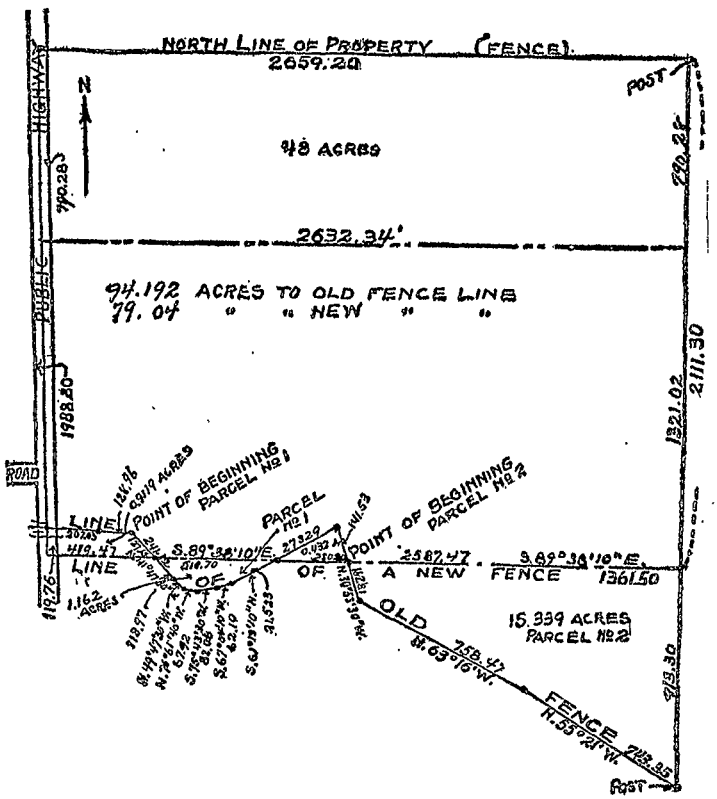
Bill by Ari E. Woodruff and others against Joseph Venia and another to quiet title to land. From a decree dismissing the bill, plaintiffs appeal. Reversed, and decree entered for plaintiffs.

Woodruff & Woodruff and *Frank W. Atkinson,* for plaintiffs.

Willis Baldwin, for defendants.

The bill of complaint in this cause was filed to quiet title to lands lying between the property of the plaintiffs and the property of the defendants. The location of the disputed strips can be readily seen from the annexed map of the *locus in quo*, which was offered in evidence and marked "Exhibit A."

EX. A.



The defendants filed an answer and a cross-bill in which they claimed ownership of that portion of the property lying between the line of the "old fence," which it is claimed followed the course of Bad creek,

and the so-called "new fence" which the defendants attempted to erect on the said property. The line of this new fence cuts off from the property which the plaintiffs claim to own, two parcels, one consisting of 1.162 acres and the other consisting of 15.339 acres. These parcels are designated on the map, Exhibit A, as "Parcel 1" and "Parcel 2." On the hearing of the case in the court below both parties claimed title to the disputed land by adverse possession. A decree was entered dismissing the bill of complaint and giving to the defendants affirmative relief sustaining their contention that they had acquired title by adverse possession to the two disputed strips in question, and from this decree the plaintiffs have appealed.

KUHN, J. (*after stating the facts*). It is the claim of the defendants that they owned the property, *first*, by virtue of conveyance which is attached to the bill of complaint, and *second*, by adverse possession. Defendants' claim of title by virtue of deed is based upon a deed from Louis Lozon to Adolph Venia and Joseph Venia, dated February 20, 1889, and a subsequent conveyance to him by Adolph Venia of the undivided one-half interest of the said Adolph Venia in the property described in said deed. The description in this deed is as follows:

"Being a part of the north half of the northwest quarter of section two (2) in township six (6) south, range ten (10) east, and bounded north by Bad creek, east by the northeast quarter of said section and Bad creek, south by land formerly owned by Godfrey Venia and west by section three (3), containing thirty acres more or less."

It will be noticed that the north boundary of this land is described in the deed as Bad creek, and the difficulty here arises from the fact that the location and character of Bad creek is in dispute. For a period of about 17 or 18 years the fence, which was con-

structed by the defendant himself, followed what was known as Bad creek. It is his claim that he constructed it for the purpose of keeping his cattle from trespassing upon the lands of the Elliotts to the north. The record discloses that Bad creek is well defined to the west of the highway, but to the east of the highway it gradually widens out and at places is 30 or 40 feet wide and becomes swamp land. The record also discloses that a dike was erected by Julius Elliott upon a portion of the land in dispute to make it more suitable for cultivation, and that at least a portion of the land in dispute lying north of the old fence was cultivated by Huldah Elliott without any objection being made thereto by the defendant, although he admitted that he knew this was being done.

Counsel seem to have no serious controversy as to the law which is applicable to the situation here presented, but the dispute arises over the determination of what conclusion should be drawn from the facts as presented by the record. It is reasonable to assume that at the time that the deed in question was drawn, Bad creek must have been a well defined stream suitable to have been used in a description as a boundary line. The deed further described the land as 30 acres, more or less. A reading of the record gives no convincing reason why the defendant built a meandering fence and thereby cut off, as he now claims, about 17 acres of his property, instead of in a straight line, as would ordinarily be done, unless he recognized that the center of Bad creek was the division line between the properties. The only claim of actual possession which the defendants rely upon is that from time to time he hunted over the grounds and gave permits to others to hunt thereon. The record, however, shows that the defendant Venia never planted crops on any part of the property in dispute, and it is admitted that he never used it other than for hunting as above

stated. On the other hand, the testimony of the witnesses is convincing that, with reference to the property north of the old fence, which it is claimed came into the possession of Huldah Elliott in 1877 and was owned by her up to the time of her death, it was well understood that the southern boundary of this property was the old line fence, which followed the course of the creek, and that the Elliotts, for upwards of 20 years prior to the commencement of this suit, have used from time to time portions of this land for farming purposes. Considering the character of the property in question, that a part of it was swamp land and not suitable for cultivation, we have come to the conclusion that it is clearly shown that the possession and occupancy of the plaintiffs and their predecessor in title was of such a character as to openly and publicly indicate an assumed control and use thereof and that the occupancy was of such a character as to notify and warn a claimed owner who should visit the premises, that a person was in possession under a hostile claim. The plaintiffs by their testimony have shown such an open, notorious, continuous, exclusive, visible, distinct and hostile possession to the disputed land in question as to make out a title by adverse possession by clear and cogent proof.

The decree of the lower court must be reversed and a decree will here be entered in accordance with the prayer of the bill of complaint, with costs to the appellants.

BIRD, C. J., and OSTRANDER, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

HARRIS *v.* MICHIGAN MUTUAL HAIL INSURANCE CO.

1. INSURANCE—HAIL INSURANCE—GROWING FRUIT—DEFINITION.
Fertilized growths on apple and pear trees, which in due course would have been apples and pears, *held*, to be within the terms of a hail insurance policy, indemnifying insured against damage to "growing grain, fruit, and other farm products," in the absence of a rule in said policy defining growing fruit.

2. SAME—DAMAGES—EVIDENCE—SUFFICIENCY.
Where, in such action, it cannot be said that there was no competent evidence before the jury of the damages sustained, and no complaint is made that the judge's charge to the jury was erroneous, the judgment in favor of plaintiff will be affirmed.

Error to Van Buren; Des Voignes, J. Submitted April 29, 1919. (Docket No. 12.) Decided July 18, 1919.

Assumpsit by George E. Harris against the Michigan Mutual Hail Insurance Company on a policy of insurance. Judgment for plaintiff. Defendant brings error. Affirmed.

Kinnane, Black & Leibrand, for appellant.

William J. Barnard and *Earl L. Burhans,* for appellee.

OSTRANDER, J. The plaintiff made written application to defendant for membership and for—

"indemnity against damage or loss to growing grain, fruit, and other farm products * * * $1,000 on 112 acres of fruit, on Sec. 20, Lawrence Twp., Van Buren Co., Mich."

—from noon of the 25th of May, 1915. The policy issued upon this application recites that plaintiff—

"has this 25th day of May, 1915, become a member" of the defendant company and "has insured in said company, against loss or damage to growing grain, fruit, and other farm products by hail, to the amount of $1,000, from noon of the 25th day of May, 1915."

The premises and specification of the insurance are as stated in the application, namely, "$1,000 on 112 acres of fruit, Sec. 20, Lawrence Twp." * * * The undertaking of the company is—

"to make good unto the said insured * * * all such loss or damage, not exceeding the amount insured, as shall happen by hail to the property above named, and more specifically described in the application on file, * * * which is hereby made a part of this contract, from the 25th day of May, one thousand, nine hundred and fifteen, * * * the said loss or damage to be estimated according to the actual cash value at the time the same is adjusted." * * *

The policy was in force May 8, 1916, on which day a violent hail storm occurred at the plaintiff's farm. Plaintiff then had, on section 20, about 2,000 bearing fruit trees from 14 to 40 years old, apple and pear trees. He notified the defendant that he had sustained a loss by the hail storm. Officers of the defendant visited the orchards, there was some correspondence. Finally, after an attempt had been made to adjust the loss, and on October 16, 1916, defendant wrote plaintiff a letter, signed by its secretary, the pertinent portions of which are:

"We will say in regard to your claim for damages by hail on May 8, 1916:

"*First,* that blossoms are not fruit and, hence, is not covered by the policy.

"*Second,* that on your pear orchard on which you claimed 50 per cent. loss, did not show to as good fruit men as are in Van Buren county, any loss by hail. So if any loss occurred to your crops, it was from something besides the hail of May 8, 1916."

In September, 1917, plaintiff filed his declaration in this cause, with a bill of particulars. Defendant pleaded the general issue. The cause came on to be tried in February, 1918. Plaintiff offered, defendant did not offer, testimony. There was a motion by defendant for a directed verdict upon the grounds:

(1) That plaintiff had shown no injury to any property covered by the policy, namely, growing fruit.

(2) That the plaintiff "has failed to show any damages that could be submitted to a jury at this time, all damages from whatever cause they may have occurred, or whether they occurred or not, being uncertain, speculative and contingent."

There was a verdict for plaintiff for $1,056.60, upon which judgment was entered. The grounds asserted in the motion for a directed verdict are those urged here for a reversal of the judgment. Upon the first point, defendant, appellant, presents the question in this way:

"Whether or not," it says, "the incorporators had in mind the line of demarkation where the protection would commence, there certainly is a line somewhere and that line must be ascertained from the language they used. If we say 'growing fruit' includes blossoms, then it is by a hair's breadth to the next station and include fruit buds. Horticulture teaches and the evidence shows that the fruit of this year is produced from buds grown last year. Therefore damage to this year's fruit buds may have a tendency to damage next year's fruit crop. Having gone that far it is only a very short step to the next station, by claiming that inasmuch as damage to fruit buds is proof of damage to fruit, proof of damage to leaf buds ought to be admitted as proof of damages to fruit on the theory that damage to the foliage has a tendency to damage the fruit crop, present or future. This line of reasoning could be continued like the rhyme of 'The House that Jack Built,' to include future damage to foliage, damage to the limbs of the trees, then to the trunk, then to the soil from which the trees draw their sustenance, etc.

"It must be clear that these farmers intended mutually to insure another against loss or damage to some kind of growing fruit and grain, not something that might or might not develop into growing fruit and grain.

"To determine what the contract is we must resort to the language used in the writing. There is no parol testimony from which assistance may be had in the construction and whatever that construction is found to be, the parties must be held to be bound by it."

It refers to the Century dictionary, the New International Encyclopedia, and to the opinion of a Federal court (*Nix* v. *Hedden,* 39 Fed. 109, 149 U. S. 304) for a definition of the word fruit. With respect to these definitions it is said:

"It will be observed that one element tenaciously present in all these definitions is the element of seeds. We find no comprehensive definition of the term 'fruit' which does not contain the element of 'seed.' We can then say that unless the blossoms contain seed they would not be fruit within the purview of the policy.

"There is no evidence that any of those blossoms or fruit buds contain seed resulting or contained in a pollenized ovary which develops into the core and obtains the result of proper fertilization—seed.

"Pollen is referred to by some of the witnesses as seed, but pollen is not the seed mentioned in the definitions. The stamens which contain the pollen is part of the blossom (the leaves and carpels), and is never contained in the growing or ripened fruit. The seeds of fruit have such a well known meaning that no one can be mistaken as to what is meant when it is said that one of the constituent elements of fruit is seed, contained in and covered by the juicy, pulpy product of a tree or plant.

"This would seem to be the only logical place to draw the line. The policy covers when the embryo apple is sufficiently advanced so that the presence of seed is susceptible of proof, until then five-sixths of the blossoms may not be fertilized and those not fertilized would, of course, never develop into fruit.

"To hold the other policyholders liable for damages to blossoms that would never have developed even into

a fertilized embryo apple was certainly not within the contemplation of the incorporators. It would be doing violence to their language to so hold."

Counsel for appellee, directing attention to the fact that in the policy the words growing fruit are employed to describe the risk insured, refers to the lexicographers and to botanists for definitions of "growth," "grow," "growing," and to Black's and Bouvier's dictionaries for a definition of "growing crop," and they say that anything that is developing is growing and—

"We claim fruit is growing fruit any time after the ovary within the blossom is pollenized, or is impregnated, as it were. From that point life begins and from then to maturity it is merely in its stages of growth. True, a bare blossom is but a possibility. The ovary of the blossom contains what we call ovules. On receiving the pollen it fertilizes and the ovules become seeds. Where fruit is spoken of as a ripened ovary, we find botanists using this word in the sense of a pollenized or impregnated ovary."

Upon the other point the defendant, appellant, says, in the brief in concluding the argument:

"In this case there were no damages whatever proved. There was no proof that the blossoms claimed to have been injured had been far enough advanced to have even developed into embryo fruit. There is absolutely no proof of any kind or character as to how many bushels less the plaintiff probably received as a result of the hail storm. There is not even any proof of that character to enable the jury to make any kind of a guess. What the jury did was to simply allow plaintiff the full face of the policy without having anything before them by which they could tell whether his damages were $1,000, $100, or $10,000. There was just as much proof as to any one of the above three sums as there was to either of the other two."
* * *

To this, appellee replies, generally, that difficulty in ascertaining the damages is not a reason for refusing

recovery, and that it does not follow that because their ascertainment is difficult they are therefore uncertain, remote or speculative. He asserts that the damages may be measured by the difference between what his orchard, affected by the hail, produced, and what other orchards in the immediate locality, not affected by the hail, produced. For the purpose of applying this rule, he contends that the record furnishes an ample basis. The rules given to the jury by the trial court we do not know, none of the charge of the court appearing in the printed record, and no complaint being made that the charge was erroneous.

Defendant is a mutual company and its articles and by-laws are printed upon the policy which it issued to plaintiff. In the articles of association, the "object" of the company is stated to be—

"to mutually insure the property of its members against loss or damage by hail on grain, fruit and other farm products in such a manner as set forth in its by-laws."

The 16th article provides that the company insures its members against loss or damage by hail to growing crops—on farm crops not to exceed $30 an acre, on fruit and garden truck not to exceed $100 per acre.

"The rate of assessment on fruit and garden truck shall be treble what it is on farm crops."

It is provided in the by-laws that a loss exceeding $100 shall not be adjusted before the maturity of the crop, and further provided that the association will not be liable for any loss or damage except that occasioned by hail.

The testimony tended to prove a rather severe hail storm, the wood of trees and buildings being scarred, the blossoms knocked or cut from the trees, that plaintiff had in one field 550 apple trees, 15 years old in 1916, in another about 800 apple trees, 10 years old, that there were also 940 or 950 Keifer, 400 Bartlett,

and 150 Angel pear trees, 14 years old in 1916. On the 8th of May, 1916, the trees had been in blossom for a week or more and the blossoms were dropping.

The secretary of defendant, called as a witness by the plaintiff, testified that he looked the orchards over June 14, again in September, and a third time in October, that he estimated plaintiff's loss on his pears at from 300 to 350 bushels. To this effect, under date October 9, 1916, he wrote to plaintiff. He testified, also, that he never admitted plaintiff had any loss on his apples by hail. In what manner this witness estimated the loss of pears is not shown. No expert biologist or botanist gave testimony. A number of fruit growers, with large practical, but with little theoretical, knowledge of the subject, gave testimony. Plaintiff, on direct examination, testified, in part, as follows:

"The hail storm had the effect of knocking off the blossoms, that is, the fruit on the stem. It cut some of them. That morning I went out and found the blossoms cut off. Some was knocked off entirely and some was cut off so you could cut it with shears, the little fruit, the fruit, you know; after the blossoms, you know how the fruit looks. After these white leaves, blossoms, drop off, there is your fruit right there, and it cut them off. They were all over the ground, it was covered.

"*Q.* With things that you could identify as apples and pears?

"*A.* Yes, sir.

"*Q.* I will ask you if previous to the storm, you had examined blossoms out there with regard to whether or not pollenization or fertilization had taken place. You know what I mean when I speak of a stamen, don't you?

"*A.* Yes.

"*Q.* What was the condition of that practically on the end of the stamen—now I don't know what they call it?

"*A.* Well, the way that I should call that, it was ripe, it was kind of a brownish; it had turned brown.

When they first come out they are white and then they turn kind of a yellowish color and grow a little darker.

"*Q.* When they turn that color what is that an evidence of?

"*A.* That the pollen is distributed."

On cross-examination, he testified, in part:

"Friday, previous to the hail storm, I opened up some of the buds to show Mr. High some of the inside, the fruit; you can see the fruit with the naked eye when they are blossomed. You could see the small apple. The apple would be about the size of a pin head. The blossoms were about half on. It showed the fruit on May 4th or 5th. I went out there to show him my prospect of the fruit crop. When I went out there, Monday morning, I don't know as I saw a branch broke off from the trees, but I saw that my blossoms was cut. Some was knocked clear off from the main branch and some was cut just as you cut it with shears. And they were laying all around on the ground with the fruit in the blossom. That I did notice that it knocked off the blossoms that had the fruit set in them and that they were laying on the ground. There are always more blossoms than a tree is capable of bearing apples or pears. Not all the blossoms were cut off, there was those left, Monday morning, that I thought at the time might make a crop, but in two or three days those stems had been hit with the hail and turned black. Then I knew I had a pretty heavy loss and got busy and wrote Garber. There are different things that might injure the blossom and kill the fruit, besides the breaking off of the stem. A cold, steady rain for a week will damage the blossoms and a hard enough freeze will hurt apples. * * *

"*Q.* Did you, at any time previous to the trial, claim any damage on growing fruit? Was it not always damages to the blossom?

"*A.* On growing fruit. I claim that the blossom, when it gets developed as far as they was developed, is growing fruit, because your fruit is in the—you can open it—I have opened probably thousands of them; I am always in the orchard seeing how they are

coming, probably 3 or 4 days in a week, I go out in the orchard and open up these blossoms—and you can see it. If you have ever examined it yourself you can see it.

"*Q.* Your position is that the blossom was injured and as a result the fruit would be injured?

"*A.* Why, the fruit was injured when the blossom was injured; it is all the same thing; the fruit was there with the blossom."

Another witness, a fruit grower of long experience, testified:

"From my observation, I find an apple makes two kinds of growth, what we call wood growth and blossom growth. All apple buds are produced, practically all of them, on the end of a fruit spur which must be produced the season previous or some time before the blossom bud can be formed. Many other fruits have lateral fruit buds that grow on the previous year's growth, as a peach, but the apple grows on a fruit spur which is made in some previous year before that, and the bud for the ensuing year's crop—the bud for the 1916 crop would be completed during the growing season of 1915, and in the following spring, if nothing should happen to injure that bud in any way whatever, I think there could be no reason whatever why that bud shall not proceed to grow and make a bloom and we believe, from my observation, that every perfect bloom, under right weather conditions, fertilizes. Later on, as the apple begins to grow, nature eliminates the weakest of these apples and thins them—what we call the June drop—and usually thins them down to the crop that the tree can mature.

"*Q.* From your experience as an apple man, can you tell by the examination of the apple tree whether or not the apple has been fertilized?

"*A.* Under normal conditions, under normal weather conditions, when the petals begin to drop naturally the growth of the little apple is visible, at the time which the petals drop naturally.

"*Q.* By the petal you mean the flower?

"*A.* The white bloom of the apple. But my observation is that when the petal drops normally fertiliza-

tion has taken place and to prevent—the only thing that will prevent its making an apple or starting to grow—and until that dropping period what we call the June drop—would be some disease affecting the apple, or bad weather conditions; that might affect it. I think that apples may be sometimes fertilized and still injured later by bad weather conditions, but it would be very exceptional; as an incident, I might give the year, I think, of 1910, when our apples blossomed in April; on the 16th of April, apple trees were in full bloom in our township; that is the year snow went off about the latter part of February and we sowed our oats in March—but that was very exceptional—and that year, in May, we had a very severe snow storm and freeze from the northwest and it practically ruined the apple crop which was formed at that time. That is the only instance I know of being ruined from that cause after fertilization has apparently taken place or positively taken place.

"*Q.* And after these petals have begun to drop normally the fruit is then growing?

"*A.* Yes, sir.

"*Q.* And it can be distinguished, you say?

"*A.* Yes, sir. One point I would like to make. Every observer knows that a cluster of about 6 or 7, 5 to 7 blossoms—in each apple bud, contains 5 to 7 blossoms separately, and the center one of those seems to be a stronger bud than the others and blossoms generally about two days earlier than the other blossoms open; and that center blossom usually fertilizes and the petals begin to drop by the time the others are in full bloom. And in our own orchard at home, we had one crop of Jonathans, a very good crop that consisted entirely of apples formed from that one strong bloom in the center which blossomed two days previous to the others coming out, and the others were destroyed, simply withered up and turned brown, the petals did, and made no apples and didn't fertilize.

"*Q.* From your observation as an apple man, can you tell by the examination of these petals on the tree, whether or not fertilization has taken place—that is, supposing it has not taken place, explain what condition you find the petals in?

"*A.* I find when weather conditions are so as preventing apples fertilizing that the petals remain on

very much longer than in case fertilization has taken place, if the weather conditions are such and it is damp and the pollen can't circulate; I suppose that is the reason, but the petal will remain for a long period; I have known it to remain for ten days or two weeks.

"*Q.* Under favorable weather conditions, where it is warm, how long does it take for fertilization to take place?

"*A.* I think under perfect weather conditions, that the apple will, at the expiration of two days after the apple is in full bloom, that the petals will begin to drop."

Other witnesses gave testimony to the same effect.

The articles of association and the policies issued by defendant seem to make no distinction between fruit and grain or other farm products. These members ought to have agreed among themselves concerning the state to which nature must have brought growing grain and fruit before liability would attach for its destruction, if they did not want the courts to give to the words employed by them a popular meaning. The argument of defendant that blossoms are not insured could be modified and used in the case of grain by saying that the growing wheat plant or corn plant was not insured. Suppose the property insured and destroyed was a field of wheat, not headed out, or a field of tomatoes, with plants in blossom or having lost some or all of their blossoms. Without applying to the contracts of these mutually insuring members of the defendant corporation the rule that the language used by the insurer in the policy will be given a meaning favorable to the insured, we are justified in saying that in popular phrase wheat not headed and corn upon which no ears have formed are growing grain. It being so easy, and manifestly so proper, for defendant to state a rule, we shall attempt to state none for its guidance. We are contented to say that evidence was introduced which fairly tends to prove that

the trees in plaintiff's orchards had on them growing fruit, fertilized growth, which in due course of time would have been apples and pears, for the destruction of which by hail the defendant, by the terms of its policy, may be liable.

The subject of the damages sustained by plaintiff has given us greater trouble. It must be assumed that the defendant did not intend merely to collect premiums and suffer no losses. Rarely, will two orchards, or two fields of growing grain, with different owners, be found where the soil, the exposure, the tillage, are the same. The rule that to prove the extent of his loss by the crops secured by a neighbor whose orchard was untouched by the hail, the plaintiff must prove that in the orchards compared the soil, moisture, exposure, fertilization, spraying, were the same, is not a workable one in such a case as this. Corporations like defendant have themselves made a practical rule for estimating damages to grain by hail which is (*Barry* v. *Insurance Ass'n*, 110 Iowa, 433, 437 [81 N. W. 690, 692]):

"The loss in all cases shall be considered the difference between the amount grown on the damaged tract, and a fair average of the same kind grown on an equal tract in the immediate neighborhood, where no damage was sustained."

In the case at bar, the testimony for plaintiff tended to prove that there were in the immediate neighborhood orchards of pear and apple trees not affected by the hail and some trees in the plaintiff's orchards somewhat protected from the storm. The yield of the protected trees, the usual yield of the orchards themselves, the yield of fruit in the neighborhood orchards, these facts were laid before the jury. The cost of picking, packing and marketing the crop was in evidence. We are not warranted in saying that the jury had before it no competent evidence of the dam-

ages sustained. We must assume that the court properly instructed the jury upon the subject. The court did not err in refusing to direct a verdict for defendant.

The judgment is affirmed, with costs to appellee.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

SELLICK *v.* SELLICK.

1. WILLS—CONSTRUCTION—LIFE ESTATE.
   Where a husband's will gave to his wife "$25,000, to be used and enjoyed by her during her life, and at her death to be equally divided between" his nephew and niece, *held*, to give the widow the use of the money for her life, a life estate, and no more.

2. SAME.
   That testator in one clause of his will gave said nephew and niece $5,000 to be paid presently, in no way modified the plain, unambiguous language of another clause giving them $25,000, to be paid upon the death of the wife.

3. SAME—TERMINATION OF LIFE ESTATE—DISPOSITION OF FUND.
   Where the widow took under the statute and rejected the life estate in the $25,000 given her in the will, thereby diminishing the fund of the residuary legatee, *held*, that said sum should be placed in trust and the income therefrom paid to the residuary legatee during the life of the widow and at her death the *corpus* be paid to the remaindermen.

4. SAME—ACCELERATION—APPLICABILITY.
   While the doctrine of acceleration of the time of taking effect of the remainder upon the termination of the life estate by act other than the death of the life tenant must

be recognized and applied in proper cases, such doctrine should not be applied where, by the election of the widow to take under the statute, a portion only of the legacies are diminished in order to make up the amount required by the statute to satisfy the widow's statutory rights.

Appeal from Van Buren; Des Voignes, J. Submitted June 11, 1919. (Docket No. 3.) Decided August 9, 1919.

Bill by William R. Sellick against Arthur F. Sellick and another for the construction of a will. From a decree for plaintiff, defendants appeal. Reversed, and decree entered.

Thomas J. Cavanaugh, for plaintiff.

Alfred J. Mills, for defendants.

FELLOWS, J. This case involves the construction of the will of William J. Sellick, late of Paw Paw, Van Buren county, and the effect as between certain of the legatees of the election of the widow to take under the statute. Mr. Sellick left real estate inventoried at $8,500 and personal property inventoried at upwards of $176,000. He left a widow, Caroline Sellick, and one son, William R. Sellick, the plaintiff, now grown to manhood, who was the child of a former wife. He also left collateral kindred, including the defendants Arthur F. Sellick, a nephew, and Gertrude Sellick, a niece. To his collateral kindred other than defendants he gave varying sums aggregating $15,000. By the second clause of his will he gave to each of the defendants $5,000. The first clause of his will is as follows:

"I give, devise and bequeath to my wife, Caroline Sellick, Twenty-Five Thousand Dollars ($25,000), to be used and enjoyed by her during her life and at her death to be equally divided between my nephew, Arthur F. Sellick, and my niece, Gertrude Sellick."

The residue of his estate he gave to his son, the plaintiff. The widow elected to take under the statute. The trial judge construed the first clause of the will, when taken in connection with the second clause which gave each defendant $5,000 and the residuary clause, as giving the widow absolutely $25,000, and accordingly held that the defendants took nothing under such clause. This rendered unnecessary the determination of the other questions involved. From a decree in accordance with these views the defendants appeal and it is here urged by their counsel that the first clause of the will gave the widow a life estate with remainder over to them; that by the election of the widow to take under the statute her life estate is at an end, and that applying the doctrine of acceleration of remainders they are now entitled to said sum of $25,000. On the other hand, it is insisted by counsel for the appellee that the bequest to the widow gave her an absolute estate; that the bequest falls within that class of bequests controlled by *Jones* v. *Jones*, 25 Mich. 401, and kindred cases, and that the decree should be affirmed. It is further insisted by appellee's counsel that if we decline to follow this contention and accept the view that a life estate only was given the widow, still we should not apply the doctrine of acceleration of remainders, but that such life estate given to the widow by the will should be sequestered to reimburse the plaintiff in part for the depletion of his bequest occasioned by the payment out of it of the sums necessary to make up the widow's statutory share. In short, that he is known in the law as a disappointed legatee, and that the doctrine of acceleration of remainders should not be adopted at the expense of disappointed legatees.

We are not disposed to take time or space in differentiating between the instant case and *Jones* v. *Jones*, *supra*, and kindred cases. Under the repeated deci-

sions of this court the clause of Mr. Sellick's will above quoted gave the widow the use of $25,000 for her life, a life estate, and it gave her no more. *Glover* v. *Reid,* 80 Mich. 228; *Gadd* v. *Stoner,* 113 Mich. 689; *Farlin* v. *Sanborn,* 161 Mich. 615 (137 Am. St. Rep. 525); *In re Moor's Estate,* 163 Mich. 353; *Bateman* v. *Case,* 170 Mich. 617; *Laberteaux* v. *Gale,* 196 Mich. 150. The opinions in these cases together with the authorities cited in them establish beyond doubt that under the language found in this clause Caroline Sellick took but the life use of $25,000. While it is true that the entire will must be considered, we find nothing at variance from this conclusion in any of its provisions. The fact that the testator gave each of the defendants $5,000 to be paid presently in no way modifies the plain, unambiguous language of clause one by which he gave them $25,000, to be paid upon the death of his wife.

This brings us at once to the interesting and novel questions in the case. It must be conceded at the outset that the decisions of the court of last resort of the State of Pennsylvania sustain the contention of defendants' counsel unequivocally. *Coover's Appeal,* 74 Pa. St. 143; *Ferguson's Estate,* 138 Pa. St. 208 (20 Atl. 945); *Vance's Estate,* 141 Pa. St. 201 (21 Atl. 643, 12 L. R. A. 227, 23 Am. St. Rep. 267). Is the rule laid down by the Pennsylvania court supported by the weight of authority and by equitable principles? Should the doctrine of acceleration of remainders be applied where by its application the remainderman gets more than the will gave to him and legatees either specific or residuary get less? To these questions we shall now direct our attention

Some support is given defendants' contention by the holding of the court of appeals of Kentucky in *Trustees Church Home* v. *Morris,* 99 Ky. 317 (36 S. W. 2). But in that case it was said:

"There is no reason whatever, in this case to depart from the direct command of the testator to distribute this estate in the manner in which he directs it to be done. It might be different if an intention was apparent to benefit certainly the residuary legatees, and the bulk of the estate was expected to be left for them. In such event they, and not others, could be said to be the chief objects of the testator's bounty, and they would be protected, not because it would be equitable or just, but because such was the intention of the testator."

And *Sherman* v. *Baker,* 20 R. I. 446 (40 Atl. 765, 40 L. R. A. 717); *Dean* v. *Hart,* 62 Ala. 308; *Slocum* v. *Hagaman,* 176 Ill. 533 (52 N. E. 332), and *Adams* v. *Gillespie,* 55 N. C. 244, give color to defendants' claim. But some of these cases only consider the general doctrine of acceleration of remainders and do not determine that such doctrine should be applied where by an election not to take under the will other legacies to other legatees are diminished.

That the determination of the life estate by act other than the death of the life tenant is as effective to let the remainderman into possession as the death of the life tenant, that the time of taking possession is accelerated by such act, is generally recognized in this country and in England. Thus in *Jull* v. *Jacobs,* 35 L. T. Rep. 153, the testator gave a life estate to his daughter with remainder over to her children on their becoming of age. The daughter witnessed the will thus incapacitating her from taking the life estate. The life estate having failed from this fact it was held that the children who took the fee should be let into possession at once, Vice Chancellor Malins remarking:

"Then, taking away her life estate, does that cause an intestacy as to the life, or an acceleration of the estate in remainder? It is clear that the children are postponed because of the mother's life estate, but if she does not take the life estate why should they be

postponed? It is a mere accident, through ignorance on the part of the testator, and I think that, as the tenant for life cannot take, the reason for postponing the children ceases."

In the case of *Lainson* v. *Lainson,* 18 Beav. 1, the testator gave an estate for life to A and on his decease to B in tail. By a codicil he revoked the devise to A. It was held that the estate of B was accelerated and that he took at once. A similar result was reached on a similar state of facts in *Eavestaff* v. *Austin,* 19 Beav. 591. But it has also been held in England that where the heir takes against the will under which he received considerable benefit, those devisees and legatees disappointed by such election may not have a lien upon the estate but may require such heir to account for the whole amount received by him under the will. *Greenwood* v. *Penny,* 12 Beav. 403.

This court has recognized the doctrine of acceleration of remainders upon the termination of the life estate of the widow by her election to take under the statute. *In re Schulz's Estate,* 113 Mich. 592. But that was a case where none of the legatees were in any way harmed by the application of the doctrine. By the election of the widow to take under the statute their bequests were proportionately diminished, and by the acceleration of their remainders they were proportionately reimbursed.

The supreme court of Ohio in *Millikin* v. *Welliver,* 37 Ohio St. 460, has also recognized the doctrine of acceleration of remainders. But that case like the *Schulz Case* did not involve a disappointed legatee whose legacy was depleted to make up the sum paid to the widow for her statutory right. This was pointed out by that court in the later case of *Holdren* v. *Holdren,* 78 Ohio St. 276 (85 N. E. 537, 18 L. R. A. [N. S.] 272), where the court quoted from the former case and said:

"This holding is based upon the doctrine of acceleration, but it must be understood as limited to cases in which that doctrine is applicable; otherwise it is too broad. In that case there was no disappointed legatee, but all of the estate went to the remainderman. It is well settled, when a widow elects not to take under a will, but to take under the law, her portion under the will will be sequestered to compensate those beneficiaries under the will whose shares are cut down by her election."

And this was but a reiteration of the early case of *Jennings* v. *Jennings,* 21 Ohio St. 56.

So likewise the court of appeals of Maryland recognized the doctrine of acceleration of remainders. *Randall* v. *Randall,* 85 Md. 430 (37 Atl. 209), but declined to apply it in a case somewhat similar to the instant case. *Hinkley* v. *The House of Refuge,* 40 Md. 461 (17 Am. Rep. 617). Considering the rule it was there said:

"But, while this is the general rule, it is modified under certain circumstances, by the application of the principles of equity, where it is apparent that the event producing the acceleration of the time for vesting the remainder in possession, is not contemplated by the will, and the result produced would contravene the intention of the testator. In this case, it is manifest that it was never contemplated by the testator that the legacies now claimed as payable presently, should be paid before the death of his widow. The renunciation by the widow is an event not provided for by the will; and as by that event a certain portion of the principal or *corpus* of the estate is withdrawn from the trust intended for the benefit of the children of the daughter and sister of the testator, it is but equitable that they should be indemnified or compensated as far as can be, by the appropriation of the benefit renounced by the widow. This is not an application to compel an election, but to have declared the effect of an election already made; and, in such case the general and well established principle applies, that a court of equity will assume jurisdiction to sequester the benefit intended for the refractory donee,

in order to secure compensation to those disappointed by the election."

And in the later case of *In re Rogers' Trust Estate,* 97 Md. 674 (55 Atl. 679), the Maryland court again declined to apply the doctrine because so to do would be contrary to the intent of the testator.

The supreme court of New Hampshire in a case similar to the *Schulz Case* (*Parker* v. *Ross,* 69 N. H. 213 [45 Atl. 576]), applied the doctrine of acceleration of remainders, but when that court had before it the question of a disappointed legatee whose estate had been diminished by the election of the widow, and such diminution differed in proportions from other legatees (*Cotton* v. *Fletcher,* 77 N. H. 216 [90 Atl. 510, Ann. Cas. 1915A, 1225]), the doctrine contended for by the plaintiff here was applied, and the estate given the refractory legatee by the will was held for the purpose of indemnifying the disappointed legatee.

In the case of *Jones* v. *Knappen,* 63 Vt. 391 (22 Atl. 630, 14 L. R. A. 293), the court had before it a case quite similar to the instant case. We quote from the syllabus:

"The election of the widow, who is made life tenant of her husband's property, to take against his will, does not accelerate the time for distribution so that it may be made during her life time; where the remainder is to be divided between specific and residuary devisees and the result of her election would work inequity by diminishing the residuary, and leaving the specific devisees to be paid in full."

In this case the court quotes the following from 1 Woerner on Administration, § 119:

"The rejection by the widow of the provisions made for her by the will generally results in the diminution or contravention of devises and legacies to other parties. The rule in such case is that the devise or legacy which the widow rejects is to be applied in compensation of those whom her election disappoints."

And then says:

"The controlling, and, we think, the more reasonable, principle announced in most of these cases, is the one expressed by Woerner, *supra*, viz., to use the renounced devises and legacies given by the will to the widow, to compensate, so far as may be, the devises and legacies diminished by such renunciation. When the remaindermen are affected *pro rata* by such renunciation, acceleration of the enjoyment of their devises or legacies, diminished proportionally, will equitably compensate them, so far as possible, for such diminution. But in this case acceleration of enjoyment would increase the specific pecuniary legacies, to the detriment of the residuary legatees, whose shares only are diminished by the renunciation. Applying the principle stated, the life use of the property given by the will to the widow, and renounced by her, should be used to compensate the residuary legatees, the next of kin of the testator and of his wife."

Another quite similar case to this one is that of *Firth* v. *Denny*, 2 Allen (Mass.), 468. We quote the syllabus:

"A testator in his will, after various absolute devises and bequests, directed a certain sum to be invested, and the income thereof to be paid to his wife during her life, and, after her death, to be distributed among various legatees in certain specified sums, and gave the rest of his estate to his residuary legatees. He died without leaving issue, and his widow waived the provisions of the will in her behalf, and thereby became entitled to a larger share of his estate than the will gave her. *Held*, that the residuary legatees are entitled, during the life of the widow, to the income of the fund provided for her, and after her death the principal should go to the legatees named in the will, in like manner as if the widow had accepted the provisions therein made for her."

See, from the same court, *Brandenburg* v. *Thorndike*, 139 Mass. 102 (28 N. E. 575).

In *McReynolds* v. *Counts*, 9 Grat. (Va.) 242, the court had before it the question here involved. The

widow had renounced the provisions of the will, and it was determined that the disappointed legatees were entitled to the estate renounced for the purpose of reimbursing them the amount of their disappointment, and such estate was placed under the control of the court for such purpose.

Mr. Pomeroy in his work on Equity Jurisprudence (1 Pomeroy Eq. Jur. [4th Ed.] § 517) says, in considering the question of elections:

"The other parties interested as donees under the instrument creating the necessity for an election are affected by it, when made, in the following manner: If the person on whom the duty of electing rests elects to take in conformity with the will or other instrument of donation, he thereby relinquishes his own property, and must release or convey it to the donee upon whom the instrument had assumed to confer it. If he elects against the will or other instrument of donation, he thereby retains his own property, and must compensate the disappointed donee out of the estate given to himself by the donor. A court of equity will then sequester the benefits intended for the electing beneficiary, in order to secure compensation to those persons whom his election disappoints. This rule is applied in many of the American cases cited below to elections made by widows in favor of their dower and against the testamentary provisions, whereby the interests of other devisees were disturbed. Such disappointed devisees are held entitled to compensation out of the benefits intended to be conferred by the will on the widow, but which she had rejected."

See, also, *Timberlake* v. *Parish,* 5 Dana (Ky.), 346; *Wakefield* v. *Wakefield,* 256 Ill. 296 (100 N. E. 275, Ann. Cas. 1913E, 414); *Fox* v. *Rumery,* 68 Me. 121; *Lovell* v. *Charlestown,* 66 N. H. 584 (32 Atl. 160); *Ford* v. *Ford,* 70 Wis. 19, 54 (33 N. W. 188, 5 Am. St. Rep. 117); *Colvert* v. *Wood,* 93 Tenn. 454 (25 S. W. 963); *Miller* v. *Miller,* 91 Kan. 1 (136 Pac. 953, L. R. A. 1915A, 671, Ann. Cas. 1917A, 918); *Latta* v. *Brown,* 96 Tenn. 343 (34 S. W. 417, 31 L. R. A. 840); *Carper* v. *Crowl,* 149 Ill. 465 (36 N. E. 1040);

Woods' Adm'r v. *Woods' Devisees*, 1 Metc. (Ky.) 512; 2 Alexander on Wills, §§ 837, 838; 1 Woerner on Administration (2d Ed.), § 119, p. 293; and notes in 12 L. R. A. 227; 14 L. R. A. 293; 18 L. R. A. (N. S.) 272; 27 L. R. A. (N. S.) 602; L. R. A. 1915A, 671; Ann. Cas. 1913E, 416.

We are persuaded that under the great weight of authority the contention of plaintiff's counsel in this regard must prevail. While the doctrine of acceleration of the time of taking effect of the remainder upon the termination of the life estate by act other than the death of the life tenant (*i. e.*, by the election of the widow to take under the statute), must be recognized and applied in proper cases, such doctrine should not be applied where by the election a portion only of the legacies are diminished in order to make up the amount required by the statute to satisfy the widow's statutory rights. And that this should be true whether the legacy diminished be a specific or a residuary one. Under such circumstances the disappointed legatees may in a court of equity compel the sequestration of the legacy to the refractory legatee for the purpose of diminishing the amount of his disappointment.

Manifestly this is in consonance with equitable principles. In the instant case the residuary fund given to the plaintiff has been diminished by many thousand dollars in order to discharge the claim of the widow resulting from her election. To adopt defendants' claim would give to them the $25,000 many years before the time fixed by the testator for its payment. They would not only receive the amount given them by the will, but they would also receive the widow's life estate renounced by her to the disadvantage of the plaintiff. Equitable principles do not require that this should be done.

We are asked to fix the present worth of the widow's life use of the $25,000 with a view of finally closing

the estate and disposing of all matters at once. The parties interested are all of age and may make such adjustment as they may desire, but we do not feel empowered to fix the present worth of the widow's use and direct its present payment. We see no occasion, however, to longer hold the estate open. A trustee may be appointed to handle this fund of $25,000. He shall annually pay the income thereon to the plaintiff during the life of the widow, and upon her death pay the *corpus* to defendants in equal shares.

It follows that the decree must be reversed and one here entered in conformity with this opinion. The defendants will recover costs of this court. Neither party will recover costs of the circuit court.

BIRD, C. J., and OSTRANDER, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

BURTCH *v.* CHILD, HULSWIT & CO.

1. WARRANTY — BREACH — REPRESENTATIONS — OPINIONS — STATEMENTS OF FACT—INTENTION—QUESTION FOR JURY.

In an action by the purchaser of bonds against the seller, a brokerage corporation, for breach of warranty, where plaintiff notified defendant that he was ignorant of the value of the bonds and that he relied upon its representations, and demanded a statement in writing from defendant direct that the bonds were good, in response to which defendant's secretary wrote that "We *know* that the bonds are *absolutely good*," *held*, to be open to the inference that more than a mere expression of opinion was intended and the question as to whether an expression

of opinion or statement of fact was intended was properly submitted to the jury.

2. SAME—AGENT'S AUTHORITY—EVIDENCE—SUFFICIENCY.
Testimony as to the secretary's authority to make the warranty, *held*, sufficient to submit to the jury.

3. SAME—AGENT'S AUTHORITY—NOTICE—RATIFICATION.
Where plaintiff refused to buy without a statement in writing from defendant that the bonds were good, and the next day he received such statement signed by defendant by its secretary, and thereupon defendant received plaintiff's money and retained it after being advised of the circumstances under which it was received, defendant, as a matter of law, ratified the act of its secretary, if he acted without authority.

4. SAME—BREACH OF WARRANTY—MEASURE OF DAMAGES—INSTRUCTIONS.
Where there was some testimony that the bonds were worthless at the time they were sold in 1909, an instruction by the court that if the jury found that they were worthless, the measure of damages would be the amount plaintiff paid for them, with interest to the date of the trial, was not erroneous, where they were also instructed that if they found there was some intrinsic value in the bonds in 1909 they should ascertain that value, and the difference between that sum and what plaintiff paid for them, plus the interest, would be the proper measure of damages.

5. SAME—CONFLICTING TESTIMONY—QUESTION FOR JURY.
Where certain letters written by plaintiff, introduced in evidence, were in conflict with his testimony on the trial that he relied on the representations of defendant, it was the province of the jury to determine which, if either, of these statements was true.

6. TRIAL—EVIDENCE—AFTER EVENTS—HARMLESS ERROR.
The admission of evidence of after events, although irrelevant, *held*, not prejudicial.

Error to Kent; Perkins, J. Submitted June 12, 1918. (Docket No. 6.) Decided October 6, 1919.

Assumpsit by Manley W. Burtch against Child, Hulswit & Company for breach of warranty on the sale of

corporate stock. Judgment for plaintiff. Defendant brings error. Affirmed.

Butterfield & Keeney (*Charles B. Blair*, of counsel), for appellant.

Charles E. Ward, for appellee.

BIRD, C. J. In 1909 plaintiff was engaged in the manufacturing business at Sparta. The defendant was a corporation engaged in the business of bond brokers at Grand Rapids. It is the claim of plaintiff that in August, September, and October, 1909, he purchased from defendant $13,500 in bonds of the Denver-Greeley Valley Irrigation District of Colorado on a warranty that they were a secure investment and absolutely good. They proved to be otherwise, and this suit in assumpsit was begun to recover the purchase price. The question whether defendant warranted the bonds was submitted to the jury, and they found that defendant did warrant them, and awarded plaintiff a judgment of $17,550, which covered the purchase price and interest. Application for a new trial and for judgment *non obstante veredicto* followed, but both applications were denied.

1. Defendant strenuously contends that there was no testimony on the question of warranty which justified the trial court in sending it to the jury. This point makes it necessary to review to some extent the testimony on that question. It appears from the testimony of plaintiff that he was solicited by defendant to purchase the bonds by descriptive literature outlining the irrigation projects, and by its personal representative, Mr. Stanton, who called upon him several times. Mr. Stanton praised the bonds, said they were good, said the company had been out there to investigate and that they were in a position to know their value. That plaintiff finally advised Stanton that he

would not purchase them unless he got a letter from the company direct, stating that the bonds were good. Mr. Stanton went away and soon thereafter plaintiff received from defendant the following letter:

"MR. MANLEY W. BURTCH,
"Sparta, Michigan:

"The writer, on returning to the city this morning, finds that our Mr. Stanton called on you last week and that you were interested in the Denver-Greeley Valley Municipal Irrigation District bonds, which we have been offering.

"If you are in funds at this writing we will be very glad to have you take some of this issue. * * *

"The writer has personally been over this district, Mr. Burtch, and it has also been visited by other members of our firm. * * * We *know* that the bonds are *absolutely good* and we recommend them as a very secure investment, paying an attractive rate of interest.

"CHILD, HULSWIT & CO.,
"RALPH S. CHILD, Secretary."

After receiving this letter plaintiff saw Mr. Child, who informed him—

"that the bonds were absolutely good, and the security back of them was adequate, that is, it was sufficient, that it was in the nature of a municipal bond, the same as a school bond, and that it was the highest kind of security that could not be destroyed. He said the lands were settled. He said that he, as well as other members of the firm, had been over the proposition, made investigations that it would not be possible for me to make, and that the bonds were good and that I need have no fear of losing my money. He said they were perfectly competent to investigate those things and that I was not competent to do so. Why, he said that they had made an investigation, and I told him I was relying absolutely on their word in making the investigation, because I did not claim to know enough to make an investigation myself; and, as a matter of fact, I told him I had no time to investigate it, and when I handed the money over to him I says, 'I am relying on you people absolutely in this matter.'"

Plaintiff further testified that he relied upon these representations, and would not have purchased the bonds except for them. This is, in substance, the basis of plaintiff's claim of warranty.

Defendant argues that the statements, oral and written, show, upon their face, that they are mere expressions of opinion and are not such as constitute in law a warranty, citing in support of this contention the following cases: *Bristol* v. *Braidwood,* 28 Mich. 191; *French* v. *Fitch,* 67 Mich. 492; *Krause* v. *Cook,* 144 Mich. 365; *Deming* v. *Darling,* 148 Mass. 504 (20 N. E. 107); *Crosby* v. *Emmerson,* 142 Fed. 713; *Worth* v. *McConnell,* 42 Mich. 473; *Chafey* v. *Mathews,* 104 Mich. 103 (27 L. R. A. 558); *Getchell* v. *Dusenbury,* 145 Mich. 197; *Duffany* v. *Ferguson,* 66 N. Y. 482.

And it is further contended that there is no evidence which shows that the statements were intended to be warranties. None of the cases cited is directly in point. They, like most of the cases, deal with the general rules and their application to the particular facts therein involved. It is not always easy to determine where expressions of opinion leave off and representations of fact begin. Sometimes the same statement made on different occasions but under different circumstances will be differently construed. As was said in *Andrews* v. *Jackson,* 168 Mass. 266 (47 N. E. 412, 37 L. R. A. 402):

"It is often impossible, * * * to determine as matter of law whether the statement is a representation of a fact which the defendant intended should be understood as true of his own knowledge or an expression of opinion. That will depend upon the nature of the representation, the meaning of the language used as applied to the subject-matter, and as interpreted by the surrounding circumstances in each case. The question is generally to be submitted to the jury."

Counsel suggest that the cases of *Bristol* v. *Braidwood* and *French* v. *Fitch, supra,* are similar on the facts and are controlling. We cannot agree with them in this view. The facts and the points decided are more or less at variance with the present one. In so far as particular cases can aid we think the cases of *Taylor* v. *Soper,* 53 Mich. 96, and *Knauss* v. *Major,* 111 Mich. 239, are more nearly in accord with the facts of the present case.

However, it may be said generally that:

"One who purchases a bond honestly relying on the seller's representations that it is valid when it is in fact invalid or worthless, may recover the price paid for it, in an action for a breach of warranty, although the seller may have acted in good faith and the buyer may have had ample opportunity to examine the bond. All material representations made by the seller with respect to the nature and character of the security for the bonds or as to the existence of security, when relied on by the purchaser, constitute warranties." 30 Am. & Eng. Enc. Law (2d Ed.), p. 158.

We might be able to agree with counsel in their contentions were it not for the letter of August 4th and the circumstances under which it was written. Plaintiff had been solicited by letter and literature to purchase the bonds. This was followed by several visits from Stanton who tried to induce plaintiff to purchase them. He had explained the irrigation projects upon which the bonds were issued, had praised their value and endeavored to convince plaintiff that he knew whereof he spoke, as members of his firm had been out to Denver and personally inspected the proposition. All this did not appear to satisfy plaintiff, he wanted something more, he wanted a letter from defendant itself that the bonds were as represented. In order to consummate the sale defendant yielded to his demand and wrote the letter, in which the significant words "know" and "absolutely good" were underscored.

Considering these circumstances, together with the fact that the irrigation projects at that time were new to the public, that plaintiff knew nothing about them and so advised defendant, and further advised defendant, when he purchased them, that by reason of his lack of knowledge he relied upon the representations so made to him, it cannot be said, as a matter of law, that the representations were mere expressions of opinion. We are persuaded that they are open to the inference that something more than mere expressions of opinion was intended. The question whether they were intended as expressions of opinion. or statements of fact was properly submitted to the jury. 35 Cyc. p. 481.

2. But counsel say there was no competent proof that Child, who wrote the letter of August 4th, had authority to warrant the value of the bonds. The trial court held, as a matter of law, that defendant had the power to warrant the value of bonds which it disposed of, but left it to the jury to say whether Child was authorized by defendant to do so. It appeared from the testimony that he was a director, secretary and vice-president of the company, in charge of the buying and selling of bonds. Testimony was received showing similar dealings with other persons. We think there was sufficient testimony to submit to the jury on the question of his authority to make the warranty, but if this question be a doubtful one, we think it can be said, as a matter of law, that the company ratified the act of Child. Plaintiff said to Stanton, "I will not buy unless the company writes me a letter saying the bonds are good." The next day he received such a letter signed by the defendant. This shows conclusively that the ultimatum of plaintiff was delivered to defendant and upon this letter defendant got plaintiff's money, and retained it after being advised of the circumstances under which it was received.

3. On the question of damages the court instructed the jury, in substance, that if they found the bonds were worthless in 1909, the measure of damages would be the amount plaintiff paid for the bonds, with interest to the date of the trial. They were further instructed that if they found there was some intrinsic value in the bonds in 1909 they should ascertain what the real value was, and the difference between that sum and what plaintiff paid for them, plus the interest, would be the proper measure of damages. Defendant claims that this was error because there was no evidence that the bonds were worthless in 1909. There was considerable testimony bearing on the value of the bonds in 1909, and there was some to the effect that they were worthless at that time. In view of this there was no error in submitting the case upon that theory. The instruction on the measure of damages finds support in *Maxted* v. *Fowler*, 94 Mich. 106.

4. Counsel argue that plaintiff, in purchasing the bonds, did not rely on the representations of defendant. This contention is supported by certain letters of plaintiff addressed to Trowbridge & Niver, in which he stated he relied on them in purchasing the bonds. This was in conflict with his testimony on the trial that he relied on the representations of defendant. After the admission of the letters plaintiff explained why he wrote them. It was the province of the jury to determine which, if either, of these statements was true. *Kelly* v. *Freedman*, 56 Mich. 321; *Watson* v. *Watson*, 58 Mich. 507; *People* v. *Hansen*, 183 Mich. 565; *Parnell* v. *Pungs*, 190 Mich. 638.

5. Serious complaint is made because the trial court admitted evidence of after events, namely: What steps were taken by the bondholders to protect their interests. Reports issued by the receiver and the bondholders' committees were received. Some of this testimony was important as throwing light on the value

of the bonds in 1909, but much of it had no relevancy to the issue. While we think there was much testimony admitted on matters foreign to the issue, we are not persuaded that such irrelevant testimony was prejudicial to defendant. We have examined and considered the remaining questions, but find no merit in them.

The judgment of the trial court is affirmed.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

CITY OF FLINT *v.* GRAND TRUNK WESTERN RAILWAY CO.

1. RAILROADS—STREETS—UNAUTHORIZED CROSSING—ESTOPPEL.
   Where defendant railroad company, in 1910, constructed three stub tracks, constituting a siding, crossing certain streets in the city of Flint, without the latter's consent, but no objection was made thereto and said tracks were used until 1916, said city is estopped from requiring said tracks to be torn up and the streets returned to their original condition.

2. SAME—STATUTES—RIGHT TO CROSS STREETS.
   In view of 2 Comp. Laws 1915, § 8232 *et seq.*, permitting the tracks of steam railroads built on private right of way to cross public highways and streets, and a resolution of the common council of the city of Flint authorizing the construction of certain stub tracks across certain streets in said city, by defendant steam railroad company, to facilitate the movement of freight, which resolution was later rescinded and the construction sought

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On power of municipality to compel removal of spur track, turnout or switch from street or highway, see note in L. R. A. 1918B, 481.

to be enjoined, although defendant had incurred considerable expense in reliance thereon, *held*, that the completion of the tracks should be permitted.

3. SAME.

Held, that defendant should be permitted to connect the east end of said sidings with its main track, subject to the conditions imposed by the resolution of the common council authorizing said construction.

4. SAME—REGULATION BY MUNICIPAL CORPORATION—ORDINANCES—PUBLIC UTILITIES COMMISSION.

If the State laws as to the movement of trains over streets and highways is insufficient to safeguard those using the streets of a city, they may be supplemented by reasonable ordinances and by the maintenance of gates and the keeping of watchmen as may be required by the public utilities commission.

Appeal from Genesee; Brennan, J. Submitted October 15, 1918. (Docket No. 51.) Decided October 6, 1919.

Bill by the city of Flint against the Grand Trunk Western Railway Company to enjoin the laying of certain tracks. Defendant filed a cross-bill, claiming affirmative relief. From the decree rendered, defendant appeals. Reversed, and decree entered.

John H. Farley (*Guy W. Selby*, of counsel), for plaintiff.

Harrison Geer (*Geer, Williams & Martin*, of counsel), for defendant.

MOORE, J. The trial judge stated so clearly the issues involved in this proceeding in a written opinion filed by him, that we quote from it freely as follows:

"From the concessions made in open court by counsel for the respective parties, and the testimony of witnesses produced upon the hearing, I find the material facts to be substantially as stated in plaintiff's amended bill of complaint, except that I am unable

to find that there has been such use made by the public of the streets known as Cherry and Willow streets for a distance of 165 feet crossed by the lines and tracks of the defendant railway north of Burton street as will justify the city in claiming the existence of these streets across defendant's property as public highways.

"Prior to May, 1910, the defendant and its predecessors had a steam railway extending through the city of Flint for the transportation of freight and passengers, using one main line track which extended across Forest street and Burton street and easterly across Walnut, Decker and Maple streets, which is represented on the blueprint attached to defendant's pleadings by the lower white line, and it was at that time also using a track represented by the white line just north of said main track, coming from the west and extending to a point at or near the west line of Walnut street.

"Said defendant, in May, 1910, commenced the construction of what is now known as Flint east yards by constructing the three stub tracks, so-called, indicated by the upper white lines on the said blueprint, crossing Willow, Cherry, Walnut, Decker and Maple streets, and said tracks were laid across Walnut and Decker streets without first obtaining the consent of the common council of the city of Flint, and said stub tracks have since their construction been used by the defendant for the storage and switching of cars across those streets as well as Burton, Forest, Crapo streets and Richfield road.

"That in 1915, the track lying just north of the main track was extended across Walnut, Decker and Maple streets, and the track shown by the white line on the blueprint lying just north thereof was also constructed extending across these streets, which was also done without permission of the common council of the city of Flint, and these have since been used for the switching and storage of cars across these and the other streets named.

"That in May, 1916, the defendant commenced the construction of the tracks indicated on the blueprint by red lines, and some objection having been made, an application was made to the common council, July

31, 1916, for the permission to construct these additional tracks; that such permission was granted upon certain conditions, which conditions were not complied with, and at the next session of the common council of the city of Flint, that body acting under the authority conferred by its charter, reconsidered and rescinded its action granting such permission, and the city of Flint applied to this court for an injunction restraining the defendant from continuing the work of laying such additional tracks and applied for and obtained a temporary injunction, and by leave of the court, plaintiff filed an amended bill of complaint, which the defendant answered, and this case has been heard upon the pleadings so amended.

"At the request of counsel, I have made a personal inspection of the yards and crossings in the vicinity thereof, and I find from the evidence in the case and from such inspection that the Richfield road, Crapo and Forest streets are much traveled streets; that an electric street railway crosses defendant's railway tracks at grade on Crapo street, and that the switching of freight cars by the defendant railway across these streets in connection with its use of the tracks now laid in its east yard greatly impedes traffic on these streets and has created a dangerous and menacing condition, and that this is also true to a lesser extent at Burton, Walnut and Decker street crossings; that the occupation by the railway company of Walnut and Decker streets by such yard tracks without the consent of the city council creates and constitutes a public nuisance.

"While in the opinion of some of the witnesses produced by the defendant, the construction of the proposed additional tracks would tend to diminish dangers resulting from the switching of cars in and out of this yard across Richfield road, Crapo and Forest streets, yet from the inspection of the defendant's yard and the manner in which the cars must necessarily be stored and switched on the tracks as proposed, the court is not convinced that the danger will be materially lessened, but on the contrary the menace will be greatly increased across Walnut, Decker and Maple streets should such additional tracks be constructed as proposed, and the construction of such tracks in such

streets would also be a public nuisance and menace to persons having occasion to use said crossings.

"The questions presented by the pleadings and proofs are whether the right to construct these additional tracks with the tracks already constructed, occupying about 165 feet of the streets for yard purposes, is conferred by subdivision 5 of section 6587, Howell's Michigan Statutes (2d Ed.) [2 Comp. Laws 1915, § 8243], without the consent of the common council of the city of Flint, as well as the right of the defendant to maintain the tracks constituting part of said switching yards constructed in 1910 and 1915, and to continue the operation of such yards without the consent of the common council. The case of *Highway Commissioner of Ecorse Township* v. *Railroad Co.*, 148 Mich. 436, is controlling in my opinion of the law in this State so far as these questions are concerned.
* * *

"In conclusion I find that in view of the existing conditions which have made necessary better shipping facilities, and the fact that some considerable time may be required for the defendant railway to establish and equip switching yards at suitable points in or near the city, it is obvious that the defendant should be permitted to continue the use of its east yard with the tracks now laid and be permitted to construct the additional tracks proposed, as shown on the blueprint, and maintain the same for a longer period than would ordinarily be considered reasonable, and for these reasons only, the defendant should be permitted to construct the proposed tracks as shown on the blueprint by the red lines, and to use the same and continue the use of the last mentioned tracks after their construction, together with those already in use in its east yard as now located for a period not exceeding four years.

"Therefore, a decree may be entered that the defendant railway be perpetually restrained and enjoined from the further use of its switching and storage tracks constituting said east yard, as distinguished from its main and sidetracks necessary for the transportation of freight and passengers from and after four years from the date of the decree, and from the construction of any additional tracks across Burton,

Maple, Decker and Walnut streets, and that the defendant be required to remove from said streets all such tracks and ties now laid in said streets other than its main and sidetracks for the transportation purposes only, and that it restore said streets to their original condition, as near as may be, within four years of the date of such decree. The court recommends that in view of all the circumstances and present conditions, and the government control of the defendant, that the common council grant permission to the defendant railway to use all said streets with its proposed additional tracks under reasonable, proper safeguards; that the defendant file with the city a properly executed agreement to remove all such sidetracks, including the proposed tracks, if constructed within a period of four years from the date of this decree."

From this decree the defendant has brought the case here by appeal.

The plaintiff did not appeal and the conclusion of the trial judge as to Cherry and Willow streets must be regarded as final.

The first question calling for serious consideration is the status of the tracks constructed in 1910. The construction of these tracks was known to everybody in that vicinity. They were built upon defendant's private right of way at a very considerable expense. Upon their completion the defendant immediately began to use them and continued to do so without objection or complaint so far as the record shows, upon the part of the city, until the amended bill of complaint was filed in December, 1916. To now require the defendant to tear up these tracks and to restore the streets to the condition they were in before the tracks were built would be exceedingly inequitable, and the city should be regarded as estopped from asking this to be done.

The next question is as to the decree which should be entered in relation to what was proposed to be done in 1916. These tracks if laid would all be on defend-

ant's right of way except where they crossed the streets and would be between the tracks laid in 1910 and Burton street.

In defendant's answer to the amended bill is the following:

"For answer unto paragraph VI of said amended bill, and in partial explanation of the allegations therein made, this defendant says that on July 31, 1916, the common council of said city of Flint passed the following resolution, viz.:

"'Moved, that the application of the Grand Trunk Railway Company for permission to construct certain sidetracks in the vicinity of Walnut street as shown on the map filed with such application, be granted on condition that the same be without prejudice to the right of the city to a crossing on Willow street when desired, and on further condition that gates be placed on all crossings affected by such increased railroad traffic and that such crossings be planked the full width of street; also that at the same time said railroad company, at its own expense put in a crossing in continuation of Minnesota avenue, with proper cattle guards, sidewalks and planked roadway at least sixteen feet wide, which motion was adopted.

"'Dated, July 31st, 1916.'

"That in contemplation of the passage of said resolution this defendant had caused the work of installing said tracks to be started before the passage thereof, but had not made very much progress in that respect, and that after the passage thereof, it proceeded vigorously to prosecute the work of grading, etc., preparatory to installing said tracks, and had expended a large sum of money in such work, to-wit: five thousand dollars and upwards, when said common council, without any notice to it, said defendant, on August 7, 1916, rescinded said resolution, and now claims that the defendant has no right to proceed to construct said tracks across said streets as planned, and as permitted by said resolution. It further says, in explanation of the alleged dangerous condition in which said streets were left, that it was restrained by the injunction of this honorable court, issued in this suit, from further proceeding with such work, and that its failure, if any failure there was, to restore said streets to their

original condition as near as may be, was because of said injunction, and not because of any intentional omission to thus restore them, and that whatever trouble the plaintiff has been put to in obtaining protection at any of said street crossings, is directly due to the stoppage of said work by said injunction."

There was an abundance of testimony supporting the averments of the answer as to the work done and the cost thereof. These proposed tracks are near the main line. There is testimony that if constructed they would not only relieve the situation as to local freight but would facilitate the movement of through freight. An inspection of the blueprint supports this testimony.

The instant case is more within the principles of law stated in *City of Mason* v. *Railway Co.*, 157 Mich. 1, than it is within *Highway Commissioner of Ecorse Township* v. *Railroad Co.*, 148 Mich. 436, as the last-named case dealt with a terminal yard. The applicable statute is quoted in the opinion in the first-named case and need not be repeated here. In view of the use to be made of the tracks which were in process of construction when this suit was brought, and the resolution of the common council of July, 1916, and the expenditure incurred by defendant in reliance thereon, we think defendant should be permitted to complete the tracks begun in 1916.

Another question demands attention, and that is, Should defendant be permitted to connect the east ends of these sidings with its main track? An examination of the blueprint and the undisputed evidence shows that this would have a tendency to relieve the situation instead of further congesting the traffic. The defendant should be allowed to complete its work as proposed by the blueprint, but subject to all of the conditions imposed by the resolution before quoted which was adopted by the common council.

It goes without saying that public streets are essential in every city. It is equally true that modern civili-

zation could not get along without railroads. Every intelligent person knows that the highways cannot be used as freely where they cross railroad tracks as where there are none. On the other hand the railroads must recognize the existence of the public streets and the uses to which they are put. The users of the highways and of the railroads have mutual rights and mutual duties which must alike be observed. If an enforcement of the State laws as to the movement of trains over streets and highways is not sufficient to safeguard those using the streets of the city of Flint, they may be supplemented by the enactment and enforcement of reasonable ordinances and by the maintenance of gates and the keeping of watchmen at the street crossings as may be required by the public utilities commission.

The decree is reversed and one may be entered here in accordance with this opinion, with costs in favor of the defendant.

BIRD, C. J., and STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

BURLESON *v.* BLAIR.

1. FRAUD—FRAUDS, STATUTE OF—REPRESENTATIONS AS TO CREDIT OF ANOTHER.

In an action for the value of certain bonds sold to plaintiff by defendant by reason of alleged fraudulent representations as to their value, the statute of frauds (3 Comp. Laws 1915, § 11983) requiring representation or assurance as to the credit, etc., of any other person to be in writing and signed by the party to be charged, in order to sustain an action thereon, has no application if defendant was the owner of said bonds or if he profited by the transaction.

2. SAME—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY.

Where plaintiff's testimony as to defendant's representations that he was the owner of the bonds was corroborated, the court below was in error in holding that there was no proof to go to the jury on that question.

3. SAME—FRAUDS, STATUTE OF—APPLICABILITY—PERSONAL PROFIT.

Where defendant, the cashier of a bank at the time he sold the bonds for a brokerage firm, had an arrangement with said firm, of which he was a stockholder, to become its treasurer and director and take charge of the sale of bonds, in the near future, at an advance of salary over what he was receiving, and later received the position which he desired, *held*, to be such profit as to render inapplicable said statute of frauds, although he did not receive a direct commission.

Error to superior court of Grand Rapids; Dunham, J. Submitted January 10, 1919. (Docket No. 26.) Decided October 6, 1919. Rehearing denied December 23, 1919.

Assumpsit by Willard M. Burleson against Hugh Blair for the purchase price of certain stock. Judgment for defendant *non obstante veredicto*. Plaintiff brings error. Reversed, and case remanded with directions to enter judgment on the verdict with leave to renew motion for new trial if desired.

Louis T. Herman (*Charles E. Ward,* of counsel), for appellant.

Butterfield & Keeney and *Myron H. Walker* (*Charles B. Blair,* of counsel), for appellee.

BIRD, C. J. Plaintiff brought suit in assumpsit to recover the purchase price of 8 Laramie Municipal District Bonds of $500 each, which he purchased from defendant in April, 1909, on the ground that the purchase was induced by false representations as to their value. Plaintiff was successful in establishing his claim before the jury, they finding a verdict for him in the sum of $5,285.33. Subsequently a judgment was entered for defendant by direction of the court, notwithstanding the verdict. The main question discussed is whether the trial court was justified in so doing.

1. At the time the parties had their dealings both were residents of Grand Rapids. Plaintiff was practicing his profession as physician and surgeon, while the defendant held the position of cashier of the City Trust & Savings Bank. Plaintiff claims that, by invitation of the defendant, he visited the bank on April 8, 1909, and when he arrived there he found that defendant wanted to talk with him about purchasing some irrigation bonds. Referring to the false representations, plaintiff testified in substance that defendant said to him:

"You have a certificate of deposit here for $3,000, drawing 3%. I have got some bonds as good as government bonds, drawing 6% interest that I want to sell you. They are bonds of the Laramie Valley Municipal Irrigation District of Wyoming. They are municipal bonds, the same as municipal bonds in a city, such as sewer taxes and improvements. The government built this irrigation project in Wyoming and then turned it over to the district and the district has issued these bonds, and they are a first lien on everything, including all the land and all of the irrigation

project. I have been out there and have been all over this project (here defendant brought out 7 or 8 loose leaf productions of photographs of harvest scenes and growing crops, such as would only be seen on exceptionally fertile soil), defendant then said: I have seen those conditions and those pictures were taken while I was there, and I can vouch for their correctness. I have seen the James Lake System, and it is all completed, and in use. The land in this irrigation district is selling from eighty to one hundred dollars an acre. Everything is completed and in use. The land is all under irrigation in this district and improved, everything is all settled and all under cultivation, all prosperous farmers. The bonds, being a first lien on all of this valuable improved land and irrigation system, are very valuable and, therefore, are selling above par, at 101."

Plaintiff testified that relying on defendant's representations concerning the bonds and the security behind them, he purchased eight $500 bonds; that defendant computed the interest due him on the certificate of deposit, that he then went to his place of business, secured a check from his brother for the balance, came back and delivered the same to defendant and the defendant delivered to him the bonds, after which he redelivered them to defendant as collateral security for the loan, in place of the certificate of deposit, and took a receipt therefor.

Defendant's version of what took place is in serious conflict with plaintiff's version on many of the material matters. It is the claim of defendant that he himself did not own any of the bonds. He admits having an interview with plaintiff concerning the purchase of the bonds, but denies that he sought it. His version is that it came about by the suggestion of Mr. Sibley, the father-in-law of plaintiff's brother, and that his first interview with plaintiff took place on the 7th of April, upon which date the plaintiff signed an order for the bonds, directed to Child, Hulswit & Company, brokers

of Grand Rapids; that the order was handed over by him to that company, and in pursuance of said order the bonds were ordered from Chicago and delivered to him the next day, April 8th, and that later in the day he delivered them to the plaintiff. He further testified that he received nothing as commission for bringing about the sale.

Plaintiff introduced testimony tending to show that certain material representations made by defendant with reference to the security and value of the bonds were untrue, but we need not dwell upon that phase of the case as defendant conceded that if the claimed representations were made by him they were untrue.

The principal defense was that even if the statements were made as testified to by plaintiff they were not admissible in evidence by reason of the statute of frauds, which provides that:

"No action shall be brought to charge any person, upon or by reason of any favorable representation or assurance, made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." 3 Comp. Laws 1915, § 11983.

Plaintiff meets this defense by the assertion that the statute does not apply when the property about which the representations were made belonged to the one making the representations, nor when the party making the representations profits by the transaction.

Defendant does not seriously dispute this, but he insists that there is no competent proof that he was the owner of the bonds; neither is there any proof that he profited by the transaction, but on the other hand there is positive proof that he did not own the bonds and that he did not profit by the sale of the bonds; and it is argued that, with these representa-

tions eliminated by the statute, there is nothing left of plaintiff's case.

We think it is clear that if defendant were the owner of the bonds or profited by the transaction, the statute does not apply. In construing this statute, Mr. Justice CAMPBELL said:

"The legal provision concerning the necessity of representations in writing to sustain an action upon favorable assurances concerning the character, conduct, ability, trade or dealings of another person, was intended to reach cases where the plaintiff has dealt with and given credit to the person favorably mentioned, and done so on the faith of the assurances. That statute cannot apply to conspiracies or frauds, where the representation is made to enable the party making it to profit by it." *Hess* v. *Culver*, 77 Mich. 598 (6 L. R. A. 498, 18 Am. St. Rep. 421).

And this construction was later approved in the case of *Massey* v. *Luce*, 158 Mich. 133. The material questions, therefore, to be determined are:

(*a*) Was the question of defendant's ownership of the bonds one for the jury?

(*b*) Does the record show that defendant profited by the transaction?

a. Was defendant's ownership of the bonds an issue for the jury? The plaintiff testified that defendant represented that he was the owner of the bonds, and that he delivered them to him. Mr. Sibley's testimony tends to corroborate plaintiff's testimony in this respect. Defendant denied that he owned the bonds and denied that he so represented to plaintiff. He claims plaintiff signed an order, addressed to Child, Hulswit & Company, for the bonds, and claims that he read it to plaintiff in Sibley's presence. Both Burleson and Sibley deny this, and plaintiff denies that he signed the order. The question as to whether the signature to the order was the genuine signature of the doctor

was much controverted. Several business people and experts gave it as their opinion that it was the genuine signature of the doctor. One expert thought it was not. The twelve jurors who examined it concluded it was not the doctor's signature, and they answered a special question propounded by defendant that it was not the doctor's signature.

While the testimony of defendant as to his ownership of the bonds and as to the signature of the doctor is quite convincing, we do not feel that it is within the province of this court to say that the positive testimony of Dr. Burleson, the corroborating evidence of Mr. Sibley, the opinion of Mr. Patterson, the expert, and the ocular inspection by twelve jurors in connection with the other testimony in the case did not make an issue of fact. We are of the opinion that the trial court was in error in holding that as between the parties there was no proof to go to the jury on the question of defendant's ownership of the bonds.

b. We are also of the opinion that, under the uncontradicted testimony, the defendant did profit by the transaction to such an extent that the provisions of the statute do not apply. When the defendant made the sale to plaintiff he was not only a stockholder of Child, Hulswit & Company, but had an arrangement with that company to become its treasurer and director and take charge of the sale of irrigation bonds, and within 10 days after the sale he was elected director and treasurer of the company, with an advance of salary over what he was receiving as cashier of $1,600, and on May 1st he assumed these duties. When the sale was made he had already resigned his position in the bank. On April 8th he and Mr. Child had just returned from a trip to Denver to inspect the irrigation projects in that vicinity which had issued, or was about to issue, bonds. On this trip defendant was the guest of, and his expenses were paid by, Trowbridge

& Niver, Chicago brokers, who were handling these irrigation issues. The following excerpts taken from the testimony of defendant Blair tend to show his interest in his future employer:

"When I went to Denver I knew I was going to quit the bank, and I knew at that time that I was going with Child, Hulswit & Company, and so at the invitation of Trowbridge & Niver, I went west and took Mr. Child with me. That was the last week in March, 1909, and I was going to engage in the sale of irrigation bonds if the project looked good to me. I was going for the purpose of making a personal investigation of the Denver-Greeley projects and the other two projects for Child, Hulswit & Company. I was going to be the active man in charge, I was going to be the bond man. I wanted to go out there and satisfy myself that all was well. * * * The reason they took us out there was to close the deal with us so we would take on the sale of the bonds. That was the understanding. * * *

"*Q.* Witness, you have said on direct examination, didn't you, that you went out there for the purpose of preparing yourself on the sale of these bonds?

"*A.* That, and to see whether I wanted to enter into it as Trowbridge & Niver had suggested our doing. After resigning from the bank I had an understanding with Child, Hulswit & Company that I was to go out west. Then it was all arranged before I went west except the formal meeting electing me director and treasurer."

Mr. Child, of Child, Hulswit & Company, referring to the $4,000 of bonds sold to plaintiff, testified, upon cross-examination, as follows:

"*Q.* Do you recall personally of this order coming in there on the 7th of April?

"*A.* Yes, I do.

"*Q.* It was quite a shock to you to get an order like that unsolicited.

"*A.* It was not a shock.

"*Q.* A surprise?

"*A.* No, it was a pleasant thing to have come in,

because it was one of the first sales, a sale of any amount of irrigation bonds, and naturally I noticed it.

"*Q.* You learned a little later on—in fact you learned from a letter—that it did come through the instrumentality of Hugh Blair?

"*A.* Yes, sir. I saw the City Trust & Saving Bank on there and I saw it was his handwriting. Prior to that time Hugh Blair and I had been out west to look over the irrigation projects. That was about the latter part of March, 1909. At that time we were contemplating taking on the sale of irrigation bonds in addition to other bonds. We were contemplating putting Hugh Blair in charge of that field.

"*Q.* You were a little bit pleased to know Hugh Blair on this day had sold the highest amount of irrigation bonds that had ever been sold by your firm?

"*A.* Yes; I was pleased to get the order, naturally.

"*Q.* You were so pleased that you made considerable commission out of it?

"*A.* I do not see that that has anything particular to do with the pleasure.

"*Q.* You were in the business for the money you made?

"*A.* Yes, we were, surely. The profit on the sale of $4,000 of bonds, that profit would not be sufficient to give any great amount of pleasure. The fact, as stated before, we were expecting Mr. Blair was coming with us, this was an indication to me—that—

"*Q.* He would make good?

"*A.* Yes, and possibly this, that he knew people who could buy bonds. * * *

"*Q.* During that month, when he was still in the bank, whenever he would send you any of these customers he did it purely out of personal motives, I suppose, because he was a friend of yours?

"*A.* Sure, because he was planning then to come with us, and he wanted to do anything he could to develop the business, naturally. I think he was elected director and officer of our association about the 17th of April, 1909.

"*Q.* Prior to that time you had concluded by reason of the fact that you elected him to this position to handle your bonds, you had concluded that he had demonstrated his ability to make good, hadn't you?

"*A.* Well, I would not exactly say that. We felt he could make good, but I think it would be rather a difficult thing for a man in making a few sales of bonds to demonstrate that he could make good."

Later, on direct-examination, the witness testified:

"When I replied to Mr. Herman, that I felt, when Mr. Blair came with our company he could make good, I meant by that, that he would be able to sell and negotiate the sale of securities in such amounts as would make it worth while to have him associated with our association, that is, that he would develop ability in that regard and command the confidence of the community."

Occupying the position that Mr. Blair did during this transaction, can it be said that he did not profit by the sale of the bonds, which netted a commission of $240 to Child, Hulswit & Company, because that company did not hand him a check for two per cent., or some other reasonable amount, as commission? Does anyone believe that Mr. Blair would have sold these, and other bonds, netting the company a commission of $1,334 without compensation, if there had been no arrangement for him to ally himself with that company in less than 30 days thereafter? Men who work for a living are not ordinarily as liberal as that. It is not unusual for men to grow liberal when they have some ulterior purpose to serve. Blair was reaching for a position and for an advance in salary, which had not yet been fixed. He was trying to convince Child, Hulswit & Company that he was the man they were after, that he could make good, and instead of accepting the check for his proportion of the commission of the sales he waived it in order to secure something of more importance. During the days when these sales were made Mr. Blair manifested the same interest in Child, Hulswit & Company that he did afterward when he became a part of it. He admits that he did the same work afterwards as before. He

demonstrated his fitness for the position and succeeded in getting what he was after.

It is also worthy of comment that plaintiff did not seek defendant and solicit information concerning the credit and ability, etc., of the Laramie irrigation district, as is usually the case when this statute is invoked, but Blair sought plaintiff, knowing he had money on deposit in the trust company. He tried to reach him through Mr. Sibley. Failing in this, he communicated directly with him. After he reached him, he deliberately advised him to withdraw deposits from the bank he, himself, was paid to serve and invest it in bonds from which Child, Hulswit & Company, his future employer, would reap a commission of $240. This evinces his eagerness to please Child, Hulswit & Company, and to demonstrate his fitness for the position he was about to fill. In this he succeeded, and in his success he found his compensation. By refusing to make a direct charge for services which are ordinarily compensated, for the purpose of capitalizing it in another direction, he cannot be heard to say that he received no profit from the transaction.

The judgment for defendant must be vacated and judgment entered for plaintiff on the verdict of the jury.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

ON MOTION FOR REHEARING.

On denial of a motion for rehearing, the order was modified to remand with directions to enter judgment on the verdict with leave to renew motion for new trial if desired.

BARNHARDT *v.* HAMEL.

1. FRAUD — EXCHANGE OF PROPERTY — FALSE REPRESENTATIONS — REMEDIES.

   Where plaintiff is defrauded in an exchange of land he may disaffirm the contract, tender reconveyance and demand reconveyance or refund of what he parted with, and, if refused, bring suit to recover the same, or he may affirm the contract, retain what he received thereunder, and bring an action for fraud to recover his damages.

2. SAME—MEASURE OF DAMAGES.

   In the latter case his measure of damages would be the difference between what the value would have been if the representations had been true and the actual value of what he received.

3. SAME—CONDONATION—SETTLEMENT—DEFENSES.

   The acceptance by defendant of a note from plaintiff for the amount of undisclosed additional incumbrance upon land received by defendant in the exchange, not discovered until some time after the transaction had been completed, *held*, to amount to condonation of the misrepresentation, and not a bar to an action for fraud brought by plaintiff.

4. SAME—ABILITY TO FULFILL CONTRACT—DEFENSES.

   Plaintiff's inability to fulfill his future obligations under his contract to purchase a farm from defendant, as part of the transaction, is not to be determined as a matter of law, where the contract recited that the balance is "payable in five years," and he is not shown to be in default, although he had paid nothing on the contract since it was executed, and had moved off the premises in question.

5. SAME—INSPECTION OF LAND—MISREPRESENTATIONS—ESTOPPEL.

   The fact that plaintiff visited the farm with defendant's agent at a time of year when crops were not growing, and looked it over would not preclude him, as a matter of law, from making proof of material, fraudulent representations as to facts not then discovered by, or reasonably apparent to, him, such as the exhausted condition

of the soil, possibility of drainage, or that the land had a clay subsoil.

6. SAME — MISREPRESENTATIONS — WHETHER DISCOVERABLE NOT A QUESTION OF LAW.

Whether the truth of said claimed representations of facts was apparent or discoverable by him under the circumstances is not a question of law.

7. SAME—EVIDENCE—PLEADING—VARIANCE—PREJUDICIAL ERROR.

Permitting witness to answer in the affirmative a leading question as to whether the farm in question was more susceptible to frosts than other farms in that vicinity, although no claim of this nature was made in the declaration, in view of testimony that in the "year of the big frost" there was a frost which was quite general in that part of the State, *held*, prejudicial.

8. SAME—TRIAL—EXCITING SYMPATHY OF JURY—CURING ERROR.

Where plaintiff's real claim of fraud related to the soil, and not the elements, but throughout the trial by evidence, argument, and ruling of the court the misfortunes and distress which befell plaintiff and his family by reason of failure of crops partly due to frost one season, and to unusually hot, dry weather another, was emphasized, *held*, prejudicial, although the court instructed the jury not to let their sympathy influence their verdict.

9. SAME—DILIGENCE IN DISCOVERING—STATUTE OF LIMITATIONS.

In an action for damages for fraud in an exchange of land, no special diligence is required to discover the fraud or in bringing such action after discovery short of the statute of limitations.

Error to Manistee; Withey, J. Submitted February 4, 1919. (Docket No. 84.) Decided October 6, 1919.

Assumpsit by Elizabeth Barnhardt and another against Adolph Hamel and Adolph Kann, copartners as Hamel, Kann & Company, for fraud and deceit in the exchange of real property. Judgment for plaintiffs. Defendants bring error. Reversed.

Smurthwaite & Campbell, for appellants.

Harry F. Hittle (*Max E. Neal*, of counsel), for appellees.

STEERE, J. Plaintiffs recovered a verdict and judgment for $2,400 against defendants as damages for fraud claimed to have been practiced upon them by the latter in a land deal negotiated in April, 1914. At that time defendants were and had been for some years in the business of selling farm lands in the vicinity of Manistee and adjoining counties, with their headquarters and office in Manistee, Michigan.

Plaintiffs, who are husband and wife, then owned and resided upon a small farm of 19¾ acres in Allen county, Indiana, located about 9 miles southwest of Fort Wayne, which they valued at $3,500. Defendants owned and had for sale a farm of 120 acres, called the "Strine Farm," located in Arcadia township, Manistee county, Michigan, on which they put a price of $6,000, or $50 per acre. The parties were brought together through the activities of one John W. Long, of Monroeville, Indiana, whose business was "real estate and law," who had known both contracting parties for some time and was experienced in selling Michigan farms, as he testified. Although some question is raised by defendants as to the scope of his agency, it is undisputed that he initiated negotiations and closed a contract between these parties by authority of defendants, from whom he received a commission and for whom he testified he had sold several farms since then—had been in their office he supposed 40 times.

The transaction involved an exchange of the two properties on a basis of $3,500 for plaintiffs' 19¾ acres in Indiana, and $6,000 for defendants' Strine farm in Michigan, plaintiffs to deed their land to defendants subject to a $1,500 mortgage and defendants to eventually deed the Strine farm to plaintiffs who were to give a mortgage back on it for $4,000 as balance of the purchase price. The contract was closed at Barnhardt's home in Indiana where Long, who drew the initial papers, went for that purpose after

Barnhardt had been to Michigan with Long on the latter's solicitation to look at Michigan lands and had seen the Strine farm. The initial paper drawn by Long was a land contract from "A. Kann & Co." to plaintiffs agreeing to sell and convey them the Strine farm (giving legal description) for $6,000, payable $2,000 cash and $4,000 within five years from March 1, 1915, with interest at 6% from date, the instrument being dated April 20, 1914. Growing crops on the premises were reserved, possession was to be given March 1, 1915, and "deed to be made and abstract delivered at Monroeville, R. No. 4, on or before October 1st, 1914." This instrument in duplicate was signed first in order by plaintiffs, followed by "A. Kann & Co., per Jno. W. Long." On it was indorsed a receipt for $2,000, dated April 20, 1914, signed "A. Kann & Co. per Jno. W. Long." Long also drew up a short form deed from plaintiffs to defendant Adolph Kann containing what was supposed to be (but was not) a description of plaintiffs' Indiana land for one dollar and other valuable considerations, dated April 30, 1914, which defendants executed, acknowledged before and delivered to him.

In the spring of 1915 Barnhardt moved with his family, consisting of a wife and 10 children, to Michigan and settled upon the Strine farm which he proceeded to cultivate. Up to that time the details of the business had been attended to by Long who both drew up the papers and as agent signed what purported to be defendants' firm name where it was required. But, as Kann testified he authorized Long to close the deal and it was subsequently ratified by defendants, they are not in a position to question his agency beyond, at most, their denial of his authority to make certain charged untruthful representations upon which plaintiffs claim to have relied.

About 80 acres of the Strine farm had long been

cleared and under cultivation. It was an old place with fairly good farm buildings and other improvements, including an orchard of four acres. Barnhardt looked over the buildings and improvements when he visited the place in April, 1914, and no complaint is made of any fraud or misrepresentation as to them. The improved portion was sandy soil which had been farmed for many years and, as claimed, to exhaustion. A neighbor named Bradford testified that he had known the farm for over 40 years, that it was "old land and to be productive in that community it must be fertilized." The back 40 was unimproved swamp land. Barnhardt accompanied Long to Michigan to look at farms and was taken by him to look at this and other places in an automobile, in company with a driver Kann furnished, at a time when no crops were growing. They were at this farm about an hour during which time he looked through the buildings and improvements generally and walked across some of the cultivated land which he was assured was sandy loam with a clay sub-soil. On returning to Manistee he and Long went to Kann's office and talked of the matter. Two other farms were also under consideration but this one had impressed him more favorably because of its larger acreage. He testified that Kann asserted it was a very good farm, raised good crops of all kinds, such as corn, wheat, oats, potatoes and a lot of hay, being all good farming land; that after his return to Indiana Long visited their home and repeated these assurances, with various other laudatory statements as to the place and surrounding conditions, to him and his wife. While many things are charged in plaintiffs' declaration the substantial false and fraudulent representations claimed to have been made by Kann and Long by which they were induced to enter into the agreement related to the nature and fertility of the soil and that the marsh could be re-

claimed and made good farming land, also the market value of such land in that part of Michigan.

After moving his family and personal effects to Michigan in April, 1915, Barnhardt was in somewhat straitened circumstances and borrowed some money from Kann. He proceeded energetically to work the farm with the assistance of his oldest son, who was 14 years of age. With such facilities as he had he planted and cultivated quite an acreage of various crops, including 28 acres of corn, 14 acres of beans and 6 acres of potatoes.

Some time before July, Kann discovered that the deed from plaintiffs to him of the Indiana place contained a wrong description and went out to their farm where he had them execute another deed, dated July 7, 1915, which properly described the property. He was there but a few minutes and explained the necessity of their signing a deed to correct the description, which they did without protest although Barnhardt then told him the starting crops did not look very good. However they might otherwise have turned out, a killing frost during the summer practically destroyed the crops, that being what witness spoke of as "the year of the big frost" which was quite general in that section of Michigan. Soon after finding the error in the deed Kann also discovered unpaid back interest on the $1,500 mortgage plaintiffs left on the Indiana land and that there was in addition a second mortgage for $300 on the land which he had to pay. When confronted with these discrepancies Barnhardt gave Kann a note, dated July 25, 1915, for $351.89 due December 1, 1916, which was never paid. He also later in the season acknowledged liability for some delinquent taxes against the Indiana land.

The second season (1916) he again planted and cultivated the farm, but the crops were poor and it produced but little. He admitted the weather was hot

and dry during that summer and it was a poor year for farming. Finding, as he testified, that he was unable to support his family by what he could raise on the farm, and having discovered by experience the misrepresentations and fraud imposed upon him by defendants as to the nature and value of the farm, he moved with his family to the nearby village of Arcadia and found employment in a furniture factory, after which he began this action to recover damages for the fraud and deceit practiced upon him.

Plaintiffs introduced testimony to the effect that the tillable portion of this farm was light, sandy soil, with no clay sub-soil, and was run down, worn out, old land which had been improperly worked without fertilization and cropped to exhaustion; that a fair market value of that portion of the place in its then worn out condition did not exceed $20 per acre, and about 30 acres of the back, uncleared 40 acres was worthless marsh, so wet, soft and boggy that stock could not even go upon it to pasture and so low that drainage was impossible; while defendants in person or by their agent Long had represented and asserted the market value of the 120 acres to be fully $50 per acre and cheap at that price, the cultivated portion being good, fertile sandy loam with clay sub-soil which raised good crops, and the marshy, unimproved portion being good farming land which could be cleared, drained and farmed successfully. Defendants denied misrepresenting the place or conditions in any particular, insisted that they answered his questions about it truthfully, did not represent it was underlaid by a clay sub-soil, or that the marsh was susceptible of perfect drainage, contended that Barnhardt having examined the property and seen the nature of the soil and marsh to his own satisfaction was estopped from claiming he was misled; introduced testimony tending to show that the cultivated land was of average quality and fertility

in that locality and the market value of improved farms in that vicinity was from $40 to $50 per acre. The highest appraisal by a disinterested witness which we find put upon this farm in its then condition is, however, $40 per acre for the cultivated portion.

Barnhardt had made no payment on the Strine farm beyond the $2,000 credited on his contract for the mortgaged 19¾ acres in Indiana, and it was conceded that in addition he owed Kann for the unpaid note above mentioned and other unsecured indebtedness, for seed furnished, back taxes on the Indiana land, etc., $599.98. This the trial court instructed the jury should be deducted from any damages they might find plaintiffs had suffered because of the claimed fraud, or if they found plaintiffs not entitled to recover the verdict should be for defendants in that amount under their claim of recoupment, and stated the measure of damages applicable to plaintiffs' claim would be the difference between what the property would have been worth if defendants' representations, as claimed, were true and what it was actually worth.

While conceding the general rule, defendants' counsel contend that its application would be unjust and inequitable under the facts in this case, where plaintiffs themselves falsely stated the incumbrance upon their Indiana property and only had at best about $1,400 interest in the Strine farm upon which they made no further payments and abandoned it at the end of the second season; and in any event the jury should have been instructed that plaintiffs having failed to remain and, on their part, abandoned the farm and contract, recovery could not exceed their actual interest in the land.

No requests were tendered to the court upon the question of damages by defendant. This is an action at law for a claimed fraud perpetrated upon plaintiffs with no claim of rescission or tender back of the prop-

erty. They could have either disaffirmed the contract, tendered reconveyance with demand for refund, or reconveyance of the Indiana property, and, if refused, brought suit to recover the same or affirm the contract and, retaining that which they acquired under the same, bring an action for fraud to recover as damages the difference between the value of what they would have received if the representations were true and the value of what they actually received. *Smith* v. *Realty Co.*, 175 Mich. 600. They saw fit to adopt the latter remedy and affirm the contract. Their misrepresentation as to the amount of incumbrance on their Indiana land was condoned and settled shortly after they moved upon the farm, before they had on their part learned of the fraud they now complain of, as they claim, and it cannot now be urged by defendants as a bar to this action. Neither is plaintiffs' inability to fulfill their future obligations under their contract for purchase of the Strine farm to be determined as a matter of law. Whatever their indebtedness or delinquencies may otherwise be, they are not shown to have been, when this action was brought, in default on their contract to purchase the farm signed by them at their home in Indiana, drawn up and signed by Long for defendants, which they subsequently ratified, accepted the benefits therefrom and have since retained. It recites that "This contract contains all the agreements between the parties hereto," acknowledges payment of $2,000 down, and makes the deferred payment of $4,000 "payable in five years from March 1, 1915, at 6% interest from date."

The circumstance that plaintiff, chaperoned by Long, went to and spent an hour on the farm looking it over at the time of year shown would not preclude him as a matter of law from making proof of material, fraudulent representations as to facts not then discovered by or reasonably apparent to him, such as the

exhausted condition of the soil, possibility of draining the swamp, or that the land had a clay sub-soil. Whether the truth of these claimed representations of facts was apparent or discoverable by him under the circumstances was not a question of law. *Jackson* v. *Armstrong,* 50 Mich. 68.

In the re-examination of a willing witness for plaintiff named Rowan he was asked, "Is this farm of Mr. Barnhardt's subject to frost?" to which defendants' counsel objected as immaterial and because no charge of that kind was declared upon by plaintiff, whose counsel said in reply that it was brought up on cross-examination, to which the court said:

"No; that is not all there is about it. The plaintiffs' claim is, the defendant represented it good for farming purposes, for crops generally, and if the locality and this land in particular is subject to frosts and to freezing that is pertinent and should be inquired into. The objection is overruled. It goes to the very gist of the action—whether it is good for farming purposes or not."

The witness was then permitted to answer the leading question if it was more susceptible to frosts than other farms in that vicinity, and said the rear of it was, where near the swamp, the same as land he was working, but the balance as a rule was not. As no claim of this nature is made in plaintiffs' declaration, nor covered by any of the representations claimed to have been fraudulently made by defendants, the argumentative ruling was particularly prejudicial in connection with the fact which was incidentally and inevitably disclosed in the progress of the trial that plaintiffs had lost their first crops from that cause in the "year of the big frost" which was quite general in that part of the State. Plaintiffs' real claim of fraud related to the soil, not the elements; but, carried through the trial by evidence, argument and ruling of

the court, is emphasized the misfortunes and distress which befell plaintiffs and their children by reason of the failure of their crops during those two years, concededly due, in part at least, to the year of the big frost, followed by an unusually hot, dry season. On this subject the court told the jury they had a right to have "all the sympathy that is commensurate with the situation for an unfortunate in any and every case," which should not, however, influence their finding, and further said in part:

"You cannot help sympathizing with Mr. and Mrs. Barnhardt and the family; may be you sympathize with Mr. Kann in his troubles, but you must not let that influence your verdict,—not one particle."

Barnhardt was permitted to testify that he was unable to earn a living from the place for his family and members of it were obliged to work elsewhere to that end, and his wife after testifying in general to the same effect was permitted against objection to testify as to their numerous family, that their friends and neighbors contributed to their support and gave them clothes for the children, because they did not have enough and needed them. When counsel for plaintiff had apparently exhausted the subject and said, "I think that is all," the court suggested:

"Why don't you find out why she didn't buy herself clothes and clothing for the family?"

Counsel then renewed the subject, asking:

"Q. Why didn't your husband and yourself buy them clothes?"

Objection to which was overruled and the witness answered:

"He didn't raise enough on the farm to buy the clothes we needed, and he had to work out."

Plaintiffs' counsel cite in support of this line of inquiry *Yanelli* v. *Littlejohn*, 172 Mich. 91. In that

case there were no children whose deprivations were or could be stressed to rouse the sympathy of a jury. Commenting that some of the testimony complained of was remote and might properly have been excluded, the court went no farther than to hold:

—"that whether the plaintiff was able to live on the place, and the amount that could be produced there, were material questions, as well as the efforts made by the plaintiff and family in that direction."

The testimony in this case did not stop there but was elaborated in the distress of plaintiffs' children to a point where the court felt impelled to tell the jury that they could not help sympathizing not only with the plaintiffs in the case but with their family, and "may be" even with defendant Kann, as to whom no small children were shown to appertain. Despite this somewhat equivocal caution, we are impressed that a prejudicial tone was given to the case in the particular complained of, diverting from a fair and impartial trial of the real issues, which is reflected in the verdict.

Upon the chief grounds urged for the defense why a directed verdict should have been granted, it may be stated that under the testimony in this record we cannot accept the contention that as a matter of law plaintiffs have by any conduct following discovery of the claimed fraud waived the same, or that lack of diligence after its discovery precludes this action. The relief asked in this form of action does not involve the parties being placed *in statu quo*, but is only to recover damages for a wrong done, and no special diligence is required to discover the fraud or in bringing such action after discovery short of the statute of limitations. *Dayton* v. *Monroe*, 47 Mich. 194; *Smith* v. *McDonald*, 139 Mich. 225; *Smith* v. *Werkheiser*, 152 Mich. 177 (15 L. R. A. [N. S.] 1092); *Wegner* v. *Herkimer*, 167 Mich. 587; *Hutchinson* v. *Westbrook*, 191 Mich. 484.

For the errors above pointed out the judgment must be set aside and a new trial awarded, with costs to defendants.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

CHANDLER *v.* PRESTON.

1. TRUSTS—EXISTENCE OF RELATION OF TRUSTEE AND CESTUI QUE TRUST.

   The relation of trustee and *cestui que trust* begins with the execution of the trust agreement; during the preliminary negotiations no such relation exists.

2. SAME.

   Although prior to the execution of a trust deed and agreement the proposed trustee offered to assume said trust for a certain compensation, he had a legal right, prior to its acceptance, to withdraw said offer and submit a new one naming a larger sum, notwithstanding his action was induced by information received from an agent of the *cestui que trust* that the latter would pay more than the sum first named.

3. SAME—BREACH OF TRUST.

   The withdrawal by the proposed trustee of his first offer, and his acceptance of a counter proposal by the *cestui que trust* naming a larger amount, did not constitute a breach of trust or a fraud upon the latter.

4. SAME—BREACH OF TRUST—TERMINATION—CONDUCT OF TRUSTEE—EVIDENCE—FINDING OF COURT.

   On a bill for the removal of the trustee, for an accounting,

for the termination of the trust, and to determine the amount of compensation to be paid the trustee for services already rendered, testimony *held*, to sustain the finding of the court below that in the sales of trust property made, and the prices obtained for same, the conduct of the trustee was not open to criticism.

5. SAME—COMPENSATION OF TRUSTEE—MUTUAL MISTAKE—RESCISSION.

The fact that the sales of land during the existence of the trust did not amount to as much as contemplated, *held*, not to justify the holding of the court below that therefore the compensation of the trustee was fixed under a mutual mistake of fact and should be rescinded.

6. SAME—ACCOUNTING—CONSTRUCTION OF CONTRACT.

Where the trustee neglected to furnish the money at six per cent. to take up mortgages bearing seven per cent. when they matured, as the trust agreement provided he should do, he should be charged with the amount paid in interest in excess of six per cent. on the overdue mortgages after maturity.

7. PARTIES—INTERVENERS—STATUTES—INTEREST IN LITIGATION.

Under 3 Comp. Laws 1915, § 12362, an attorney who acted as a go-between in the procurement of a trust agreement, and who was to receive part of the compensation to be paid to the trustee for his services, had such an interest in the subject-matter of the litigation as would give him the right to intervene in a proceeding involving the right of the trustee to recover under the contract.

8. PRINCIPAL AND AGENT — DUAL CAPACITY — NOTICE — AGENT'S RIGHT TO RECOVER.

Under well established rules of law, where the principals have knowledge of the fact that an agent is acting in a dual capacity, and assent thereto, he may recover for his services from either party.

Appeal from Alpena; Emerick, J. Submitted April 30, 1919. (Docket No. 46.) Decided October 6, 1919.

Bill by Merritt Chandler and another against Thad B. Preston and another for the removal of defendant Preston as trustee, for the termination of the trust, and for an accounting. George E. Nichols intervened,

claiming an interest under a contract with defendant Preston. From the decree rendered, all parties appeal. Modified, and affirmed.

Henry & Henry (*H. E. Spalding*, of counsel), for plaintiffs.

Hawley & Eldred, for defendants.

Ellis & Ellis, for intervener.

This is a bill for the removal of a trustee. It prays also for an accounting, for the termination of the trust, and for the reconveyance of the trust property to the plaintiff Merritt Chandler. By agreement of the parties during the trial, the issues were broadened to include the determination of the amount of compensation to which the defendant Preston is entitled as trustee and the establishment of an equitable lien on the trust property therefor. Mr. Hinkley, an agent of Mr. Preston in the administration of the trust, is joined as a defendant, but the substantial issues are between Mr. Chandler and Mr. Preston. Mr. Nichols' claim as intervener is based upon a separate agreement between Mr. Preston and himself, by the terms of which he was to receive a certain portion of the compensation which the trust agreement provided for Mr. Preston. Both the plaintiffs and the defendant Preston have appealed from the decree of the circuit judge made after a full hearing of the controversy.

The principal facts disclosed by the evidence are as follows. In the year 1912, the plaintiff, Merritt Chandler, who resides at Onaway, Presque Isle county, was the owner of large holdings of timber lands and other lands in Presque Isle and Cheboygan counties, also a large farm near Onaway, and a store and other property in that city. From time to time prior thereto, however, he had been borrowing money in

considerable amounts, some of it at a high rate of interest, and had also allowed other indebtedness to accumulate against him, with the result that, for some years prior to 1912, the interest on his obligations, the taxes on his lands, and other necessary expenses, had exceeded to a considerable extent the entire income he was able to realize from all sources at his command. His situation had been growing steadily worse until he had reached a point where he was refused further loans and further extensions of those which were maturing; his creditors were pressing him, some of them had taken judgments against him, and others were threatening bankruptcy proceedings. In this emergency he began a search for some person or corporation whom he might induce to take over his property in trust, to advance sufficient money to meet his more urgent indebtedness, and to inspire confidence in his remaining creditors so that they might further extend credit, until sufficient of his property could be disposed of to liquidate his entire indebtedness or reduce it to a point where his remaining possessions could be profitably held. His first efforts in this direction failed, but while he and his attorney, Mr. DeVere Hall, were returning from an unsuccessful trip to Grand Rapids and Chicago on this errand, they chanced to meet on the train Mr. George E. Nichols, an attorney, of Ionia, to whom they explained the purpose of their journey, with the result that he took up the matter with the defendant, Mr. Thad B. Preston, a business man of Ionia, of large means and wide and diversified business interests, and secured a proposition from him which, on Augut 2, 1912, culminated in a trust arrangement, the details of which were as follows:

(*a*) Mr. Chandler (his wife joining) executed to Mr. Preston a trust deed of all his real estate, comprising some 30,000 acres;

(*b*) Mr. Chandler also executed a bill of sale to Mr. Preston of all his personal property, except household goods and wearing apparel;

(*c*) A trust agreement was entered into between Mr. Chandler and Mr. Preston, which, after certain preliminary recitals, contained the following provisions:

"It is mutually agreed between the parties hereto as follows:

"1st. That under and by virtue of the terms of said deed and bill of sale, the second party shall have full power and authority to sell and dispose of any and all of the property, if necessary, of the first party, as trustee, with reasonable dispatch consistent with fair valuations, for the purpose of liquidating the debts, obligations and liabilities, as hereinbefore stated, but it is understood that no sale shall be made by the second party, as trustee, without first consulting the first party in regard thereto.

"2d. That after the payment, adjustment or satisfaction of the debts, liabilities and obligations of the first party and the entire expenses of the trust and any other expenses of executing, carrying out said trust, which expenses shall include those necessary expenses incurred by the trustee, attorney fees, taxes, repairs, improvements, labor, material and other matters or things required to successfully and properly handle and control the business and derive, so far as possible, a revenue therefrom, such property as remains on hand, or in the name of the trustee, shall thereupon be reconveyed to the said first party, or his representatives or assigns, provided, however, that by mutual arrangement in writing between said parties hereto, said trust may be closed before the payment of all the obligations, debts and liabilities of the first party.

"3d. Said second party shall have five years from the date of this instrument to complete and carry out the terms and conditions of said trust if necessary, but in case the said second party is able to close and complete said trust, or if it is so mutually agreed in writing between the parties hereto, the property con-

veyed by said deed and bill of sale may be reconveyed at any time that the parties hereto shall so mutually agree, but in no case as long as any creditors of the first party interested in this trust shall object thereto.

"4th. The second party is to furnish such sums of money as may be required to pay any and all of the obligations, debts and liabilities of the first party, together with the interest thereon as the same may fall due, or as the creditors of said first party may rightfully demand payment, and for all such sums advanced the second party is to be paid from out of the assets of said estate six per cent. annual interest while such money so advanced remains in use, and the first party is to execute and deliver his notes payable from time to time bearing six per cent. interest and secured by said trust to the second party for such moneys so advanced.

"5th. Upon the delivery of said trust deed and bill of sale and this instrument, the second party is to have the full management, control and possession of said property in every way with the right to dispose of the same as he may think best, and to that end the second party is authorized to employ some competent person at an annual salary not exceeding twenty-five hundred ($2,500) dollars a year who shall take active charge of said property and business and who shall consult with first party from time to time in relation to the management and disposition of said estate, and in case of the failure of the first party and said person so in charge of said property to agree upon the disposition and management or control of said estate, or any other matter of dispute, the same shall be referred to and finally determined by second party, whose determination shall be final on all matters.

"6th. The second party expressly agrees not to permit any property belonging to said estate, or conveyed under said trust instruments, to be sold under any execution or mortgage foreclosure sale for any of the debts, obligations or liabilities of the first party herein mentioned, without the consent of said first party in writing and any violation of this provision shall be deemed a sufficient ground to declare the trust ended, and upon paying to the second party the amount of money that he, at the time of such declaration, has

actually advanced, with interest at six per cent. thereon, he shall reconvey all the property held under said trust and surrender the notes given in connection with said trust as compensation for the services of said second party; provided, however, that second party shall have notice of such execution or foreclosure sale for a sufficient time prior thereto to permit him to pay the same and protect the property from the sale.

"7th. The second party is to pay all taxes upon said property when due and to fully protect the property from being sacrificed in every way, so far as possible, consistent with good management, and manage, operate and control the same in the first party's interests to the end that after paying his debts, obligations and liabilities, and the compensation to said trustee and the other expenses of said trust, that as much of the property shall be returned to first party as is possible under all the circumstances.

"8th. The second party, as such trustee, agrees to pay to the first party two hundred ($200) a month for his services in assisting in the carrying out of the business in connection with said trust, looking after and disposing of the property, which said amount shall be charged to expenses and, if advanced by the second party, he shall be entitled to interest thereon from the time of such advancement until repayment, and it is expressly understood that such employment of the first party by the second party shall and in no way will impair or limit the authority of the second party as trustee as hereinbefore provided.

"9th. At the time of the delivery of this instrument and said trust deed and bill of sale, or as soon thereafter as reasonable and convenient, the second party, as trustee, shall make a complete inventory of all the property and assets, real and personal, coming into his hands and under his control, and shall deliver a copy thereof to the first party, which inventory shall consist simply of a sufficient description of the property, without valuations attached thereto.

"10th. The second party shall keep books showing a full and complete statement of the entire trust matters, showing the time when and the amount of all moneys advanced and for what purpose, the amount of disbursements and for what purpose, and the

amount of receipts and from what sources, and shall furnish the first party with a statement of the affairs of said trust every ninety (90) days, or oftener, if requested, in writing, and the first party shall have access to such books at any and all reasonable times.

"11th. The first party, at the date of this instrument, shall deliver to the second party his notes payable on or before five (5) years from date for the sum of twenty-five thousand ($25,000) dollars, bearing six per cent (6%) interest in such amounts as the second party may desire, and which notes are given as compensation for second party's services as trustee, and in the management and control of said property, and shall be secured by the said trust and shall be paid before the first party can require the reconveyance of said property, or any part thereof, except as hereinbefore stated, and said second party, as such trustee, shall thereupon be paid no further sum for such services.

"12th. It is understood, however, that in the management of the estate, if occasion arises when the first party shall be able to negotiate the sale of any pieces or parcels of property belonging to said estate advantageously, that he reserves the right to make such sale at prices not less than the inventory valuations as prepared by one E. J. James and dated June 1st, 1912, a copy of which is in the hands of said trustee, turning the money over to the possession of the said trustee at once, and in case the proposed sale of the property is at an amount less than the inventory valuation, then said sale shall only take place upon the second party's approval, or the approval of his representative.

"13th. It is the intention and purpose of this trust that the first party shall place in the hands of the second party as trustee his entire property, to the end that the second party shall pay off all of his liabilities, debts and obligations, but in doing so the second party may sell and dispose of any part or portion of said property, real or personal; that he may encumber the same for the purpose of gaining extensions of time on any obligation; that he may exercise his best judgment as to the best manner and means of achieving the end desired, to wit, the relief of the first

party from his present embarrassed condition and turning back to him his property, or so much thereof as shall remain on hand, either free from all obligations and encumbrances, or in such a condition that he shall be able to manage and control the same without the aid and assistance of the second party.

"14th. To that end and for that purpose the second party has accepted said trust and agrees with the first party that he will faithfully and honestly and without unnecessary delay, carry out and execute the terms and conditions of this trust in every respect and particular, and, so far as possible, with the consent, approval and approbation of the first party in all things.

"15th. It is expressly understood that the party of the second part in no wise obligates himself personally to pay any of the debts, obligations or liabilities of the first party beyond the terms and conditions of this trust."

The inventory referred to in paragraph 12th of the above agreement as having been made by Mr. E. J. James (who, it appears, was assisted therein by one Jesse Morrill) included 46,632 acres of land, outside of the city property and the so-called "Home farm" or "Allis lands." It also included the personal property then owned by Mr. Chandler. The "Home farm," of 927.37 acres, was shown separately, the land being valued at $18,073.70 and the buildings at $19,175.00, total $37,248.70. The aggregate value of Mr. Chandler's property, as shown by this inventory, was $340,603.91.

Immediately upon assuming the trust, Mr. Preston, pursuant to the provisions of paragraph 5th of the agreement, sent Mr. Alexander Robertson to Onaway as his representative. Mr. Robertson at once prepared an inventory of the trust property, the values therein being fixed largely by Mr. Jesse Morrill, who had assisted in the preparation of the "James inventory." The "Roberton inventory" included 41,097 acres of land, outside of the "Home farm" and the city prop-

erty, which were shown separately. The personal property was also included. Though less property was shown by this inventory than by the "James inventory," the total valuation exceeded that of the James inventory by some $84,000, being in exact figures $425,337.72.

Of the farm lands, some 1,170 acres were cleared, at least partially, though only about 400 acres had been fully cleared so as to be fit for profitable cultivation. The remainder had not been stumped, and much of it had grown up to shrubs and underbrush. A considerable portion of plaintiff's land was timbered. Upon it were two valuable water powers.

In the "James inventory," Mr. Chandler's liabilities were stated to be $160,304.71 absolute, and $2,150 contingent; in the "Robertson inventory" $114,119.70 absolute, and $1,957.19 contingent; in the recitals of the trust agreement it was estimated at $118,000; the plaintiffs now claim it was only about $113,000, while defendant computes the actual indebtedness at the date of the trust agreement as about $125,000, aside from the $25,000 in notes given to the defendant for his compensation pursuant to the terms of paragraph 11th of the agreement, and in support of these figures he sets up in his brief a large number of items paid by him, as trustee, of indebtedness incurred prior to the trust, which were not included in Mr. Chandler's estimate. About $78,000 of the indebtedness was secured by mortgages on portions of plaintiff's lands.

Mr. Chandler was 68 years of age when this trust arrangement was made. He had then held most of his lands some 25 or 30 years. He had had a long experience in dealing in lands, had done considerable lumbering, and had developed and carried on the farm referred to. It appears, however, that he was over sanguine, lacked financial judgment, and had exaggerated ideas of the value of his holdings. His farm was

well provided with tools and farming implements, well stocked with cattle, and produced large quantities of hay. The testimony was conflicting as to whether it was operated at a profit or a loss. It seems to be conceded that his store at Onaway was losing money. At the commencement of the trust, the annual interest charged against Mr. Chandler was approximately $9,000, and the annual expense for taxes about $7,000. There was also the expense of insurance upon the farm buildings, dwelling houses and the store block. The trust arrangement added an expense of $2,500 a year for a manager, and required the payment of $200 per month to Mr. Chandler.

Mr. Preston at once began to advertise for sale the lands embraced in the trust. These advertisements were inserted in newspapers, agricultural journals and magazines, both in English and in foreign languages, not only in Michigan, but in other States, in order to interest prospective purchasers or real estate agents who might assist in disposing of the lands. He also directly interested a number of real estate agencies in making efforts to effect sales. From the outset there was a disagreement between Mr. Chandler and Mr. Preston in regard to the values of the lands and the prices at which they should be sold, and it is the claim of Mr. Preston that Mr. Chandler's attitude greatly hindered and embarrassed him in making sales. In a letter written by Mr. Chandler to Mr. Preston on January 2, 1913, he said:

"Our difference really is in what should be considered a fair price for the land sold, and if there is a loss resulting from my plan of holding till there is some demand for the land that will make the price better, the loss will fall on me in the end."

The amount of land sold by the trustee was comparatively small. During his administration of the trust estate, the trustee received from rents, sales of

lumber and timber, sale of the store, sale of farm produce and stock, with other miscellaneous receipts, exclusive of land sales, nearly $93,000. Of the land, he sold altogether (partly in cash sales and partly on land contract) 6,459 acres, besides certain city lots, the prices obtained aggregating about $50,000. In addition, one of the water power properties was sold for $25,000. At the time this suit was instituted, the trustee held, in the form of land contracts and bonds taken in connection with the above sales, quick assets aggregating about $48,000. It appears from the evidence that, notwithstanding the sales made by the trustee, the annual interest charge and the annual expense for taxes at the time this proceeding was begun were no less than at the commencement of the trust. The total indebtedness of Mr. Chandler's estate at the time of the filing of the bill herein appears to have been about $122,000 plus the notes for $25,000 given to the trustee for compensation. More than half of this $122,000 was due to Mr. Preston for money advanced to take care of such portions of Mr. Chandler's indebtedness as had matured, and for which the creditors were pressing for payment.

Mr. Robertson remained as general manager of the trust estate until April, 1915, when he was succeeded by Mr. Algernon V. Hinkley, who was president of the Onaway State Savings Bank. He remained in charge during the balance of the trust period. Both Mr. Robertson and Mr. Hinkley appear to have been chosen with the approval, if not at the express suggestion and request, of Mr. Chandler. Mr. Preston's instructions to each of these managers were, to conduct the business economically, to get rid of all unnecessary expense, to sell all the property that could be sold at a fair price, and to obtain for Mr. Chandler full consideration for every dollar of the value of his property, to do nothing that would sacrifice in any way any of

Mr. Chandler's equities or rights, and to consult with Mr. Chandler about everything they did; in case of a difference between them, to refer the matter to Mr. Preston for his decision.

About six months before the expiration of the trust, Mr. Chandler filed the bill of complaint in this matter and obtained an injunction restraining the trustee from selling or disposing of any more real or personal property. The bill complained that the trustee was wasting the trust property, that he had sold too much of the trust estate and at too low prices, and alleged that he intended to further sacrifice the real estate and personal property of the trust estate in order to obtain money to pay the debts of plaintiff Chandler and the expenses of administering the trust. After a full hearing of the case, the circuit judge filed the following memorandum opinion:

"It seems to me, in view of the elaborate briefs from counsel, covering every possible phase of the litigation, that a concise statement of my opinion and conclusions upon the law of the case and the facts as I deem them established by the proofs, is more desirable than an extended argument in support of the same. I therefore state such opinion and conclusions as follows:

"1. Preston was not, either under the spirit or the letter of the trust contract, to devote all, or even the greater part of his personal attention to the administration of the trust.

"2. Neither was he to pay in the first instance all of the debts and so become the sole creditor of the trust estate.

"3. He sold all the property that anyone could have sold, and more than Mr. Chandler wished him to sell, at the best possible prices obtainable at the time. Mr. Robertson was a more efficient man, by reason of his experience and qualifications, to manage and push the sale of the lands and other property at home and abroad, and oversee and conduct the business at Onaway, than Mr. Preston. Mr. Preston should not have been removed for failing to sell more.

"4. He sold the little he did sell for a reasonably fair price, and should not have been removed for selling too low.

"5. Preston's failure to redeem from certain foreclosure sales worked no loss to the trust estate.

"6. No damages should be allowed against the trustee. He has administered the trust with a fair degree of industry and skill.

"7. The agreement for the compensation of the trustee at $25,000 was made upon a mutual mistake of fact. The fact was that in August, 1912, when this contract was made, and from thence hitherto, there was and has been absolutely no market, in the region where the Chandler lands were situated, for any considerable quantities of land. After extensive advertising and much publicity, mere driblets of the land could be, or were sold, but not nearly enough to pay the overhead expense of the estate. As to this existing, concrete fact both men were mistaken, although it was notorious to others. If it were not that both were mistaken as to this fact, Chandler would not have agreed to pay, and Preston would not have exacted the sum of $25,000. This mistake should annul the agreement to pay $25,000 and only allow the trustee an equitable compensation for his services—say $5,000, without interest. This may be a novel application of the doctrine that a mutual mistake as to the essential elements, or subject-matter, of a contract avoids the same, but, if sustained, it is a highly equitable one in this case. Besides, it will, perhaps, eliminate the contest between the intervening defendant, Nichols, and the defendant Preston as to the interest upon this sum of $25,000.

"Mr. Preston has an equitable lien upon the trust property as a security for the money advanced by, or earned by him under the trust contract. These sums as of August 1, 1917, have been ascertained and fixed by the report of the auditor. Any changes made by later transactions will be computed up to the settlement of the final decree. The decree will provide for a liberal, but definite, time for the payment of the amount so found to be due the trustee, and that in default of payment the property be sold as upon foreclosure."

The facts connected with the claim of Mr. Nichols, intervening defendant, are as follows: When Mr. Nichols first undertook to find someone to assume the trusteeship for Mr. Chandler, the latter agreed to pay him $500 for his services, if successful, with the understanding that he might secure such further compensation as he might be able to arrange for from the party he produced. Mr. Preston's original memorandum of the terms upon which he would accept the trust called for compensation of $25,000, without interest. Mr. Nichols returned to him with a statement of the terms Mr. Chandler would agree to, which provided for compensation of $25,000, with 6% interest. After Mr. Preston had signified his assent thereto, Mr. Nichols suggested that Mr. Preston give him half of the amount of the interest on the $25,000, viz., $3,750, for his services, to which Mr. Preston agreed, and on August 19, 1912, Mr. Preston wrote Mr. Nichols as follows:

"Yours of the 12th came just as I was leaving for the north. I have received from Merritt Chandler his notes aggregating $25,000 running five years 'on or before' with interest payable at 6%. My arrangement with you is that one-half of the interest on these notes when and as paid is to be turned over to you. If the aggregate amount of such interest paid to you on or before five years does not equal $3,750, I am to pay you, but only out of my share of the interest money I receive on said notes, an amount which with what has been paid you shall equal said sum of $3,750."

Thereafter, Mr. Nichols promised Mr. DeVere Hall to pay him the first $1,000 that was received from Mr. Preston on this account. In 1913, Mr. Preston paid himself one year's interest on these notes for $25,000, amounting to $1,500, and he paid over one-half of this, $750, to Mr. Nichols, who in turn paid it over to Mr. DeVere Hall. Sometime in 1913, Mr. Preston sold these notes to third parties to obtain

money to use in other enterprises. As trustee, he continued to pay the interest on these notes down to the time of the commencement of these proceedings, the interest being forwarded to the then holders of the notes. He paid nothing further to Mr. Nichols. Mr. Preston's first knowledge of the agreement between Mr. Nichols and Mr. Hall came in a letter written him by Mr. Nichols May 20, 1915, as follows:

"I am enclosing a letter from Ray A. Hall, who is executor of the DeVere Hall estate. Under my arrangement with Mr. Hall he was to have $1,000. I paid him the $750 out of the first interest you paid me, and there is $250 coming to the estate. He has written me two or three times about it. Is there any way the matter can be fixed up? I don't feel that I should be called upon to advance the money, and I didn't know but what the matter now was in a situation where you could pay the $750 due me last July. Anyway, if you cannot do that, kindly write me a letter as to the conditions so I may send it to Mr. Hall and satisfy him that so far as I am concerned I am doing all that can be done and not retaining any money due the estate."

In his argument on this appeal plaintiff seems to have abandoned his position that the trustee was wasting the trust property by sacrificing same to raise money to pay off the indebtedness, and now states his complaint as follows:

"Aside from the obligation to deal honestly and faithfully, which is the basis of every trust, the terms of the trust required him to pay off the indebtedness from the property and proceeds and meanwhile to furnish any funds necessary to discharge at maturity all debts and to protect the property against loss. The property did not and could not produce revenue sufficient to meet more than a fraction of the fixed charges for interest and taxes and the expense of administration. The obviously proper course, the only possible method of accomplishing the ends of the trust was to effect sales, even at a sacrifice, of enough of the prop-

erty to pay off the indebtedness or of at least reducing it to such a point that the ordinary revenues would meet fixed charges. While the trustee was not required to guarantee such results, he must have understood at the outset that success or failure depended upon his devising and carrying out a policy that would accomplish them. * * *

"Mr. Chandler was visionary and impracticable, optimistic and trusting. Mr. Preston was of a different type. He foresaw the inevitable end from the beginning. What was his duty considering the power with which he was vested and the situation as he saw it? Plainly to disregard Chandler's opinions, which he knew were wrong, and act on his own judgment, which was (notwithstanding his attempted qualification of his admission) that property should be sold until the debts were reduced to manageable proportions.

"To effect this, instead of treating every sale as a proposition by itself, referring purchasers to Chandler or delaying the sale to overcome his objections and thereby risking its loss, the obviously proper course was, at the outset of the business after a full discussion with Mr. Chandler, to determine once and for all a general schedule of prices such as the trustee's judgment should approve. *This was the trustee's capital duty and this he never did.*"

Plaintiff summarizes his grounds of appeal as follows:

"1. In the formation of the trust, Mr. Preston, having first offered to one of Mr. Chandler's attorneys to take in full compensation for his services $25,000, payable in five years at the expiration of the trust without interest, afterwards bargained with this attorney (Mr. Chandler being ignorant both of Preston's original offer to forego interest and of this bargain) for an increase of that compensation by the addition of interest, and for a division of the excess between himself and the attorney.

"2. The trustee failed at the outset to frame any proper policy for the management and sale of the trust property, failed to give the trust proper attention and management, paid unnecessary interest, failed to carry out his obligation to refund matured indebt-

edness at lower interest, all with the design of preventing a reduction of indebtedness, to the end that he himself might acquire the trust property for the amount of the liens."

KUHN, J. (*after stating the facts*). 1. The relation of trustee and *cestui que trust* between Mr. Preston and Mr. Chandler began with the execution of the trust deed and agreement. During the preliminary negotiations no such relation existed. The parties were strangers to each other, and were dealing at arm's length. Mr. Preston was under no obligation whatever to assume the trust, and the only appeal the proposition had for him was from the standpoint of a business venture. It involved some risk on his part. The essential feature of the transaction was his agreement to finance the trust estate for the period of five years, which, under adverse conditions, would require the furnishing of an indefinitely large sum of money. And this was of the utmost importance to Mr. Chandler. What the consequences to him might have been had he been unable to find anyone with both the ability and the willingness to render this assistance, it is impossible to estimate. It is clear, therefore, not only that Mr. Preston had the right in the first instance to demand such compensation as would make it worth while for him to undertake the risks and burden of this unusual trust arrangement, but also that at any time prior to the acceptance of his terms, he had the right to revoke or alter his proposition, and in doing so to increase his demand for compensation, if, upon reflection, he was dissatisfied with his first figure. Had he received an intimation from any outside source that Mr. Chandler was willing to pay a larger compensation than that suggested in Mr. Preston's proposal, Mr. Preston clearly would have had a legal right to withdraw his offer and to submit a new one naming a larger sum. The fact that his information came

through Mr. Chandler's agent does not alter the situation in point of law. Mr. Preston was still under no obligation to enter into the transaction at all. Mr. Chandler, instead of accepting Mr. Preston's offer, had made a counter-proposition embodying several new features, among others an agreement on the trustee's part to pay Mr. Chandler $200 a month during the entire five-year period. Up to the moment of acceptance, therefore, Mr. Preston was free to do as he pleased and to insist upon such terms as he pleased. The provision for the payment of interest on the $25,000 which Mr. Preston was to receive as compensation was embodied in this counter-proposition of Mr. Chandler's. There is no merit to plaintiffs' contention that Mr. Preston's acceptance of this offer was, under the circumstances, a breach of trust and a fraud upon the beneficiary.

2. After a careful reading of the testimony, we have reached the conclusion that the plaintiffs' second contention is also unfounded. We agree with the trial judge that Mr. Preston administered the trust with a fair degree of industry and skill, that he sold all the property anyone could have sold, and more than Mr. Chandler wished him to sell, and that he obtained reasonably fair prices for the property sold and the best prices obtainable at the time. Under all the circumstances of the case, we do not think he is open to criticism either for selling at too low prices, as urged in plaintiff's bill, or for not making greater sacrifice of the trust property in order to reduce the indebtedness and diminish the interest and taxes, as plaintiffs urge so strongly on this appeal. We think it also clearly appears that both Mr. Robertson and Mr. Hinkley were competent managers.

3. The trial judge was in error in holding that the agreement fixing the compensation of the trustee at $25,000 was made under a mutual mistake of fact.

The salability of land during a period of five years in the future is not an existing fact. Most purchases and sales are based upon the judgment of the parties as to future value. A mistake in judgment in that regard is no ground for the relief of either party. 1 Black on Rescission and Cancellation, § 146; *Parke* v. *City of Boston,* 175 Mass. 464 (56 N. E. 718); *Du-Bois Borough* v. *Water Works Co.,* 176 Pa. 430 (35 Atl. 248, 34 L. R. A. 92); *Taylor* v. *Ford,* 131 Cal. 440 (63 Pac. 770); *Chicago, etc., R. Co.* v. *Wilcox,* 116 Fed. 913, 54 C. C. A. 147. What we have said above as to the value of Mr. Preston's services to Mr. Chandler is pertinent in this connection also. We think the trustee was entitled to his compensation as agreed.

4. We agree with the contention of plaintiffs' counsel as to the construction of the 4th paragraph of the trust agreement, above set forth. It clearly refers to two classes of indebtedness, and by its terms Mr. Preston was to take up indebtedness of fixed maturity when it became due, and indebtedness due upon demand when demand was made. All of the mortgages upon Mr. Chandler's property matured on fixed dates. They bore interest at 7%, payable semi-annually. The holders of these mortgages, however, were willing to let them run after maturity. Mr. Preston interpreted the contract to mean that he was not obliged to take up indebtedness of any kind until the creditor insisted upon payment, and accordingly did not take up such of these mortgages as became due. The trustee should, therefore, be charged in the accounting with the further amount of $2,384.67, being the interest in excess of 6% paid on the overdue mortgages after maturity.

5. We are of the opinion that by virtue of section 11, chapter 12, of Act No. 314, Public Acts of 1915 (3 Comp. Laws 1915, § 12362), the defendant Nichols had such an interest in the subject-matter of the litigation as would give him the right to intervene, in

accordance with the holding of this court in *Weatherby* v. *Kent Circuit Judge,* 194 Mich. 46; *McMillan* v. *School District,* 200 Mich. 280; and *Detroit, etc., Loan Ass'n* v. *Oram,* 200 Mich. 485. It appears clearly that his interest in the subject-matter is of such a direct and immediate character that he will either gain or lose by the direct legal operation and effect of the decree of this court determining the right of the defendant Preston to recover for his services in accordance with his contract.

We are satisfied from this record that Nichols was acting as a go-between. In the first instance he was acting for Chandler, with the understanding that he might get such further compensation as he could from Preston. Preston was apparently willing to accept his services and agreed, as the record conclusively shows, to pay him for obtaining the contract which was finally executed and by which he receives the compensation which he demanded and was agreed upon. So far as Mr. Preston is concerned, it does not make much difference whether his contract was more favorable to him, as he claims, than if he had dealt directly with Chandler. Mr. Chandler did not testify with reference to this phase of the case and makes no complaint about it. We are impressed, on reading the testimony, that as by this opinion the contract entered into between the parties is sustained, in equity and justice likewise the claim of Mr. Nichols should be sustained for the services which he rendered for Mr. Preston and for which Mr. Preston agreed to pay. We think the record is convincing, by reading the testimony of Mr. Nichols, that he dealt fairly with both parties to the transaction, and under the well established rules of law, where the principals have knowledge of the fact that the agent is acting in a dual capacity and, with such knowledge, assent to his so doing, he may recover for his services from either

party. See 1 Am. & Eng. Enc. Law (2d Ed.), p. 1074; 2 Corpus Juris, p. 713; *Adams Mining Co.* v. *Senter*, 26 Mich. 73; *Colwell* v. *Keystone Iron Co.*, 36 Mich. 51; *Aldine Manfg. Co.* v. *Phillips*, 129 Mich. 243. The decree herein should provide that the intervener, Nichols, be paid by the defendant Preston the balance due him for his services, in accordance with the agreement made between the parties, with interest at 5% on sums received by Preston from the date such sums were thus received.

The decree of the lower court, as herein modified, will be affirmed, without costs to any of the parties hereto.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

INTERSTATE CONSTRUCTION CO. *v.* UNITED STATES FIDELITY & GUARANTY CO.

1. CONTRACTS—CONSTRUCTION — SEVERAL INSTRUMENTS CONSTRUED TOGETHER.

   Where several instruments are made at one and the same time having relation to the same subject-matter they must be taken to be parts of one transaction and construed together for the purpose of showing the true contract between the parties.

2. SAME—BREACH OF CONTRACT—EVIDENCE—ADMISSIBILITY.

   In an action for damages by the general contractor on a public building against a subcontractor for breach of contract in refusing to perform on the ground that plaintiff's

delay until July 17th in having the building ready for defendants to begin work amounted to a breach thereof, a telegram from plaintiff to defendants bearing the same date as the contract stating that "you are to start work about May 1st," *held*, admissible for the purpose of showing the true contract between the parties, although the contract provided that the work should be "commenced promptly upon notice."

3. SAME.

Where the evidence clearly shows that plaintiff's agent notified defendants that it was expected work would begin about May 1st, the admission of the telegram, whether admissible or not, *held*, not prejudicial.

4. SAME—BREACH—BURDEN OF PROOF.

In order to justify defendants' refusal to perform, the burden was upon them to establish, by a fair preponderance of the evidence, that the neglect of plaintiff was so unjustifiable, unreasonable, and inexcusable as to amount to a breach of the contract.

5. SAME—CHANGED CONDITIONS—ADMISSIBILITY.

Defendants having elected to repudiate the contract, claiming a breach, evidence of the changed condition of the labor market in the meantime, which would have imposed upon them an extraordinary and unwarranted burden, *held*, admissible.

6. TRIAL—INSTRUCTIONS—REQUESTS TO CHARGE.

It was not error for the court below to refuse plaintiff's specific requests to charge, where the charge as given fully protected his rights, and all proper requests were either given or covered.

7. SAME—REMARKS OF COUNSEL.

A ruling of the court below sustaining appellant's objection to remarks of counsel, and adding "I do not think that makes any difference and need not be considered by the jury," *held*, not reversible error.

Error to Wayne; Shepherd, J., presiding. Submitted April 29, 1919. (Docket No. 14.) Decided October 6, 1919.

Assumpsit by the Interstate Construction Company, Limited, against the United States Fidelity & Guar-

anty Company and others on a bond. Judgment for defendants. Plaintiff brings error. Affirmed.

Watson, Safford & Shepherd (*Frank T. Lodge,* of counsel), for appellant.

Douglas, Eaman, Barbour & Rogers (*Lewis W. McCandless,* of counsel), for appellees.

Plaintiff as general contractor had entered into a contract with the United States for the erection of a post office building at Franklin, La. On April 22, 1913, plaintiff entered into a sub-contract with defendants Montagne, by the terms of which said defendants agreed to furnish:

"All of the labor and do and perform all the work required in constructing and putting in place the mortar and concrete, stone work, brick work, structural terra cotta, metal work, roofing and sheet metal work, plastering, interior marble and terazzo, wood work, hardware, painting and varnishing, glazing, plumbing marble work and terazzo floors for toilet rooms, under the head of plumbing, and approaches. All the material to be furnished by the party of the first part delivered on the site, party of the first part will also permit the second party to use any tools and apparatus which are owned by the first party and on the premises. * * *

"This contract is to include all labor to complete this building and approach walk except pile driving and main building excavation labor and labor in connection with mechanical equipment, but includes marble setting, terazzo floor labor and carpenter labor in toilet rooms in connection with mechanical equipment."

Section 2 of the contract follows:

"And the said party of the second part further covenants and agrees that the labor and material and the work herein agreed to be performed shall be commenced *promptly upon notice from first party to said second party,* that the said building and premises are

ready for the installation of the above mentioned labor, materials and work, and that the same shall be carried on in the order and manner as provided in said specifications and with such dispatch and in such manner as to not cause undue delay to other work on said building, and in such a manner as shall insure the completion of said work in all its parts by November 1, 1913. And it is expressly covenanted and agreed by and between the parties hereto that time is and shall be considered as of the essence of the contract on the part of the second party, and in the event that the second party shall fail in the due performance of the entire work to be performed under this contract, by and at the time herein mentioned or referred to, the said second party shall pay unto the first party as and for liquidated damages, and not as a penalty, the sum of forty ($40.00) dollars for each and every day the said second party shall be in default, which said sum the said first party shall have the right to deduct from any moneys in its hands otherwise due or to become due, to said second party, or to sue for and recover compensation or damages for the nonperformance of this contract at the time or times herein stipulated or provided for. Provided, however, that for any delay to second party which shall be caused by the first party's action or order, or by the order of the said supervising architect, the time fixed for the final completion of the work herein provided shall be extended for as many days as shall equal the delay caused to second party by any of the reasons above mentioned."

On the day of the date of the contract the following telegram was sent by plaintiff to defendants Montagne Brothers:

(Dated April 22, 1913.)

"Piles completed, if you include putting in foundations no excavating will send contracts for sixty-five hundred to our representative at Franklin and you can sign up there, you to start work about May first.

"Answer."

To which upon the same day Montagne Brothers replied as follows:

"We accept your offer for Sixty Five Hundred Dollars. Send contracts.

"MONTAGNE BROS."

Prior to the execution of the contract one of the defendants, R. J. Montagne, inspected the site, saw the condition of the work and testified that he was informed by plaintiff's superintendent that the piling was completed and that he could probably go to work in two or three days. Plaintiff's contract with the government, however, required that certain tests be made upon the piling before the superstructure was started. Those tests were made after some delay and resulted in an order from the government requiring plaintiff to drive some further piles. These piles were driven by plaintiff as required but the piling was not finally accepted by the government until July 10th. On July 17th plaintiff sent defendants Montagne the following communication:

"The above named building is now in such shape so you can make arrangements to start your work, and would suggest that you get your batter boards located and arrangements made for your tools and men so you can start pouring concrete about Monday, July 21st, and as your contract calls for all labor to be performed by you with the exceptions of the piling and excavation, it is part of your contract to screen the cement now in the shed before using it, also the removing of the rust from the reinforcing rods all to be done as directed by Mr. Clark, the government inspector.

"The writer will send you a complete list of all the materials and tools now on the site to be taken from the company's books and invoices upon his return to Saginaw, Mich., which you can check up as soon as it reaches you and give us a receipt for same; in the meantime such cement, sand, and gravel can be used to allow you to proceed with the work without delay. All new materials to be delivered to the site you are to be responsible for, and give us a receipt for same upon its arrival; you are also to be responsible [for]

all tools and material now on the site as soon as they are checked up and delivered to you. We are,"

Defendants Montagne in response sent the following notice to plaintiff:

"This is to inform you that on account of the great delay of time caused by your not being ready to turn the building work over to us, after your telegram of April 22d, 1913, confirmed by your letter of same date stating that work was to be started by us about May 1st, 1913, it will be absolutely impossible for us to complete the work in the time specified in the contract and unless certain changes are made in the contract, we will be unable to begin the work.

"There are certain stipulations in the contract which, not being lived up to by you, certainly annuls same, and we would suggest that your representative call on us at once, and see what can be done with reference to getting the matter straightened out."

This was followed on July 19th with a formal cancellation of the contract as follows:

"Please take notice that the contract entered into between you and Montagne Brothers, on April 22, 1913, has expired and is at an end. The contract terminated when you failed to live up to its specifications and to the agreements made by you. As soon as we check up and see what damages we have been put to, claim will be made."

To which plaintiff replied on the same day:

"In this connection will say that we have lived up to our part of the contract to the letter, and expect you to do the same, and unless you proceed in accordance therewith, in accordance with the terms, conditions of contract and the plans and specifications, it is our intention to give you the five days' notice in accordance with contract, and if you do not proceed it is our intention to notify your bonding company, and will make a demand upon them to complete your contract.

"Hoping that you will not make it necessary to proceed against your bonding company, as outlined above, we are,"

No accommodation between the parties having been reached, plaintiff was compelled under its contract with the government to perform through other channels the labor which the defendants Montagne had by their contract agreed to perform. Suit was brought against Montagne Brothers and the defendant United States Fidelity & Guaranty Company, as bondsmen, for damages arising out of the breach of contract. No service was had on defendants Montagne. The defendant Guaranty Co. filed a plea of the general issue giving notice of the following defenses thereunder:

"(*a*) The said Interstate Construction Company did notify Montagne Brothers to begin work in accordance with said contract on or about May 1st, 1913, and in accordance with the said contract and the said notice, Montagne Brothers did prepare for the due execution on their part of said contract, did in turn enter into contracts with various parties to enable them to fulfill the said contract, but up to and including the date when they elected not to be bound further by said contract, no opportunity on the part of the said plaintiff had been given to said Montagne Brothers to proceed with the work, but on the contrary through the fault of the said plaintiff they were prevented from fulfilling the contract sued upon.

"(*b*) The said plaintiff did not provide proper materials upon which work was to be done, as provided in said contract.

"(*c*) That through the unreasonable delay on the part of said plaintiff in fulfilling its part of the contract and in enabling said Montagne Brothers to proceed with their part of the contract, causing an unreasonable delay in the execution of said contract through no fault of the said Montagne Brothers, and that on account of said unreasonable delay said Montagne Brothers had a right to rescind the said contract sued upon.

"(*d*) That said Montagne Brothers, subsequent to April 22d, 1913, did repeatedly request of the said plaintiff an opportunity to fulfill their part of said contract; that they were always ready, able and willing to fulfill their part of said contract, but through

the neglect and unreasonable delay of this plaintiff, were prevented from fulfilling their part of the contract, and had the right thereby to rescind the said contract.

"(*e*) That the said plaintiff, because of its failure to furnish materials, to prepare the excavations and piling necessary to be done before the said Montagne Bros. could proceed duly with their work, made it impossible for the said Montagne Brothers to perform their said contract.

"(*f*) That because of the unreasonable delay on the part of the plaintiff in fulfilling its part of said contract and because of the unreasonable delay which the said plaintiff caused the said Montagne Brothers in the fulfillment of their contract, the said Montagne Brothers did have a right to rescind the said contract and consider the same at an end.

"(*g*) That a material provision of said contract sued upon subjected the said Montagne Brothers to a penalty in the sum of Forty Dollars ($40.00) per day from and after November 1st, 1913, provided the obligations on the part of the said Montagne Brothers were not fulfilled upon that date, and yet without any waiver of said provision and being a material part of said contract, the plaintiff further, by its unreasonable delay in preventing the said Montagne Brothers from fulfilling their part of said contract, did justify the said Montagne Brothers in rescinding the contract and treating it as at an end, and were thereby relieved from any obligations imposed by said contract.

"(*h*) That the said contract did specify and provide a time certain for the completion of the obligations of said Montagne Brothers, and yet through the unreasonable delay on the part of the plaintiffs did make it impossible for the said Montagne Brothers to fulfill their obligations within the time specified.

"(*i*) That the said contract sued upon presupposed an opportunity for due and diligent execution on the part of said Montagne Brothers of their obligations under said contract, and yet, through the fault of the said plaintiff and because of the delay due entirely to the fault of the said plaintiff, the said right of Montagne Brothers was deprived them wrongfully by said plaintiff, thereby fully justifying them in rescinding the said contract and treating it as at an end."

The case was tried at considerable length and submitted to the jury under an exhaustive charge in which we find the following:

"Under the well settled principles of law applicable to contracts of this character, I charge you that when the defendants, Montagne Brothers, contracted to do and perform the labor referred to in said contract, under the terms and conditions therein set forth, they were bound to make it good, regardless of the cost or difficulty to them in so doing, unless you should find that they were excused from performance by reason of unreasonable and unjustifiable delays on the part of the plaintiffs in the case, which amounted to an actual breach of the contract on their part, and in this class of cases I charge you that the mere delay complained of is not in itself sufficient to justify the defendants, Montagne Brothers, in refusing to perform the contract, and before they can claim the right to be set free they must satisfy you as I have already told you in effect by a fair preponderance of evidence, that the action of the plaintiffs, independent of other contributing causes, occasioned such an unreasonable delay as to impose a material and unnecessary burden upon the Montagne Brothers."

The jury returned a verdict in favor of the defendants. A motion for the entry of judgment in favor of the plaintiff notwithstanding the verdict was later denied and judgment rendered for defendants upon the verdict.

BROOKE, J. (*after stating the facts*). Counsel for appellant review the case in this court under a large number of assignments of error, grouped as follows:

(1) Erroneous admission and exclusion of testimony and evidence.

(2) Erroneous instructions to the jury and refusals to charge as requested.

(3) Refusal to direct verdict for the plaintiff.

(4) Was the plaintiff prejudiced by certain remarks of counsel?

These will be considered in their order.

1. Under this head there are many assignments of error, but in oral argument only two were discussed. Those only will be considered as we are satisfied that the others are without merit.

a. It is asserted first that it was prejudicial error for the court to admit in evidence the telegram of April 22d. This telegram contained the language:

"You to start work about May 1st."

It is the contention of plaintiff that inasmuch as the formal contract provided that work by the subcontractors thereunder should be "commenced promptly upon notice," the admission of the telegram in question was a violation of the rule that all antecedent negotiations must be held to be covered by the contract itself. In this connection it is to be noticed that the telegram and contract bear the same date, April 22, 1913; both were transmitted upon the same day, the contract by mail through Constantine, plaintiff's agent, and the telegram directly. Both papers had reference to the same subject-matter and were parts of a single transaction and both may be examined for the purpose of ascertaining the agreement of the parties. That agreement would appear to be that the subcontractor should commence work promptly upon notice as stated in the contract and,—

"about May 1st, as explained in the telegram."

There seems to be no question that where several instruments are made at one and the same time having relation to the same subject-matter they must be taken to be parts of one transaction and construed together for the purpose of showing the true contract between the parties. *Sutton* v. *Beckwith,* 68 Mich. 303; *Singer Manfg. Co.* v. *Haines,* 36 Mich. 385. See, also, *Gould* v. *Magnolia Metal Co.,* 207 Ill. 172 (69 N. E. 896). We are of opinion that the telegram in ques-

tion was admissible in evidence, but, whether admissible or not, its admission was apparently not harmful to plaintiff because the evidence clearly shows that the plaintiff expected and intended that defendants Montagne Brothers should commence the work about May 1st and that defendants were so notified by Constantine, plaintiff's agent, on or about April 25, 1913. The ultimate fact having been abundantly proven by evidence *dehors* the telegram, its admission cannot have been prejudicial to plaintiff.

b. Defendants were permitted over objection to introduce evidence tending to show that labor in the vicinity of Franklin was comparatively cheap and plentiful during the spring and summer but that it was scarce and high during the fall and winter by reason of the fact that during the latter period the sugar campaign was on in that region, affording employment at good wages to large numbers of men. In this connection it should be borne in mind that defendants claimed the right to refuse performance of the contract by reason of the unwarranted and unreasonable delay on the part of plaintiff, which delay, had defendants performed, would have imposed upon defendants a material and unnecessary burden. This question was submitted to the jury by the court under an instruction that in order to justify the subcontractor's refusal to perform the contract defendants must establish—

"by a fair preponderance of the evidence in the case that the delays complained of due solely to the acts or neglect of the plaintiff, were so unjustifiable and unreasonable and inexcusable as to amount to a breach of the sub-contract on plaintiff's part,"

—and in this connection the court refused to instruct the jury as requested by plaintiff that in order to excuse the defendants from performance the delay must be—

"such an unreasonable delay as to amount to an intimation of an intention to abandon and altogether refuse performance."

The court, however, did instruct the jury that the delay must have been—

"such an unreasonable delay as to impose a material and unnecessary burden upon the Montagne Brothers."

The record shows conclusively that it was within the contemplation of all the parties that the work to be performed by the defendants under the sub-contract was to commence within a reasonable time after May 1st. It further shows that defendants prepared, at considerable expense, to commence performance shortly after that date. A delay of nearly three months ensued on account of plaintiff's failure to get the piling and foundation in proper shape to permit defendants to undertake the performance of their part of the contract. In the meantime labor conditions had materially changed or would change before it would be possible for the defendants to complete. Having elected to repudiate the contract, by reason of the antecedent breach thereof by the plaintiff we think it was competent for defendants to show that performance thereof under the changed conditions occasioned by the unwarranted delay would have imposed upon them an extraordinary and unwarranted burden.

2. It is asserted by counsel for plaintiff that the court erred in refusing certain requests to charge and in the charge as given. Plaintiff's argument under this head is based in part, perhaps mainly, upon the refusal of the court to charge that plaintiff's delay was—

"such an unreasonable delay as to amount to an intimation of intention to abandon and altogether refuse performance,"

—and the case of *West* v. *Bechtel,* 125 Mich. 144 (51 L. R. A. 791) is cited in support. In that case the court considered the effect upon the contract of the failure of one party thereto to make payments on account of partial deliveries in accordance with its terms. It is, we think, clear that plaintiff was under obligation to do the pile driving, pit digging, and pile cutting before defendants were obliged to perform the part of the work covered by their contract. In other words, the performance of that part of the work to be performed by the plaintiff was a condition precedent to the undertaking of the performance of defendants' work. This obligation rested upon plaintiff as certainly as though it had been so definitely expressed in the contract. *Allamon* v. *Mayor of Albany,* 43 Barb. (N. Y.) 33; *Black* v. *Woodrow,* 39 Md. 194; *Morier* v. *Moran,* 58 Ill. App. 235. A careful perusal of the charge in its entirety, and it must be so read, convinces us that plaintiff's rights were fully protected and all proper requests either given or covered therein.

3. Our conclusions reached under 2 dispose of the assignments of error under this head.

4. An examination of the evidence upon which assignments of error under this head are based indicates that when appealed to the court held with counsel for plaintiff; in one instance saying:

"The objection is sustained. I do not think that makes any difference and need not be considered by the jury."

We find no reversible error in the conduct of the trial in this respect.

The judgment is affirmed.

BIRD, C. J., and MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

BENNETT *v.* FLEMING.

1. PLEADING — AMENDMENT NUNC PRO TUNC — JUDICATURE ACT — FURTHERANCE OF JUSTICE.

Where a chancery cause was brought on to be heard in open court, without objection by either party, upon the supposition and theory by both court and counsel that the pleadings were perfected and the cause at issue as to all parties, but it was discovered after conclusion of the proofs and submission of the case that it was not in fact at issue as to all parties, the court was authorized under section 1, chap. 16 of the judicature act (3 Comp. Laws 1915, § 12478), to grant a motion perfecting the pleadings *nunc pro tunc*, where no new elements or issues were brought into the case, and was for the furtherance of justice.

2. CANCELLATION OF INSTRUMENTS—DEEDS—INADEQUATE CONSIDERATION—UNDUE INFLUENCE.

Evidence that the grantor, 74 years of age, in the last stages of tuberculosis, physically and mentally weakened, deeded his entire property to a stranger in blood at whose house he was a guest, although he was on good terms with his family, for the claimed consideration of support for life, etc., which was left in parol, *held*, in view of the very brief life expectancy of grantor, to support the conclusion of the court below that the deed was not only inequitable because for a grossly inadequate consideration, but was the result of undue influence.

Appeal from Tuscola; Beach, J. Submitted April 10, 1919. (Docket No. 31.) Decided October 6, 1919.

Bill by George T. Bennett against Caroline Fleming and others to correct a description in a deed. Defendants filed cross-bills to have said deed set aside. From a decree for defendants, plaintiff appeals. Affirmed.

Herbert W. Smith, for plaintiff.

Quinn, Wixson & Quinn (*Walter S. Wixson*, of counsel), for defendants.

Authorities discussing the question of undue influence in conveyance or transfer of property in consideration of support of grantor or third person are collated in a note in 52 L. R. A. (N. S.) 477.

STEERE, J. On April 19, 1915, Alfred Newton, of Gilford, Tuscola county, Michigan, deeded to plaintiff, George T. Bennett, of Attica, Lapeer county, Michigan, by short form warranty deed, "In consideration of one dollar and other valuable consideration dollars," property described in said deed as the "northwest quarter of the northwest fractional quarter of section two (2), town thirteen (13), north range seven (7) east, forty acres more or less." This instrument was recorded in the office of the register of deeds of Tuscola county on April 20, 1915.

Alfred Newton was a widower, then 74 years of age and in poor health. He died intestate at the home of plaintiff on April 30, 1915, eleven days after making said deed. Defendants are his sons and daughters surviving and heirs at law.

On May 11, 1916, plaintiff filed this bill to obtain correction of the description in said deed, alleging that by mistake of the scrivener who prepared the same the premises intended to be conveyed were not correctly described therein, the true description being "the east one-half of the west half of the northwest quarter of section two (2), in town thirteen (13), north of range seven (7) east thereof," the same being what is called a "long forty" instead of a square forty. The bill also alleges that "the other valuable considerations mentioned" in the deed were an agreement by plaintiff, the grantee, "to maintain and support said Alfred Newton in his home, at the township of Attica, Lapeer county, Michigan, during his natural life * * * pay his doctor's bills and to furnish the said Alfred Newton with a decent burial." That said Alfred Newton was to retain possession of said premises during his natural life.

Defendant Southerland filed an answer on November 21, 1916, asking no affirmative relief, and defendants Arthur, Milton, Abram and Frederick Newton

filed an answer on April 19, 1917, in denial and asking as affirmative relief by way of cross-bill, that said deed be set aside.

On May 23, 1917, the cause was brought on to be heard upon pleadings and proofs taken in open court, before the circuit court of Tuscola county, in chancery, without objection by either party and, as stated by the circuit judge in his findings, upon the supposition and theory both by court and counsel that the pleadings were perfected and the cause at issue as to all parties:

"That said proofs were taken and all witnesses in said cause examined by counsel for both plaintiff and defendants, and the hearing thereof by the court conducted upon the theory that the sole issues for determination thereunder were:

"(*a*) Whether plaintiff was entitled to decree of reformation, as in the bill of complaint prayed; or,

"(*b*) Whether the deed sought to be reformed should be set aside as affirmative relief to defendants."

It was discovered from an examination of the files after conclusion of the proofs and submission of the case that it was not in fact at issue as to all parties, an amended answer and cross-bill of defendant Southerland and answer and cross-bill of defendants Fleming and Johnson prepared by Attorney T. C. Quinn, deceased some time before, never having been filed. Previous to his death he had sole charge of the defense, and the surviving members of the firm as well as the court and opposing counsel apparently labored under a misapprehension as to the true condition of the pleadings until after the case was submitted. A motion was then made by defendants' counsel for leave to file these answers, which were to the same effect as those filed by the other defendants, and perfect the pleadings *nunc pro tunc* as of May 1, 1917. Finding that such course brought no new elements or issues into the case, and was for the furtherance of justice,

the court granted this motion. No showing, or claim, is made for plaintiff that further proof or time was desired, or the issue as understood and tried on the hearing was changed, or his substantial rights on the merits of the case prejudiced in any particular. Under the situation shown, the course pursued was fully authorized by section 1 of chapter 16 of the judicature act (3 Comp. Laws 1915, § 12478).

Alfred Newton had been a widower for many years. For a time after the death of his wife his youngest daughter kept house for him until she was married, eleven years before his death, after which he lived alone at times in his own home and at other times with some of his children. His children all married and were in homes of their own. Caroline Fleming lived in Flint and Arthur Newton in Pontiac, Michigan. Elizabeth Johnson lived with her husband who was a farmer, in Gilford township, Tuscola county, where deceased bought a farm of 80 acres in January, 1910, to be near his daughter; their places were about a mile apart and while he lived alone much of the time on his own place they were "back and forth" every few days and he was in closer touch with this daughter and her family than the others. He was, however, on friendly terms and corresponded with all his children. He had lived at different times at the home of each of his three daughters—spending entire winters with them. Four of his children resided in California and he had visited them, spending a winter there. For some years he had been in declining health, for relief of which he had doctored and sought relief by change of climate in the west and south. He had sold off one-half of this 80-acre farm and the 40 remaining was all the property he possessed. It was valued at about $3,000 and had upon it a mortgage of $375. He leased portions of this 40 to his son-in-law and others. He and plaintiff were old acquaintances

and friends who had worked together in their younger days and had occasionally visited each other since. Deceased visited plaintiff once or twice a year for many years. During a portion of the winter prior to making this conveyance he had been in Georgia for his health, which was steadily declining, his condition being such that for over six months he had not been able to eat solid food. On his return in March he was at the home of Mrs. Fleming in Flint for a time and then at the home of Mrs. Johnson, from where he went to Bay City to try Christian Science treatment. Mrs. Johnson visited him there once, for but a short time, as she was informed that, being an unbeliever, her presence had a bad influence on his mind. On April 16, 1915, he left Bay City without advising any members of his family and traveled to Attica in Lapeer county. When he arrived there an acquaintance who helped him carry his grip into the station noticed he appeared feeble and had a chill. He said, in reply to an inquiry, that he did not think he could walk from the station to Bennett's, some 40 to 50 rods away, and was taken over there by an acquaintance. His condition was then such that Bennett, who testified "he was somewhat feeble and had a serious and very annoying cough," called a physician for him. During the first week he slept in the house with Bennett. Three days after his arrival Bennett took him to Lapeer to execute the deed in question. Dr. Blakely, the physician called by Bennett, testified that he cared for and treated deceased until his death, prescribing fresh air, rest and wholesome food; that he "seemed to feel the cold terribly—had a species of tuberculosis—had a bad hacking cough," and he directed Bennett to get a tent for him, which was done; that "after he was put in the tent he gradually declined, at the last he grew rapidly worse"; that he visited him seven times, furnishing medicine twice.

As to the doctor's views upon his patient's life expectancy, he was asked and answered as follows:

"*Q.* You regarded him as having been at the point of death from the start?
"*A.* Not from the start, no.
"*Q.* How long before you regarded him so?
"*A.* Just before he was placed in the tent."

No word was received of deceased's serious condition by any of his family until after his death when a telephone message was orally communicated to Mrs. Johnson to the effect that there was a death message for her and "they want you at Attica." She and Mrs. Fleming, of Flint, who had received a similar message, responded at once, arriving at Attica that night, where they were met by Bennett who told them their father had passed away and they had laid him out in a casket. He took them to his house where they had supper and on one of them asking to see their father's remains he lit a lantern and took them to a tent in the back yard where the body was laid out. He explained to them that the doctor had advised a tent for their father, and he had provided one for him about a week before he died. Mrs. Fleming testified that in a conversation upon that subject:

"I asked him—I says 'How did you come to get pa to sleep in a tent?' I says, 'When he was to my place we had to have a hot fire for him—right by the stove?' 'My,' he says, 'your father always did as I wanted him, he would do anything I wanted him to do.'"

These two daughters testified in substance that while they were there Bennett told them their father had given him a warranty deed of his place under which, if so disposed, he "could hold the whole thing," but he had no thought of so doing as it was in effect a trust deed, the understanding with their father being that Bennett should sell the property, take out of the proceeds his own charges for care and burial, give

$200 to deceased's grandson, "little Alfred," and divide the rest between his daughters. Mrs. Johnson testified that before her father's death there had been negotiations between him and her husband relative to purchase of the place by the latter for $3,000, of which she told Bennett in their discussion of the matter and, accepting Bennett's version of his understanding with her father to the effect that it was a trust deed the oral conditions for which would be carried out, she spoke of the possibility of their borrowing the money and buying the 40 acres, saying if they did so the business would be done through Mr. Stacey, cashier of the Akron bank in Akron, whom she requested Bennett to see.

Stacey testified that he first learned of Newton's death from Mrs. Johnson who called to see about borrowing money to buy the place from Bennett to whom her father had deeded it under an oral trust, as above related, proposing to mortgage it and another property for the money, and said Bennett intended to call upon him in reference to the sale; that Bennett did call in a few days and in their discussion stated the "other valuable consideration" referred to in the deed, as to which there was no writing, was the care of Newton during his life and burial at his death, admitting, however, that he was to give Alfred $200; that Stacey discussed the matter of the deed with him; pointed out the inaccuracy in description, told him that under the condition of the title the bank could not accept a mortgage on the property and in the interest of all concerned advised some equitable settlement of the matter, to which Bennett at that time seemed agreeable and after some further discussion he consented that in consideration of $200 for his services and expenses he would quitclaim to the heirs, or estate, and took with him a quitclaim deed which Stacey prepared at his suggestion to be executed by himself

and wife, agreeing to then mail it to either Stacey or the probate court. Bennett admitted the interview as outlined and that he then said Newton requested $200 be given his grandson, but explained it was after the deed had been executed, denied that he ever stated or admitted any trust relations, or that there was any consideration for the deed beyond Newton's care and burial, or that he ever agreed to sign the quitclaim deed Stacey drew up for $200, saying of it: "I took it away, but not with any intention of signing." Some days later Stacey received a short letter signed by Bennett's attorney, as follows:

"May 15th, 1915.

"MR. C. W. STACEY,
"Akron, Michigan.

"*Dear Sir:* Mr. George Bennett was in to see me today and requested me to say that he would not give a deed for the consideration you promised him.

"Yours truly,
"_____,"

It is undisputed that the description in the deed was erroneous, covering but 20 acres of the 40 which Newton owned. It was taken from a copy of a lease given to a tenant the preceding August, over which he had some trouble because of the misdescription. He had shown this lease to Stacey late in the fall of 1914 and consulted him about it, expressing himself as greatly incensed at the blunder made by the party who drew the lease for him. That he should himself so soon thereafter furnish this same faulty lease to the conveyancer in Lapeer from which to describe this property, which was all he owned, is, at least, evidence of extreme forgetfulness.

Plaintiff's present claim to equitable relief in correction of the faulty description in this conveyance is that his alleged oral agreement for care and burial has been performed, and that no other consideration entered into the transaction.

Defendants' claim, both in defense and for affirmative relief by way of cross-bill, is mental incompetency, undue influence, inadequacy of consideration and, at best, that deceased was led to suppose the parol understanding between the parties was enforcible, which as shown by plaintiff's own statements was on his part a trusteeship to sell the property and disburse the proceeds, after fairly compensating himself for deceased's care and burial, amongst deceased's daughters and grandson as directed and understood.

This record by almost undisputed testimony furnishes abundant proof to sustain the equitable features of defendants' contentions. The only fairly debatable issue of fact is deceased's mental incompetency, and we find no occasion to disturb the conclusion reached by the trial court on that issue. Under the undisputed facts shown and evident short expectancy of life of the grantor when the deed was made, the claimed consideration, left in parol, was so grossly inadequate as in itself to be evidential of overreaching and undue influence. The following conclusions of the trial court are well sustained by this record:

"The claimed agreement for support, etc., rested in parol, the very brief expectancy of life of grantor, his extreme age, his enfeebled and weak-minded condition, and the claim made that he sought to convey all the property he possessed to a stranger in blood to the exclusion of his family, with whom his relations were pleasant, leads to the conclusion that such conveyance was obtained by the exercise of undue and improper influence at a time when the grantor was so physically and mentally weakened as to be unable to withstand suggestion, properly safeguard his rights, or realize the legal consequences of his act."

In this case it is undisputed that when he executed this deed deceased was in the last stages of lingering tuberculosis, distressed with a serious and annoying cough, old, weak and feeble, stricken with an incurable disease, and of short life expectancy. But a few

days before his death he deeded his entire property to a stranger in blood at whose house he was a guest, for an evidently inadequate consideration, the conditions of which rested in parol. Such facts in themselves tend strongly to prove undue influence. The fact that the deed was not attacked until after the grantor's death is of little significance where he survived so short a time. The case of *Davis* v. *Calvert*, 18 Ky. L. Rep. 975, is quite similar to this in the particular that following the grantor's death, which occurred within four months after executing a deed given in consideration of support, his grantee brought an action to correct a misdescription in the instrument making the grantor's heirs defendants, who in response asked affirmative relief and the deed was held invalid on similar grounds to those urged in the instant case.

Without extending this opinion to comment further upon the testimony, we conclude that this record fully supports the conclusions of the learned circuit judge that this deed was not only inequitable because for a grossly inadequate consideration, but that its execution was the result of undue influence at a time when deceased was so physically and mentally weakened by disease as to incapacitate him for intelligent and independent action in protection of his rights in such a transaction.

In March, 1917, plaintiff mortgaged the property in question for $600, much of which he expended in redeeming the premises from foreclosure sale under the past due mortgage which deceased had given, and payment of interest, back taxes, etc. The decree of the trial court holding the deed in question void takes cognizance of this and protects him from loss in that particular. It also protects his claim for support, medical services and burial of deceased by referring the matter to the probate court, making the same as

it may be there determined a lien in his favor upon said premises.

The decree is affirmed, with costs to defendants.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

SCOVILL *v.* CITY OF YPSILANTI.

MUNICIPAL CORPORATIONS—YPSILANTI CHARTER—COMMON COUNCIL—DUTIES—TAXATION—PAVING.

Where the charter of the city of Ypsilanti (section 323) imposed upon the common council the duty to assess and levy taxes to raise funds for paving and other municipal purposes, the council could not evade its responsibility by calling a special election of the voters in a ward to determine the amount of a proposed pavement to be levied against the property owners and the amount to be borne by the ward as a whole.

Appeal from Washtenaw; Sample, J. Submitted April 15, 1919. (Docket No. 10.) Decided October 6, 1919.

Bill by Henry R. Scovill and others against the city of Ypsilanti to set aside a portion of a special assessment. From a decree for plaintiffs, defendant appeals. Reversed, and bill dismissed.

John P. Kirk, for plaintiffs.

Floyd E. Daggett (*George J. Burke*, of counsel), for defendant.

STEERE, J. The city of Ypsilanti appeals from a decree of the Washtenaw county circuit court, in chancery, setting aside so much of certain special taxes levied by said city against plaintiffs' property for paving purposes as exceeds 8% of the assessed valuation thereof.

Forest avenue and Huron street in said city, upon which plaintiffs' specially assessed property fronted, were paved in 1916 at a cost of $1.80 per square yard. It is indicated in the record and appears from undisputed statements in the briefs of counsel that in 1915 a considerable amount of paving was done in the city, and its authorities took action that year for paving various highways within the municipality to an extent that the work could not be, or was not, all done that year, as certain paving was at the same time ordered for 1916. Amongst the various streets ordered paved were Forest avenue and Huron street from Cross street to the Lake Shore railroad. A resolution of the common council ordering this paving was adopted on August 17, 1915, and stated the estimated cost was $1.15 per square yard for the kind of paving to be laid upon those streets, specifications for which were on file with the city clerk. The paving done pursuant to such official action in 1915 was of the specified kind and laid at the proposed price of $1.15 per square yard. The resolution of August, 1915, ordering this paving stated:

"Resolved further, that it is the purpose of the common council to assess the cost of the aforesaid paving in the following manner, to wit: One-fourth of the cost to be assessed against the city at large, 15% to be assessed against the highway districts in which the aforesaid streets are situated and 60% against the property fronting on the aforesaid streets according to frontage."

The city of Ypsilanti contained five highway dis-

tricts, each having a special highway fund. The third ward of the city, in which the paving in controversy was done, constituted the third highway district. There was opposition to this paving by owners of property fronting upon these streets, particularly on Forest avenue. Remonstrances were filed with the city council and it is stated legal steps were contemplated by parties in interest to prevent the council proceeding with it the following summer as proposed.

The chief indicated objection was to the effect that in this instance the proportion of cost proposed to be imposed on the owners was an excessive burden owing to the comparatively small value of the property which would have to pay the 60%. After consulting with the supervisor of that district and examining his assessment roll, a member of the council named Lathers called the matter up at a meeting of the council held March 20, 1916, and a resolution offered by him was adopted to submit to the electors of the third ward at the annual election to be held April 3, 1916, a question upon the subject propounded as follows:

"Shall the cost of paving levied against any property for the purposed Forest avenue and Huron street paving in excess of 8% of the assessed valuation of such property be borne by the ward as a whole? Yes.

"Shall the cost of paving levied against any property for the purposed Forest avenue and Huron street paving in excess of 8% of the assessed valuation of such property be borne by the ward as a whole? No."

A further resolution was passed at that meeting on motion of Alderman Dawson directing the clerk to advertise for bids for paving said streets according to specifications then on file in the clerk's office. The clerk was also instructed to have ballots printed for submission of the proposed question to the electors of the third ward and other requisite steps taken. Proper notice was given of the submission of this question, ballots in positive and negative form were

prepared as directed, supplied at the voting precincts of the third ward and used by the electors voting upon the question.

The city records show that on April 6, 1916, the common council met as a canvassing board and duly canvassed the vote upon this proposition, declaring the same carried by a majority of 18 votes. The tally sheets of that ward for that election showed a total vote of 287, of which 140 votes were cast in favor of the proposition and 122 against it, 25 of the electors not voting on that question.

The resolutions of the council authorizing such election and various steps taken by it and under its direction in that connection, including the canvass and determination of the council as to the result of the vote, were not thereafter reconsidered or rescinded by any resolution relating to that subject. Nor were those streets paved according to the specifications on file with the clerk at the time such proceedings were had, under which it is admitted bids were made at a price of $1.15 per square yard. A new city engineer was engaged in 1916, and the former plans and specifications for this paving were replaced by new ones calling for a different and more expensive pavement. By direction of the council at a meeting held July 17, 1916, bids were advertised for construction of such pavement, to be filed with the clerk by August 7, 1916, and on that date a bid was accepted and contract let therefor, by resolution of the council, "at a price of 50c per cubic yard of excavation and $1.80 per square yard of pavement." At a meeting of the council on August 21, 1916, the mayor interposed his veto to the contemplated paving of Forest avenue, but a resolution ratifying the proceedings taken and authorizing the paving was passed over his veto by a vote of 9 to 1. The pavement proposed and acted upon prior to the special election was specified to be of two course

concrete while that authorized by the council on July 17, 1916, and subsequently constructed, was a pavement of five inches of concrete and a two-inch wearing surface of asphalt. After this pavement was laid a resolution was passed by the council providing that 25% of its cost should be paid by the city at large, 15% by the third ward and 60% by the owners of property fronting on the street paved, which is testified to be the usual and customary apportionment for cost of paving streets adopted by the council throughout the city. Concededly this imposes upon the property owners a special tax for the improvement several times greater than it would be on a basis of 8% of the assessed valuation of their taxed property.

It is plaintiffs' contention that the council by its resolution of March 20, 1916, fairly submitted to the voters of the third ward the question of paving the two streets at an election regularly held and duly noticed, with the purpose and object fully set forth in the resolution appointing such election, that such proceeding is authorized by statute and the council bound by the result, which determines the method of assessing and collecting the special tax. In substantiation of this position reference is made to section 2924, 1 Comp. Laws 1915 (1 Comp. Laws 1897, § 3008), being section 2 of chapter 6 of Act No. 215, Pub. Acts 1895, providing for incorporation of cities of the fourth class, which is as follows:

"Special elections may be appointed by resolution of the council, and held in and for the city, or in and for any ward thereof, at such times and place or places as the council shall designate; the purpose and object of which shall be fully set forth in the resolution appointing such election."

For defendant it is contended that the submission of that question to the electors of the third ward was at most for advisory purposes in the nature of a "straw

vote," as generally talked and understood at the time, the result not legally binding upon that council or its successors, that the section under which it is claimed to be of legal force antedates by many years section 323 of the special charter of Ypsilanti, which is strictly local in character, regularly adopted by the electorate pursuant to constitutional authority and provisions of the home rule act. This section took effect April 10, 1913, and is as follows:

"SECTION 323. The common council shall have power to assess and levy a tax to pay the expenses of making, grading, paving, opening, widening and repairing streets, lanes and alleys, and for the construction of and putting curb stones, curbing, gutters and culverts therein and other local improvements, upon the lots, premises, lands and tenements in said city, which, in the opinion of the common council of the said city, are benefited by such improvement, or by a general tax, or part by local or special tax, as said common council may deem proper, provided, however, that no more than 25% of the said improvement shall at any time be assessed by the general tax of the city."

The only legal question which this scant record and counsel's briefs present and discuss is whether the city council by appointing and holding this so-called special election, and its result, is shorn of the discretionary taxing and assessing power conferred upon it by the city charter and bound to the course indicated by the proposition submitted to the electors of the third ward and affirmed by a majority of those voting on the question, but not by a majority of those voting at that election.

The authority to order and direct paving and other improvements of the city's highways, and the power of taxation to raise funds for that and other municipal purposes rests in the city council. The council cannot by resort to a "special election" under the statute referred to shirk that duty, delegate its authority

and divest itself of, or restrict, its taxing power conferred by charter, in the absence of some express provision to that effect. We are cited to no precedent to support the proposition that it can, beyond this general statute authorizing the council to appoint special elections by resolution. A "special election" not otherwise qualified in its authorization, is generally recognized to be, and defined as, an election to fill a vacancy in some office arising by death of the incumbent or other disqualifying cause, or an election for some particular emergency. (Black's Law Dictionary.) There was no vacancy in office or emergency in the case, or anything out of the ordinary. Lathers, the alderman who bethought this plebiscite, testified that when he talked with members of the council about assessing the cost in a different manner than had been customary, "the objection was raised at once that it had never been done that way, and of course we wanted the opinion of the people of the ward," and stated he had said to Mr. Gaudy (a supervisor) and Mr. Worden (an alderman) "that in offering the resolution, I did not consider it binding on the council, that I had supposed it was a straw vote." When asked if he offered it with the object in view of having the ward pay all over 8% of the assessed valuation, he replied, "I don't think that was quite my object," but had he remained on the council it was his intention "to have some proposition of that sort." Under shown conditions and the usual custom as to those special assessments the question prepared by him and submitted is indicated to have been somewhat uncertain if not misleading. His attention being called to the custom of requiring the city at large to pay 25% of the cost of paving, he said, "Yes, I meant that part should stay exactly as it was." Mr. Gaudy, the supervisor of that district and an active witness for plaintiffs, who had expounded his views upon the subject and stated that

it was part of the charter for the city to pay 25%, was asked and answered:

"*Q.* You think they intended the 25% should be paid by the city at large?

"*A.* Certainly, they always have. I don't know why there should be an exception in this case."

With such interpretation of this question by city officials who claim to have given the matter special attention and are presumed to have a better understanding of it than the casual voter, it is not an unreasonable inference that the question failed to convey a clear understanding to the electors of the proposed method of paying for the paving. The wisdom or purpose of propounding the question in that form to the electors of the ward is not altogether clear, but it is clear in our opinion that neither such course nor the answering vote could operate to suspend the provisions of a city charter imposing upon its legislative body the exclusive duty to apportion, assess and levy such special taxes according to its independent, final judgment, "as said council may deem proper," in the manner and within the limits prescribed. The council at no time by any resolution or order changed its original determination of August 17, 1915, as to the method of apportioning and assessing the cost of paving those two streets. It subsequently decided upon a different and better pavement, as is claimed, and after the same was laid directed that the cost should be apportioned and assessed as originally proposed, and as was customary.

The city of Ypsilanti was early incorporated by legislative enactment and its special charter has been perfected by revision and amendment from time to time. It was revised as early as 1877, extensively amended by Act No. 400 of the Local Acts of 1881, and further amended in certain particulars at several sessions of the legislature since then. As amended

in 1881 full plenary power and discretionary authority is conferred upon the common council by sections 164, 165 and 166 in the matter of paving and improving its streets, and determining within specified limits the apportionment of costs therefor. The more recent section 323, before quoted, is along similar lines and but slightly changes, or modifies, the older provisions, amongst other things making plain that not more than 25% of such improvements can be imposed upon the city at large. Along similar lines and under the same sub-title (*Cost of Improvements — Special Assessments*) as chapter 24 of the general law for incorporation of cities of the fourth class (1 Comp. Laws 1915, § 3106 *et seq.*), sections 199 to 224 of defendant's charter prescribe in detail, with the usual safeguards for notice, review, etc., the proceedings for levying and collecting special assessments. Nowhere amongst these many provisions on the subject, nor anywhere in the charter, is there any authority for the council to delegate its legislative powers and relieve itself of the duties imposed upon it by the fundamental law of the municipality, as is claimed to have been done here.

That being the only question fairly presented for determination by this record, the decree of the lower court is reversed and plaintiff's bill of complaint dismissed with costs to defendant.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

KELLEY *v.* PARR.

FRAUD—ACCOUNTING—EVIDENCE—SUFFICIENCY.

On a bill by stockholders of a corporation against the general manager, a capitalist who financed the operations, and a company which purchased assets of the corporation, charging bad faith and responsibility for its losses, the conclusion of the court below that plaintiffs had failed by proper proof to maintain their charges, *held*, supported by the record.

Appeal from Grand Traverse; Mayne, J. Submitted April 25, 1919. (Docket No. 45.) Decided October 6, 1919.

Bill by Walter N. Kelley and another against William W. Parr and others for an accounting. From the decree rendered, plaintiffs appeal. Affirmed.

Parm C. Gilbert, for plaintiffs.

Hawley & Eldred, for defendants.

KUHN, J. This is a bill for an accounting, filed by two of the stockholders of the South Side Company, of Traverse City, against William W. Parr, the general manager of the company, Thad B. Preston, who had financed the corporation under an agreement whereby he held its stock in trust as security, with a certain supervision over its management, and the Brown Lumber Company, which had come into possession of certain of the assets of the South Side Company after the latter ceased operations.

In the year 1909, a prior corporation, known as the South Side Lumber Company, of Traverse City, was insolvent and in the hands of a receiver. Plaintiff Kelley and defendant Parr had been stockholders in this corporation and connected with its management.

In the summer of 1909, Kelley, Parr and others organized a new corporation, under the name of the South Side Company, to take over the assets of the insolvent company, and this new corporation entered into the following agreements with defendant Preston for the furnishing of money and credit to it by said Preston, viz.:

"Memorandum of agreement, made and entered into this 20th day of July, A. D. 1909, between the South Side Company, a corporation of Traverse City, Michigan, and T. B. Preston, of Ionia, Michigan.

"Witnesseth, that whereas, the first party has this day entered into an agreement with John F. Ott, The Traverse City Iron Works and James Cameron, wherein and whereby it is provided and mutually agreed between the parties that in case the said Ott, The Traverse City Iron Works and Cameron purchase upon their bid of eighty-two thousand dollars ($82,000) the properties of the South Side Lumber Company now being advertised for sale by J. O. Crotser, receiver, upon said bid, and the court allows the said second party hereto the sum of four thousand dollars ($4,000) for attorney fees, costs and expenses, then and in that case the said first party to this agreement will pay to the said Ott, The Traverse City Iron Works and Cameron, or to the receiver, the said sum of eighty-two thousand dollars ($82,000) cash for said property as of April 1, 1909, and

"For that, whereas, the said first party hereto require, for the purpose of carrying out its agreement with Ott and others a large sum of money, which it desires said second party to this agreement to furnish to it,

"Therefore, it is mutually agreed as follows:

"*First.* The said second party agrees to furnish the money necessary, to wit: The sum of eighty-two thousand dollars ($82,000), with which said first party shall pay the purchase price of said properties, provided the same is struck off to said Ott and others, and said sale is confirmed by the court, and title thereto is transferred to said first party hereto, upon the following conditions:

"(*a*) That the court allows the said second party four thousand dollars ($4,000) for attorneys fees,

costs and expenses in the matter of a bid made by said second party for said property, which said bid and the confirmation thereof, was set aside by the court, for the purpose of accepting the bid of said Ott and others, at the sum of eighty-two thousand dollars ($82,000).

"(*b*) That said first party execute and deliver to said second party its promissory notes for the sum of twenty-eight thousand dollars ($28,000), or such other sum as said second party is required to pay for said property, over and above the sum of fifty thousand dollars ($50,000), to be paid and secured as hereinafter provided, which said notes shall become due and payable as follows:

"Five thousand dollars ($5,000) October 15, 1909; five thousand dollars ($5,000) December 15, 1909; five thousand dollars ($5,000) August 15, 1910; five thousand dollars ($5,000) September 15, 1910; five thousand dollars ($5,000) October 15, 1910; five thousand dollars ($5,000) December 15, 1910; provided the amount of thirty thousand dollars ($30,000) is required; and provided further, that whatever sum is required upon settlement with the receiver, over and above said sum of fifty thousand dollars ($50,000), then, and in that case, the said first party shall give to said second party its promissory notes or the cash, which said notes shall be due and payable as above provided, in an amount equal to the amount due said second party; and all shall be paid on or before the 15th day of December, 1910, with interest at the rate of six (6) per cent. semi-annually.

"(*c*) The first party shall also execute and deliver to said second party a mortgage securing bonds to the amount of fifty thousand dollars ($50,000), which shall be due and payable as follows:

"Five thousand dollars ($5,000) August 15, 1911; five thousand dollars ($5,000) September 15, 1911; five thousand dollars ($5,000) October 15, 1911; five thousand dollars ($5,000) December 15, 1911; five thousand dollars ($5,000) August 15, 1912; five thousand dollars ($5,000) September 15, 1912; five thousand dollars ($5,000) October 15, 1912; five thousand dollars ($5,000) December 15, 1912; five thousand dollars ($5,000) August 15, 1913; and five thousand dollars ($5,000) September 15, 1913, which said bonds

shall bear interest at the rate of six (6) per cent. semi-annually.

"(*d*) The said first party shall also execute and deliver to said second party its promissory notes as follows:

"Five thousand dollars ($5,000) October 15, 1913; five thousand dollars ($5,000) due December 15, 1913; five thousand dollars ($5,000) August 15, 1914; five thousand dollars ($5,000) October 15, 1914, bearing six (6) per cent. interest, payable semi-annually.

"*Second.* The said second party hereto agrees to furnish the said first party a line of credit to the extent of twenty-five thousand dollars ($25,000), said line of credit, however, and the cash furnished, not to exceed the sum of seventy-five thousand dollars ($75,000), in the aggregate, at any one time.

"*Third.* The said first party shall pay to said second party in cash, all such sums as may be due and payable for accumulated interest upon any moneys which said second party has had in his hands for the purpose of carrying out the former contract in relation to the purchase of said properties, and upon certified checks deposited or otherwise, and will also save harmless the second party from any and all damages, losses or expenses which he may be to in any way from the fact of depositing with the First National Bank of Traverse City and the Peoples Savings Bank of Traverse City, two certified checks under certain conditions, for the purpose of purchasing the claims of said banks against the said South Side Lumber Company. Said second party agreeing, however, that he will not at any time pay to said banks anything upon said checks in settlement or otherwise, except upon the written consent of the said first party hereto.

"In witness whereof, the parties hereto have set their hands and seals the day and year first above written.

"SOUTH SIDE COMPANY,
"WALTER N. KELLEY, President. (L. S.)
"T. B. PRESTON." (L. S.)

"Memorandum of agreement, made and entered into by and between the South Side Company, a corporation, of Traverse City, Mich., and Thad B. Preston, of Ionia, Mich., witnesseth,

"Whereas, the second party has advanced certain moneys for the purpose of paying the purchase price of the properties now owned by the South Side Company and purchased of J. C. Crotser, receiver for the South Side Lumber Company, with the understanding that the stock of the said South Side Co. should be issued in trust to the said Preston and held by him as collateral security for the fulfillment of all obligations of payment made by the South Side Co. to the said Preston and to the Union Trust Co., as trustee, therefore it is mutually agreed between the parties hereto, and the president and secretary of the said South Side Co. are to issue to said Preston the certificate of stock for forty-nine thousand nine hundred and fifty dollars ($49,950), as trustee; said stock to be held by said Preston until all obligations of said South Side Co. are fully paid to him and to the bondholders under the bond mortgage this day executed and delivered to the Union Trust Co., and when all of such obligations and indebtedness is paid and satisfied in full, said Preston agrees to surrender said stock, and thereupon the president and secretary of said company shall cancel said certificate and issue certificates to the following parties:

W. N. Kelley	$25,500
W. W. Parr	9,000
Mary E. Lowell	2,500
M. G. Vivian	500
E. L. Montague	500
Ralph Case	1,000
J. O. Crotser	1,000
Treasury	9,950

"SOUTH SIDE CO.,
"By WALTER N. KELLEY.
"THAD B. PRESTON.

"September 13th, 1909."

The promissory notes provided for in subdivision (*d*) of the first paragraph of the above agreement of July 29, 1909 (aggregating $20,000), represented the agreed compensation of Mr. Preston. For some additional assistance later rendered, this amount was increased to $22,500.

The bond issue of $50,000 contemplated by subdivision (*c*) of said paragraph was arranged through the Union Trust Company, and the bonds were sold with Mr. Preston's guaranty or indorsement.

A Mr. J. J. Corcoran was appointed by Mr. Preston to represent him in the company and was made treasurer. He countersigned checks, approved purchases, and watched the conduct of the business, but took no active part in its management.

The operations of the South Side Company resulted in loss. In February, 1912, its planing mill at Traverse City burned. It was fully covered by insurance, which was collected, but the affairs of the company were then in such condition that it did not seem advisable to rebuild, and from that time the efforts of the management were directed to winding up the affairs of the company so as to save, if possible, something for the stockholders. The company, however, proved to be insolvent.

Plaintiff Kelley was the president of the company, and at the outset was in charge of its logging and lumbering operations. Later, Mr. Preston, being dissatisfied with the results obtained, insisted on the removal of Mr. Kelley and the substitution of Mr. Parr as general manager. The latter remained in charge to the end.

Plaintiffs' case, briefly stated, is this: It had been the custom of the company to issue financial statements from time to time, copies of which were furnished to plaintiff Kelley. In June, 1912 (after the fire), the following statement was issued:

"Statement (June 1, 1912).
South Side Company, Traverse City, Mich.
Assets.

Cash—	
Interest fund	$50.00
Grand Rapids Natl. City Bank.....	1,234.61
First Natl. Bank, pay roll	100.00
Notes receivable	721.62

Accounts receivable—		
Customers		$17,575.02
Sundry debtors		730.27
Prepaid expenses at Trav. City		481.28
Inventories—		
Wholesale lumber	$7,883.08	
Retail lumber	2,206.21	
Retail lath	109.52	
Retail shingles	404.83	
Doors and windows	1,374.35	
Posts and columns	191.17	
Box factory lumber	798.03	
Carp. shop material	1,718.25	14,685.44
Steubenville box factory account		4,871.23
Plant, Traverse City—		
Real estate		4,550.00
Furniture and fixtures		402.33
Horses, wagons and harness		763.30
Tula timber		14,597.01
Tula cutover lands		5,000.00
Tula investment		3,720.61
McManus contract		23,472.81
Investment at Hiawatha—		
Current cash	$31.67	
Prepaid expenses	1,675.70	
1910 lumber	478.56	
1911 lumber	7,735.87	
1912 lumber	20,935.81	
Old shingles	193.40	
Old posts and poles	16.25	
Equipment	2,667.89	
Timber	4,633.51	38,368.66
Contract with W. W. Parr		625.87
		$131,950.06

Liabilities.

Mortgage bonds	$10,000.00
Land contracts payable	11,144.38
Accrued interest on land contracts	255.00
Notes, payable	47,725.62
Accrued interest on notes payable	667.80
Accounts payable	14,618.97
Reserve for bad debts	304.38
Hiawatha logs	2,767.91

Capital stock	$50,000.00
Loss and gain this year, Trav. City	2,837.63
Loss and gain this year, Hiawatha	3,050.10
Loss and gain previous years at Trav. City	19,159.89
Loss and gain previous years at Hiawatha	24,906.36
	$131,950.06"

To the above detailed inventories were appended. About a year later Mr. Kelley was furnished with the following statement:

	"June 6, 1913.	
	5/10/13	5/10/13
	Assets	Liabilities
Cash	$39.60	
Notes receivable	461.42	
Accounts receivable	18,325.76	
Tula Lumber Company	19,339.95	
Geo. Henderson contract	100.00	
Bark at Tula	2,000.00	
Note payable		$39,500.00
Accounts payable		2,224.39
	$40,266.73	$41,744.39"

It is plaintiffs' claim (1) that no substantial loss could have occurred subsequent to June, 1912, because the company's operations ceased at about the time of the fire in February, 1912; and that inasmuch as the June, 1912, statement, after making gain and loss adjustments, shows the capital stock unimpaired, while the statement of June, 1913, shows an entire disappearance of the capital fund, with liabilities in excess of assets, there must have been in the meantime a dissipation of the property of the corporation entirely unaccounted for.

(2) That if defendants claim the losses occurred at Tula and Hiawatha, defendants Parr and Preston should be held personally responsible for these losses for mismanagement. That, among other things, defendant Parr, after assuming the management, had released one McManus from a logging contract under

which the Tula operations could have been conducted at a profit to the company, and entered into a new arrangement with him which resulted in a heavy loss to the company.

(3) That the following checks, drawn by the company to defendant Parr, are wholly unaccounted for, viz.:

"Jan. 16, 1910, Check No. 567	$1,958.45
Aug. 31, 1910, Check No. 1048	2,460.27
Feb. 7, 1911, Check No. 1396	1,436.10
Aug. 12, 1911, Check No. 1724	2,206.10
May 8, 1912, Check No. 1726	3,117.27
	$11,178.19"

(4) That the Brown Lumber Company, in which Mr. Preston and Mr. Parr were the principal stockholders, had come into possession of certain of the assets of the South Side Company, particularly a working contract, known as the "Durant-Dort contract," and other lines of business properly belonging to the South Side Company and its stockholders.

(5) That Mr. Parr continued to draw a salary of $250 per month, fixed by his employment contract, after the company had ceased operations, and that he claimed his salary in full during the entire term of the contract.

Plaintiffs ask for an accounting of these matters; that Mr. Parr and Mr. Preston be charged personally with the losses at Tula and Hiawatha; that Mr. Parr repay to the company the amount of the checks paid to him and unaccounted for; that the Brown Lumber Company account to the South Side Company for the contracts and property taken over; that the salary of Mr. Parr cease as of June 1, 1912; and that the defendants account to the stockholders for the net value of the South Side Company as per statement of June 1, 1912.

In reply, defendants submit a more complete statement of facts, which, in the main, seems to be well substantiated by the record, and which is not questioned or denied by any reply brief on the part of the plaintiffs. The matters involved were gone into fully on the hearing in the lower court, there being nearly 500 pages of testimony in the printed record, besides voluminous exhibits. Such of the facts as serve to answer the plaintiffs' charges follow.

An addition of the column headed "liabilities" in the statement of June 1, 1912, will show that the total is incorrectly given as $131,950.06, and that it should be $187,438.04. The "assets" column is correctly added. Had the two columns balanced, as they purported to do, the gain and loss items would have indicated profits. As it is, it is doubtful what they were intended to show. Counsel seem to take it they represent losses. If so, the statement would show the capital fund more than exhausted at that date. Eliminating these items, the liabilities would still exceed the assets, and the value of the capital stock would appear on the face of the statement to have then been only $44,466.00. The statement, however, carries as assets the amounts invested in the Tula operations and a portion at least of the actual investment at Hiawatha. The testimony of the accountant shows most convincingly that there was a loss of upwards of $26,000 at each of these places. These losses, though for the most part sustained prior to the date of the statement, had not then been fully ascertained, nor had proper entries been made on the books to indicate same. It is clear, therefore, that the statement cannot be given the interpretation and weight that plaintiffs claim for it. Mr. Becker, the accountant selected by the plaintiffs to go over the books and papers of the company and make a transcript and report thereon, testified as follows:

"So far as the entries in the books are concerned and the transactions there recorded, there is nothing irregular about the books in any way. The books and records are all complete as far as there is any records. There is a debit and credit for each transaction. * * *

"*Q.* Then you take, Mr. Becker, the accounts we have with Tula and Hiawatha and you find from the books of the company that there was a material loss to the company because of those operations, didn't you?

"*A.* Yes, sir. I gained some evidence as to when this loss occurred and have undertaken to show when that occurred. * * *

"*Q.* Are you able to give from your statement the amount of the loss at Hiawatha, the total amount, for all the operations there I mean now?

"*A.* I think I am, yes.

"*Q.* Well, just give us that.

"*A.* The total loss at Hiawatha, on the whole, was $24,518.84. In addition to the above are the accounts, insurance, taxes and railroad.

"*Q.* Yes, isn't it a fact that that should be added to the loss of that operation?

"*A.* That may be possible; I don't know if there is any income from those accounts. If these were added it would bring the loss up to the figures shown here, that I made, showing the loss at Hiawatha at $26,573.04. My statement also shows a loss at Tula and that loss was $26,119.19. * * *

"*Q.* Well, you have determined the amount of the loss at the two places?

"*A.* Yes, the Tula and Hiawatha from the books and tickets, $52,693.03, I think that is the amount. * * *

"*Q.* As I understand it, witness, you did this: You took the aggregate of what was actually spent, say at Tula—

"*A.* Yes. * * *

"*Q.* Including the sales, railroad and everything?

"*A.* Yes, sir.

"*Q.* And you found that they had expended at Tula this $26,000 and some dollars more than they had gotten?

"*A.* Yes, sir.

"*Q.* And that is where you got your loss?
"*A.* Yes, sir, that is the idea."

Bearing on the question of mismanagement, and responsibility for same, the following facts appear:

Besides the planing mill, real estate and stock of lumber at Traverse City, the property purchased from the receiver consisted of a few contracts for the sale of planing mill products; also sawmill, logging outfits, camps and equipment at Hiawatha, Schoolcraft county; and a contract for the purchase of 1,080 acres of timber land at Tula, Gogebic county, on which latter there was unpaid, when turned over by the receiver, about $22,000, of which the company then paid $5,000, the balance remaining an obligation against the lands and against Mr. Preston personally. At the outset, plaintiff Kelley, the president of the corporation, was given charge of the logging and lumbering operations in the Upper Peninsula, and Mr. Parr was put in charge of the office and the Traverse City plant.

In the fall of 1909, plaintiff Kelley went to Hiawatha, and, after looking over the ground, made the following report to Mr. Preston:

(South Side Company Letterhead.)
"HIAWATHA, MICH., Nov. 5th, 1909.

"T. B. PRESTON,
"Ionia, Mich.

"*Dear Sir:* Have been here this week and have covered the situation very thoroughly and everything is progressing very satisfactory and from present indications we are going to get our logs in at a less cost than we figured on. The weather has been very favorable and we have a good class of laborers and we are getting the timber on skids at a very reasonable cost. If we have a favorable winter this will enable us to get the logs in at less than we expected and the quality of timber is better than what we have cut here during the past two years. We are figuring on putting in and manufacturing about five million feet of lumber here this coming season that will be made up about as follows:

White pine	200,000 ft.
Norway pine	1,000,000 ft.
Hemlock	500,000 ft.
Hardwood	3,000,000 ft.
Cedar shingles	7,000,000 ft.

"It will cost us about the following amount to camp us until May 1st, 1910:

Logging	$25,350.00
Manufacturing to May 1st	6,000.00
General expense	2,500.00
Hauling lumber	2,250.00
Hauling shingles	700.00
To May 1st	$36,800.00

"We have $19,184.23 of lumber and shingles on hand here so that we will need to get from Traverse City end about $.....to carry this operation through.

"Very truly,
"WALTER N. KELLEY."

Operations were begun, and in January, 1910, Mr. Kelley reported the situation as follows:

"South Side Company,
"Manufacturers, Wholesale and Retail Dealers.
"HIAWATHA, MICH., January 29th, 1910.

"T. B. PRESTON,
"Ionia, Mich.

"*Dear Sir:* This operation is in good shape, the logging is in fine condition. We have our full amount of logs cut and about one-half of them hauled. The winter conditions could not have been much better had we ordered it, the snow is quite deep but not so as to make it bad or expensive logging. Everything has been very favorable and we will be able to get our logs in at the estimated cost, and as the lumber prices are improving in all probability we will be able to make a better showing than the figures I gave you. Our mill has not got down to business yet. My calculation was based on cost of manufacturing, $3, but it has cost us $3.24 up to date, but we must get this cost down below the $3.00 mark and there is no reason why we can't. We will have all our logs into the mill

yard by March 10th. We have cut the following amount of logs up to January 22d.

January 22nd scales of logs.

Norway pine	1,006,294 ft.
White pine	224,939 ft.
Spruce	251,600 ft.
Balsam	198,400 ft.
Tamarack	325,000 ft.
Hemlock	438,168 ft.
Hard maple	1,436,277 ft.
Beech	123,629 ft.
Birch	191,422 ft.
Cedar	470,413 ft.
Total	4,666,142 ft.

"Have cut enough to make full five million since above date.

"We have on hand here of last year's dry lumber the following:

1,278,492 ft. value	$17,092.31
Shingles, 2,535 M. value	4,373.55
	$21,565.86

"We are now hauling this out and will be able to get it all out within the next sixty days. It will require the following amount of money to carry us until May 1st:

For logging	$5,000.00
For manufacturing lumber	4,500.00
For shingles	2,280.00
For hauling lumber and shingles	2,500.00
For general expenses	500.00
	$14,780.00

"Will be required at the following dates:

March 15th	$6,760.00
April 15th	4,760.00
May 15th	3,260.00
	$14,780.00

"The pay roll for February 15th amounts to $7,800.00, at which time it will be necessary to use our full line to clean up the payment, interest and pay roll, and you will notice that we will be in shape to take care of ourselves in nice shape by moving our lumber and shingles as there is $21,465.86 to pay $14,780.00 with. We have orders on our books to take this lumber just as fast as we can ship it.

"Hoping that everything is satisfactory to you,

"I am yours truly,

"WALTER N. KELLEY."

It appears from the testimony that, as a matter of fact, the logs referred to in the above letter were not scaled at all, but merely estimated; that the estimate was 4,200,000 feet instead of 5,000,000, and that the lumber that was shipped to the company therefrom amounted to only 3,903,700 feet, when it should have overrun the log scale. In the spring of 1910, plaintiff began the construction of a 3-mile spur track into the mill at Hiawatha, estimating the cost, in his report to the company or Mr. Preston, as about $1,000 per mile. The actual cost proved to be $6,000, the grading and ties having cost about $4,000 and the railroad company's bill for laying ties and iron being $2,000. Mr. Kelley also reported that he had 2,000,000 feet of lumber for shipment to the W. E. Williams Company, at Traverse City. There proved to be but 1,200,000 feet. When this fact was discovered, Mr. Preston at once ordered Mr. Parr to go to Hiawatha and look the stock over. He found 1,000 cords of wood which was worthless, there being no market for it; that the shingles on hand were less than the estimated amount and of poor quality; that the lumber fell short of plaintiff's estimate by many thousand feet; that the Norway and white pine were badly stained and damaged; that some 40,000 feet of hardwood logs and 150,000 feet of softwood logs had been left in the woods over summer, with the result that the worms had spoiled the pine logs and the hardwood had be-

come dozy and would make only cull lumber. In the fall of 1910, Mr. Kelley proposed commencing lumbering operations at Tula. Mr. Parr objected on account of lack of funds and doubtfulness of the results. Mr. Preston, having advanced the entire amount agreed under the contract, had stated that he would not furnish any more money. Mr. Kelley, however, appealed to him, representing that $3,000 would be sufficient to put the operations at Tula where they would take care of themselves, and Mr. Preston finally agreed to advance from $3,000 to $5,000 for that purpose. It appears that the receiver of the old South Side Lumber Company had entered into a contract with Foster & Ayers (subsequently known as the Tula Lumber Company) to manufacture the logs at Tula into lumber and other products, and this contract was assumed by the South Side Company upon taking over the assets. Foster & Ayers, in reliance upon the contract, had constructed a mill at Tula to carry out this contract. Upon Mr. Kelley's recommendation, a contract was entered into by the South Side Company with one Isaac Lurya for the purchase by him of the lumber manufactured at Tula, in which contract Mr. Lurya agreed to advance certain sums of money each month for lumber cut during the previous months, and the company by said contract became bound to sell the lumber to him, Mr. Preston guaranteeing performance by the company. Mr. Kelley also hired one Blue to manage the operations at Tula. After Mr. Blue had expended about $2,500 with little apparent result, Mr. Kelley discharged him and entered into a contract with one George McManus, to do the work at a certain fixed price. Mr. Kelley himself spent only four days a month at Hiawatha and Tula during the entire period of his management of these operations. In February, 1911, because of the unsatisfactory situation at both Hiawatha and Tula and other

alleged instances of poor management on plaintiff's part, Mr. Parr became dissatisfied, tendered his resignation as an officer and manager of the company, and notified Mr. Preston and the company that he would take with him what were known as the "Steubenville" or "Pope Tinplate" contract and the "Durant-Dort" contract, which he claimed to control personally, and which were the South Side Company's most valuable assets. Mr. Preston thereupon sent for Mr. Parr, Mr. Corcoran and plaintiff Kelley to meet him at Ionia. Plaintiff claims he did not get any such notice. At any rate he reached Ionia the day after Mr. Parr and Mr. Corcoran were there, and found that he had been removed as manager of the logging and lumbering operations, and that Mr. Parr had been put in full charge, the following contract having been made with him:

"The South Side Company, manufacturers, wholesale and retail dealers in lumber, lath, shingles, doors, mouldings, box shooks, 515 Lake Ave. Tel. Bell 390; Citz. 308.

"TRAVERSE CITY, MICH., February 16th, 1911

"Contract for Service.

"This contract, entered into between the South Side Company, a corporation doing business in Traverse City, Michigan, party of the first part, and William W. Parr, resident of Traverse City, Mich., party of the second part.

"The party of the first part agrees to hire, and does hire, the said W. W. Parr, party of the second part, as general manager of the South Side Company for the period of time that T. B. Preston is financially interested in said company, at an annual salary of three thousand dollars ($3,000), payable two hundred fifty dollars ($250) per month.

"THE SOUTH SIDE COMPANY,

"By J. J. CORCORAN, Treas.

"G. E. MCMICHAEL, Sec.

(Signed) "W. W. PARR, party of the second part."

It appears that the season was very unfavorable

for the logging operations at Tula, and Mr. McManus soon found that he could not carry out his contract without heavy loss to himself, and accordingly refused to proceed with the work. Upon investigation, Mr. Parr found that he was financially irresponsible and that the company would have no remedy against him. He was a very competent man for the work. The company being under contract for the output of lumber and for the manufacture of the logs into lumber, and Mr. Preston having become personally liable for the carrying out of these contracts, it was impossible to avoid a loss by discontinuing the logging operations. Mr. Parr, therefore, hired Mr. McManus, at $75 a month, to superintend the work, and continued the operations at Tula, the result of which proved to be a heavy loss to the company.

The "Steubenville contract," above referred to, also known as the "Pope Tinplate Company contract," was a very profitable one. The contract was first made in 1906 between Mr. Parr (then with the South Side Lumber Company) and Mr. Hannen, the manager of the Pope Tinplate Company, but no boxes were manufactured until 1907. In October, 1907, the South Side Lumber Company failed, but the receiver continued the contract during his receivership, through Mr. Parr, whom he retained, and who controlled the contract, which was renewed from year to year. The benefit of this contract passed to the South Side Company upon their purchase of the assets. At the time of the making of the original contract between Mr. Hannen and Mr. Parr it was verbally agreed that Mr. Hannen should receive one-half of the net profits on the business done under the contract after the South Side Company had taken a profit of $1.50 per thousand on each thousand feet of lumber used in the manufacture of the tin-plate boxes. In consideration thereof Mr. Hannen was to oversee the manufacture

of the boxes at Steubenville, Ohio, and keep a faithful account of the number of boxes made and thereby relieve the South Side Company from the expense of employing and keeping a man at Steubenville to care for its interests. Under this agreement the money was to be paid by Parr to Hannen in cash and no record kept. This verbal agreement with Mr. Hannen was called to the attention of the circuit judge during the receivership of the South Side Lumber Company and was approved and ordered to be complied with by said court. It was also understood by Mr. Kelley, Mr. Parr and Mr. Corcoran and was thoroughly discussed at the time that Mr. Kelley and Mr. Parr were endeavoring to enlist the services of Mr. Preston in the affairs of the company. No receipts were taken from Mr. Hannen at the time the payments were made to him, but during the trial Mr. Parr obtained from him, and introduced in evidence, the following:

"STEUBENVILLE, OHIO, Nov. 6, 1914.

"Received from W. W. Parr in total eleven thousand one hundred seventy-eight dollars and eighteen cents ($11,178.18), my due as per verbal agreement, to look after the manufacture of tinplate boxes at Steubenville, Ohio, for the South Side Lumber Company.

(Signed) "GEORGE W. HANNEN."

Immediately after the planing mill fire, Mr. Parr tried to rent the W. E. Williams plant at Traverse City in order to carry out the "Steubenville" and "Durant-Dort" contracts, but the Williams people refused to rent it. After some further efforts to hold these contracts, Mr. Parr finally turned them over to the Brown Lumber Company, which in the meantime had been acquired by Mr. Preston and himself. Its plant not being equipped for that kind of work, it became necessary for the Brown Lumber Company, at some expense, to enlarge and further equip its plant for that purpose, and new contracts were thereupon

made by the Steubenville concern and the Durant-Dort people with the Brown Lumber Company.

On June 1, 1912, the lumber and most of the personal property of the South Side Company remaining at Traverse City after the fire were purchased by the Brown Lumber Company, the sale being made on the basis of the prices shown by the January inventory, $15,448.74. It is the claim of defendant Parr that plaintiff was fully advised of this transaction and consented to same—in fact, that he was the first to suggest that it be done. Plaintiff admits that he asked Mr. Parr why the Brown Lumber Company didn't buy up this property, but denies that he was fully informed of, or consented to, this sale.

In the winter of 1912-1913 the Brown Lumber Company purchased logs at Hiawatha, and the South Side Company gave to one Eckstrom the use of the mill there for paying the taxes and keeping the mill in repair. The taxes amounted to some $350, being not only upon the mill, but upon a considerable quantity of real estate, the taxes on which the South Side Company was obligated to pay until 1917. Early in 1914 the mill was sold to Mr. Eckstrom for $1,000, which the testimony indicates was a good price therefor.

In November, 1912, the Tula Lumber Company bought the timber at Tula from the South Side Company. This, with the foregoing sales, practically closed out and disposed of all the property of the South Side Company. It is the claim of the defendants that the company is insolvent, without sufficient money or property to cover its remaining indebtedness. It appears that Mr. McManus has brought suit against the company, claiming some $11,000, and that the receivers of the Pere Marquette Railway Company have also commenced a suit for $966.86, levying an attachment upon the remaining real estate of the company—a barn and fifteen lots at Traverse City, as-

sessed at $2,500. Mr. Preston has been paid in full, but may incur some loss in connection with debts of the company. He testified:

"At any rate, I have been paid the original $50,000 represented by these bonds, or repaid that amount with the interest accruing; I have been paid whatever is represented by those notes to make up this purchase price, and I have been paid notes representing my bonus, $22,500."

And again:

"*Q.* Are you in any way obligated because of the debts of the company?

"*A.* I am obligated to McManus of Frankfort, the one who took the contract up at Tula, or worked for us up at Tula."

After a full hearing, the circuit judge filed a written opinion, in which, after stating certain facts, he concludes as follows:

"I have carefully examined the testimony and cannot find any evidence that would justify me in holding defendants responsible for the loss at Tula and Hiawatha. In my opinion the parties were mistaken in the possibilities of the proposition. These lands were formerly before the court in the case of the South Side Lumber Co. and the court advised by experienced operators that a heavy loss would likely result from operating them. This opinion was one of the reasons why the receiver recommended a sale of the lands. This fact may not be material, yet it explains and justified the actions of the receiver. The fact that there was a loss is not sufficient to hold the defendants responsible. Their responsibility for it has not been shown.

"The transfer of the remaining assets to the Brown Lumber Co. presents a different question. The affairs of the company had to be closed and the property sold. The testimony is conflicting upon the question of the consent of plaintiff to the transfer. I do not find that any property was transferred at less than others would have paid for it. If defendants' action was detrimental to plaintiff's rights, the testimony fails to show wherein better results could have

been reached had a different course been pursued. His loss, if any, is not so itemized that the court can point out wherein plaintiff was injured. I find no evidence from which I can determine the amount of damage, if any, sustained by plaintiff.

"Defendant Parr was employed to manage the business of the company at a salary of $3,000 per year and was to stay as long as Mr. Preston was interested in the company.

"Mr. Parr claims he is entitled to his services up to the present time at the rate of $3,000 per year. My opinion is that at the time of the conclusion of the business at Tula and Hiawatha, which business at these points was finally closed about the first of January, 1915, that Mr. Parr should receive full pay up to January 1st, 1915, and as he has had more or less business of the company to look after since that time, he should be paid for his services what they were worth, and in my opinion $100 per month since January 1, 1915, would be a reasonable and fair compensation for his services. Plaintiff not to be charged with this amount. Decree may be settled upon notice."

From the decree entered in accordance with this opinion, plaintiffs have appealed.

A reading of the record is satisfying to us that the plaintiffs have failed by proper proof to show any evidence of bad faith on the part of the defendants in their dealings with reference to the matters here involved, and we are therefore of the opinion that there is no merit in the claims of the appealing plaintiffs and that the conclusion of the learned trial judge was a just and equitable one, considering all the facts in the case, which have been set up above at some length so that the claims of the various parties might be understood. His decree will therefore be affirmed, with costs to the defendants.

MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred. BIRD, C. J., did not sit.

The late Justice OSTRANDER took no part in this decision.

ADDISON *v.* W. E. WOOD CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION—TOTAL INCAPACITY—LOSS OF FOOT.

Where an employee in the course of his employment sustained an injury to his leg, resulting in total incapacity for about a year, when his foot was amputated, he is entitled, under section 9, part 2, of the workmen's compensation act (2 Comp. Laws 1915, § 5439), to compensation as for total incapacity up to the time of the amputation, and from that time, under section 10, part 2 (2 Comp. Laws 1915, § 5440), to the specific compensation provided therein for the loss of a foot, without any deduction for payments made during the period of total incapacity.

Certiorari to Industrial Accident Board. Submitted May 1, 1919. (Docket No. 35.) Decided October 6, 1919.

Frank Addison presented his claim for compensation against the W. E. Wood Company for injuries received in defendant's employ. From an order denying a petition to discontinue payments under an award, defendant and the Zurich General Accident & Liability Insurance Company, Limited, insurer, bring certiorari. Affirmed.

Kerr & Lacey, for appellants.

George G. Hunter, for appellee.

STEERE, J. On November 5, 1915, Frank Addison, appellee, suffered an accident while in the employ of defendant W. E. Wood Company, causing a comminuted fracture of the middle third of both bones of the lower right leg. It is undisputed that the injury arose out of and in the course of his employment, and

As to application and effect of Workmen's Compensation Acts generally, see notes in L. R. A. 1916A, 23 and L. R. A. 1917D, 89.

resulted in at least temporary total incapacity for work.

The customary course of proceedings under the workmen's compensation law was followed promptly and on December 3, 1915, appellant insurance company, representing as insurers the Wood Company, entered into an agreement with Addison for incapacity compensation, on a form prescribed by the industrial accident board, "at the rate of $10 per week during disability," which was filed with and approved by the board.

Immediately after the accident Addison was taken to a nearby hospital for emergency treatment. Dr. A. C. Hall, a specialist in traumatic surgery, acting in behalf of appellants, at once took charge of the case and later removed the injured employee to Harper hospital where he was furnished all needed medical and hospital services, medicine, etc., for approximately one year, during which time he was under Dr. Hall's care and treatment with all expenses borne by defendants, receiving in addition thereto $10 per week from the insurer as provided in their agreement, and a further $5 per week contributed by the W. E. Wood Company. He became dissatisfied with the medical services of Dr. Hall, and, declining to permit further treatment of his injury by him, selected another physician who immediately transferred his patient to a different hospital and soon thereafter amputated the injured member at a point sufficiently below the knee to class the loss as that of a foot. This amputation was performed without the knowledge or consent of appellants, whose medical advice had been that amputation was not necessary. Defendants, however, continued to pay Addison the statutory compensation of $10 per week and $5 per week extra for some time during which negotiations were had and a tentative agreement reached as to compensation, as defendants contend, which Addison later refused to recognize, the

details of which may be omitted, and on July 10, 1918, defendants filed with the industrial accident board a petition to be relieved from paying further compensation beyond two weeks, setting up, which is undisputed, that compensation had already been paid by them under the act for 123 weeks and two additional weeks' compensation tendered with a request for a final receipt for payment on a basis of the loss of a foot, which claimant refused to accept or sign. After hearing the parties the board made an award upon the theory that for the period of 54 1/3 weeks after the accident and prior to the amputation Addison was entitled to receive compensation at the rate of $10 per week for total incapacity, and after the amputation further compensation for 125 weeks at the same rate on the basis of the loss of a foot, making a total of 179 1/3 weeks. From this defendants appeal by certiorari, asking an interpretation of the workmen's compensation act on that proposition.

To summarize the salient facts which raise the question: Addison suffered an accidental injury under which he was paid compensation for total incapacity at the rate of $10 per week for 54 1/3 weeks. Necessarily the payments during that time were under the provisions of section 9, part 2, of the act (2 Comp. Laws 1915, § 5439), as he had lost no members and was totally incapacitated for work. His foot was then amputated and payments at the rate of $10 per week were continued until he had been paid and tendered compensation for 125 weeks, the compensation specified in section 10 (§ 5440) for loss of a foot. The industrial accident board awarded compensation for total incapacity during the 54 1/3 weeks plaintiff was disabled without loss of any member, and after the operation continued compensation during 125 weeks more for loss of a foot.

For defendants it is contended that the one injury which plaintiff sustained resulted in the loss of a foot, entitling him as specifically provided in section 10 to 125 weeks' compensation for such loss, to be computed from the date of the injury as provided in section 3 (§ 5433), the exact time when the foot was amputated having no material significance.

Plaintiff's counsel acquiesces in the award, being "inclined to believe that the board was correct in its interpretation," but, with a reservation directed to the proposition of total incapacity to the maximum period under section 9, also says:

"We are not certain that the industrial accident board arrived at the correct decision in this matter, in awarding compensation to applicant for 54 1/3 weeks as for disability, and for 125 weeks for loss of a foot. We are quite certain that if the board erred at all it erred to the prejudice of applicant."

Part 2 of the act (commencing at section 5431, 2 Comp. Laws 1915) deals with the subject of compensation. Section 4 of that part (§ 5434) provides:

"During the first three weeks after the injury the employer shall furnish, or cause to be furnished, reasonable medical and hospital services and medicines when they are needed."

This section is but incidentally pertinent as it is undisputed that the employer furnished or caused to be furnished to the injured employee what was required in that particular for not only the first three weeks after the injury, but almost a year longer.

The controversy directly involves the construction of sections 9 and 10 of part 2, which are necessarily to be considered both with reference to their relations with each other and the general purpose of the act. First dealing in the matter of compensation with the subject of total incapacity, without particularizing as to the nature of the injury, the legislature provided:

"SEC. 9 (2 Comp. Laws 1915, § 5439). While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee a weekly compensation equal to one-half his average weekly wages, but not more than ten dollars nor less than four dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor shall the total amount of all compensation exceed four thousand dollars."

Then passing to the subject of partial incapacity it further provided:

"SEC. 10. (5440) While the incapacity for work resulting from the injury is partial, the employer shall pay or cause to be paid as hereinafter provided, to the injured employee a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than ten dollars a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury. In cases included by the following schedule the disability in each such case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be as specified therein, to wit:"

The section then continues with 16 short specifying sub-paragraphs declaring what "shall be" the compensation, measured by weeks and average weekly wages, for loss of various named members, the 14th being, "For the loss of a foot, fifty percentum of average weekly wages during one hundred and twenty-five weeks"; while the last provision of this section directly relating to loss of named members differentiates the two by relegating a double loss to the provisions of the immediately preceding section, which is devoted exclusively to total incapacity, as follows:

"The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall

constitute total and permanent disability, to be compensated according to the provisions of section nine."

"Permanent disability" in the connection used can signify in its application no more than a conclusive presumption of total incapacity for work as a result of the injury during the maximum number of weeks for which compensation may be awarded under the provisions of section 9. "Disability" and "incapacity" are of like import as found in this act, which does not cover injuries having no tendency to impair the earning capacity of the employee. The purpose and scope of the legislation is directed and limited to providing a measure of compensation, not full but certain, to those incapacitated for work by industrial accidents, to be paid without regard to any of the legal liability tests of the employee's or employer's negligence, assumption of risk or negligence of a fellow-servant. Such award is based on loss of earnings only, rated by previous average weekly wages, a percentage of which is to be paid during a fixed number of weeks made by the act definitely determinable as the facts are found, and limited at longest to 500 weeks. Loss of members is only recognized and provided for as the same relates to impairment of earning capacity for a definite time. Even if the injury results in death of the employee, continuation of a percentage of deceased's average weekly wages during a maximum period of 300 weeks is the basis and limit of the award to his dependents.

As applied to the facts in the instant case it is manifest that plaintiff's condition before amputation of his foot entitled him to weekly compensation from the date of his injury for continuing total incapacity under section 9. During that time he had lost no member, and section 10 had no application. Upon the amputation of his foot by a physician of his own selection, Addison's theretofore indeterminate total inca-

pacity, only cognizable under the general provisions of section 9, took definite classification under a specific provision of the succeeding section (10), which is devoted to partial incapacity and specified compensation for loss of named members, the maximum period mentioned in said section being 300 weeks. His disability before that time entitled him to weekly compensation for total incapacity resulting from the accident, to be "computed from the date of his injury." It was so computed and paid, as required by sections 3 and 9, to the maximum amount of weekly compensation authorized by the act until amputation took place. Not until then was the loss of his foot an element in the case. Defendants did not and could not pay him weekly compensation up to that time for the loss of a member which he had not lost. After such loss his disability from the accidental injury resulting in incapacity for work concededly continued, but from that time came squarely under the schedule of losses in section 10. The statute does not in direct words anywhere specify that weekly compensation for loss of a foot or other member must be computed from the date of the injury. Section 3 only requires in general terms that compensation for disability caused by an industrial accident, which continues for 8 weeks or longer, shall be so computed. It was so computed by the board, payable weekly on the maximum basis of half wages through consecutive weeks until terminated by the conclusive presumption which the legislature saw fit to apply to the disability resulting from the injury in its final form. Under section 9 the law does not concern itself with the kind or character of the injury sustained, beyond the inquiry whether it has caused total incapacity to work and earn wages. If total incapacity has resulted, whether temporary or permanent, that section covers the case until further developments. Its application may be terminated by

the maximum period of payment fixed by the statute being reached, by death, full recovery, or such recovery that the injured employee is only partially incapacitated for work, or by the loss of a member. When partial incapacity or single loss of a member as provided in section 10 eventuates, the latter section applies and controls, while a double loss of specified members would remain under and be compensated according to the provisions of section 9 as before pointed out. Section 10, as the last utterance upon the subject to which it relates, controls against any inharmonious provisions of section 9. That such was the legislative intent is indicated by the express provision in section 10 excluding double loss of members from its cognizance and placing such incapacity under the provisions of section 9.

It is within the spirit of the law and does no violence to the wording of the sections under consideration to construe them as authorizing compensation for existing total incapacity resulting from any injury to a member while medical skill is attempting to restore and save the same, and until such time as developments have proved amputation necessary, followed by compensation for the loss of such member during the period fixed by the act after such loss becomes an actuality cognizable under the schedule in section 10. When the schedule provisions of section 10 become applicable, the actual extent and duration of incapacity resulting from the specified injury yield to the indisputable presumption expressly declared in the statute by the legislature, which only obtains in case the member is in fact gone or lost. *Packer* v. *Olds Motor Works*, 195 Mich. 497.

Counsel contend that this construction is at variance with *Limron* v. *Blair*, 181 Mich. 76, wherein it is said that if the injured employee "is in fact disabled by the loss of a foot, or otherwise, for a greater

period than 125 weeks, compensation continues until disability is removed, or the maximum of compensation is paid." That case involved total disability due to other injuries as well as the loss of a foot. In connection with the language stressed by counsel it is also said:

"If one of the results of the accident is the loss of a foot, the period of total disability is 125 weeks, although it may be in fact only 6 weeks. The period is not extended because, as a result of the accident, the employee was in fact totally disabled for a period of 125 weeks, or for any shorter period. * * * The statute speaks in terms of disability. * * * It does not provide a specific indemnity for the loss of a member in addition to compensation for disability. The aim of the statute is to afford compensation if the employee is disabled. When the period of disability ends, compensation ceases."

Manifestly this means the period of disability as fixed and defined by statute, not necessarily the full period of actual disability in fact which may be and sometimes is for life. The disability in terms of which the statute speaks is disability or incapacity for work as recognized, defined and limited by the various provisions of the act. While the statute does not provide specific indemnity for loss of a member in addition to compensation for otherwise caused disability, when an existing disability is, or becomes, defined by and limited to the loss of a member, its thereafter duration and degree, as specified in section 10, are conclusively determined and fixed as total disability, or incapacity for work, during a period of 125 weeks, although it may be in fact only 6 weeks or for life, but if the injured employee is also in fact "otherwise" disabled, compensation could continue until such disability is in fact removed, or in contemplation of law terminated by reaching the maximum time or amount authorized. To construe the law in this class of cases

as limiting compensation to 125 weeks for the loss of a foot would be to retroactively cover under section 10 a period of total disability during which under existing facts the section had no application, and to deny relief under section 9, which, until the member was actually lost, did directly and exclusively apply; while to hold under section 9 that weekly compensation could be awarded for total disability from the date of the injury until the maximum limit of 500 weeks' time or $4,000 compensation was reached, if total disability in fact continued, would be to entirely ignore section 10, which concededly was applicable after the foot was amputated and thereafter defined by statutory presumption the resulting period of total disability and weekly compensation therefor.

The award made by the board in this case does not impose concurrent payments for separate injuries, or disconnected from earning power for any specific injury causing physical impairment. It provides compensation payable weekly for a fixed time during which the employee is actually or presumptively disabled, not any portion of it for loss of a member as such, but, so far as that loss is involved, based on a presumed disability or total impairment of earning capacity for a stated number of weeks after such loss.

We conclude that the construction of the act by the industrial accident board as applied to the facts in this case is permissible within the wording, spirit and inferable intent of the law considered in all its provisions.

The award is therefore affirmed.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

CENTRAL SAVINGS BANK & TRUST CO. *v.* STOTTER.

1. BILLS AND NOTES—BONA FIDE HOLDER—NOTICE—BANKS AND BANKING.
   A bank which discounts a note for a customer, crediting the proceeds thereof to his account, is not a *bona fide* purchaser for value, unless such credit was drawn upon before the maturity of the note, and before notice of facts invalidating it in the hands of the payee.
2. SAME—EVIDENCE OF FRAUD—ADMISSIBILITY—DIRECTED VERDICT.
   Where, in an action upon promissory notes by the transferee thereof, there was proof of fraud in the inception, and upon the record the plaintiff failed to establish its *bona fide* holding, the court below was in error in striking out the evidence of fraud and directing a verdict for plaintiff.

Error to Wayne; Mandell, J. Submitted June 13, 1919. (Docket No. 44.) Decided October 6, 1919.

Assumpsit by the Central Savings Bank & Trust Company against Isadore J. Stotter and others on certain promissory notes. Judgment for plaintiff on a directed verdict. Defendants bring error. Reversed.

Sid A. Erwin (*Samuel Shimans,* of counsel), for appellants.

Frank D. Andrus, for appellee.

STONE, J. This case was brought here to review a judgment for the plaintiff, upon a directed verdict. It is an action on three promissory notes executed by the defendants to one Luther B. Watson on September 8, 1916, due six months thereafter. The plaintiff claims to be a *bona fide* holder for value of these notes. The notes were indorsed over by Watson, the payee, to the plaintiff on February 26, 1917. They were due March 8, 1917. The plaintiff sent these notes, on

February 26th, to the German National Bank of Cincinnati to be forwarded by the latter to the First and Old Detroit National Bank for collection. And the loose leaf discount sheet of the plaintiff shows that these notes were entered on the discount sheet on February 28, 1917.

In 1915 said Watson, the payee, and Robert Wachman, one of the makers, as co-partners, were dealing in certain automobile accessories in the city of Detroit, under the name of the Jiffy Starter Company and the Evapco Company. Subsequently, both of these companies were incorporated, and at first they interested Sid A. Erwin, one of the appellants herein, and later they interested Isadore J. Stotter, the other appellant. At this time, Mr. Schulte, the president of the plaintiff, Mr. Hermes, the secretary and treasurer of the plaintiff, and Mr. Schweikart, a director, held stock in the Jiffy Starter Company—Mr. Hermes owning 150 shares, Mr. Schulte 100 shares, and Mr. Schweikart 175 shares. At the time the notes in suit were indorsed over to the bank, these three men were still connected with the bank in the capacities above described.

The transactions which led to the giving of the notes sued upon were as follows: During the early part of September, 1916, Watson and Wachman were attempting to raise money to enlarge the business, and Mr. Stotter was talked of as a "prospect" to buy part of the treasury stock, which at that time amounted to approximately $10,000. Mr. Stotter at that time purchased $5,000 worth of this $10,000 stock, paying at that time $2,500 in cash on the purchase price. In the latter part of August, or the early part of September, 1916, Wachman suggested to the appellants that they (meaning himself and the two appellants) should get rid of Watson, and that it would be a good thing to take up his stock, and also the stock of the

officials of the plaintiff bank. Prior to that time Watson and Wachman had been representing to Stotter and Erwin the very profitable business they were doing; that they were doing a business of about $400 or $500 a day, with the profits in excess of $100 a day. Watson, in September, 1916, represented that the assets of the Jiffy Starter Company and the Evapco Company were in the neighborhood of $30,000 with only current bills owing, for the purpose of inducing the appellants to purchase the stock of Watson, his wife, and that of the officials of the plaintiff. He produced a list of alleged accounts, aggregating $17,058.30, and an assignment of a claim for $3,000 which the Jiffy Starter Company was supposed to have against another concern. Arrangements were then made to purchase said stock at the rate of $7.50 a share. Watson claimed that he would have to go down to Covington, Kentucky, and get the stock of the bank officials. He brought the stock back indorsed in blank, and Stotter went to the First and Old Detroit National Bank, and paid Mr. Watson about $8,000 in cash, and he and Erwin, the other appellant, and defendants Wachman and White, executed and delivered to Watson the three notes in suit,—balance of the purchase price. About a week or ten days after this transaction, to wit: about September 21, 1916, the appellants became suspicious of the solvency of the Jiffy Starter Company and the Evapco Company, and, upon investigation, found that both concerns were in a serious financial condition; that there was no money on hand; and a Mr. Isenhart was put in charge, and upon investigation it was found that the list of accounts receivable, upon the strength of which the stock was purchased, were not *bona fide,* and that the $3,000 account never existed. It was found that the total assets of both companies amounted to $847 only. The representations of Watson, as to the worth of

the accounts receivable, were also made in the presence of Mr. Hart, vice president of the First and Old Detroit National Bank. Mr. Schulte, the president of the plaintiff, testified that Watson purchased his stock, as well as the stock of the other officials of the plaintiff at $7.50 a share; that they had paid $5 a share and that they made $2.50 a share; and that the company never declared a dividend, but that he never knew that the company never made a profit. The plaintiff bank claims to have discounted these notes on February 26, 1917, and either permitted Watson to draw against the amount of said discount or to have applied it in payment of an antecedent debt. Upon direct examination Mr. Schulte, the president of the plaintiff, testified that Watson was a customer of the bank, and had been doing business with it for 12 years, and that at the time it discounted the note it gave him credit in the usual manner of banking; and that the notes were placed to the credit of Watson. He testified:

"When I took the notes from Mr. Watson I did not know that there were any equities existing in the favor of the makers as against the payee. I took the notes in the usual course, and discounted them and gave Mr. Watson credit for them."

On cross-examination he testified:

"*Q.* Did you give him full credit for the face of the notes?

"*A.* I discounted them.

"*Q.* How much money did you pay him on that occasion?

"*A.* The full face of the note.

"*Q.* How—in cash?

"*A.* I gave him credit on his account.

"*Q.* What was the state of his account at that time—did he owe you money?

"*A.* He owed us money.

"*Q.* How much?

"*A.* I could not give that. I cannot say whether

he owed us $2,000 at that time or not. He was given credit for that amount, whether it was for payment of his note that he might have paid it later—I don't know if that is the amount of his note or not. I don't know whether he owed that amount or not. He may have owed the bank more." * * *

Upon being recalled he testified:

"When we received these notes we placed them to the credit of Mr. Watson, the payee, the full amount of these notes to his credit. As a matter of fact, the notes themselves were not discounted; they were placed to his credit—the whole thing, the whole amount, including the interest up to that date. We allowed Mr. Watson to check against that account, and he did check against it. He had the full benefit of the entire amount."

The witness also testified that he could not state what Mr. Watson's account was on February 27th.

It is stated by defendants' counsel that neither defendant Wachman nor White defended the suit, and, as we understand it, only the defendants Stotter and Erwin have appealed. The trial court received the testimony relating to the transactions leading up to the giving of the notes, against the objection of the plaintiff, and with the understanding that it would be stricken out, if defendants did not bring knowledge or notice to the plaintiff of the fraud of the payee of the notes. At the close of the testimony the court struck out such testimony and directed a verdict for the plaintiff for the full amount of the notes, to wit, $2,313.43.

By their brief counsel for appellants contend:

(1) That the plaintiff did not, as matter of law, sustain the burden of proof, that it was a *bona fide* holder for value of the notes in suit. (Assignments of error Nos. 7 and 9.)

(2) That the question of the plaintiff's *bona fides* should have been left to the jury. (Assignments of error Nos. 3, 4 and 5.)

(3) That the court erred in striking out the testimony of Erwin and Stotter, as to the fraud committed by Watson in the procurement of the notes in suit; in permitting Schulte to refresh his recollection from a loose leaf ledger sheet of the bank; and in the exclusion of exhibits 14 and 15. (Assignments of error Nos. 1, 10 and 12.)

In support of their first proposition appellants call attention to sections 54, 57 and 61 of the negotiable instruments law, being sections 6093, 6096 and 6100, 2 Comp. Laws 1915, and claim that where it is shown that negotiable paper is of fraudulent inception, the burden of proof is on the holder to establish his *bona fides*, citing *Detroit Nat. Bank* v. *Union Trust Co.*, 145 Mich. 656; *Thompson* v. *Village of Mecosta*, 127 Mich. 528, and *Mace* v. *Kennedy*, 68 Mich. 389.

It is contended that the plaintiff did not sustain the burden of proof that it took the notes in good faith and for value. And counsel say:

"Carefully scrutinizing and examining the entire testimony of the plaintiff, both on direct and cross-examination, it is impossible to gather definite information as to just what the plaintiff gave up for these notes. What was the nature of the antecedent debt? Was the antecedent debt due at that time? Perhaps, if the nature of the antecedent debt were disclosed, it would be found that it was no debt at all, and therefore that the plaintiff gave no consideration for these notes. If, on the other hand, we proceed on the assumption that the payee, Watson, drew against the discount, are we not entitled to know the nature and amounts of his drafts, and the dates thereof, and in this connection it is very important to note that the alleged discount was entered on the books on the 28th day of February, eight days before the notes were due. Did Watson exhaust this alleged discount when the plaintiff bank was informed of the protest of these notes, presumptively about nine or ten days later?"

It is the claim of the plaintiff that:

(1) The notes in suit were regularly executed by defendants and delivered to payee Watson, who negotiated and transferred them to the plaintiff for a valuable consideration before maturity.

(2) That there was nothing on the face of the notes to cast any suspicion on their character.

(3) That plaintiff received said notes in due course, and without knowledge of any infirmity in the title of the payee.

And the line of cases beginning with *Bostwick* v. *Dodge,* 1 Doug. 413; *Outhwite* v. *Porter,* 13 Mich. 533, and ending with *Drovers' Nat. Bank* v. *Potvin,* 116 Mich. 474; *Armstrong* v. *Stearns,* 156 Mich. 597, and *Hakes* v. *Thayer,* 165 Mich. 476, are cited.

The infirmity in the plaintiff's case, as it appears to us, is that it does not appear from this record when this account to the credit of which these notes were placed was drawn upon or exhausted; whether before or after the maturity of the notes, or before or after notice of the fraud, or protest. We have searched in vain for such evidence.

In *Drovers' Nat. Bank* v. *Blue,* 110 Mich. 31 (64 Am. St. Rep. 327), it was held that a bank which discounts a note for a customer, crediting the proceeds thereof to his account, is not a *bona fide* purchaser for value, unless such credit was drawn upon before the maturity of the note, and before notice of facts invalidating it in the hands of the payee. In that case Justice HOOKER, speaking for this court, said:

"The testimony shows that no money or valuable thing passed at the time of the purchase. A mere credit was given by the bank for the note—a promise to pay, in other words; and there is nothing to show that this credit was ever drawn upon, or that the account of which it became a part was exhausted before the maturity of the note, or before notice of the fraud. This did not show the bank to be a purchaser for value, within the rule"—citing authorities.

The converse of the rule is stated in *Fredonia Nat. Bank* v. *Tommei,* 131 Mich. 674, where it was held that a bank which discounts a promissory note, crediting the proceeds to the indorser's account, which becomes exhausted before the maturity of the note, is a purchaser for value, notwithstanding the indorser subsequently has deposits equal to the amount of the note.

Section 56 of the negotiable instruments law (2 Comp. Laws 1915, § 6095) provides that where the transferee receives notice of any infirmity in the instrument, or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

We are of the opinion that upon this record the court erred in holding that the plaintiff was a holder for value, as matter of law, and in striking out the testimony of the said defendants, and in directing a verdict and judgment for the plaintiff.

The judgment below is reversed and a new trial granted, with costs to appellants.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

WHITMAN *v.* WHITMAN.

CONTRACTS — CANCELLATION OF INSTRUMENTS—DEEDS—SUPPORT—SPECIFIC PERFORMANCE.

A written contract whereby a father deeded certain premises to his son, who was to conduct a saloon business thereon, pay existing incumbrances against the same, and then execute a life lease to the father, who was to have "a living out of the proceeds of such business without charge being made therefor," construed and *held*, that upon paying the incumbrance and executing the life lease the deed had become absolute, but that the father was entitled to specific performance of the agreement for his support, the amount thereof, in excess of the income from the property which had been turned over to him upon discontinuance of the business, being made a lien thereon.

Appeal from Saginaw; Kendrick, J. Submitted June 11, 1919. (Docket No. 4.) Decided October 6, 1919.

Bill by Peter Whitman against John D. Whitman and another to compel a reconveyance of certain property, and for an accounting. From a decree for plaintiff, defendants appeal. Modified, and remanded.

E. L. Beach, for plaintiff.

Purcell & Travers, for defendants.

STONE, J. The bill of complaint herein was filed to compel a reconveyance by the defendants to the plaintiff of certain real estate in the city of Saginaw, for an accounting, "and that plaintiff be granted such other, further and different relief in the premises as may be agreeable to equity and good conscience."

On relief of grantor in conveyance in consideration of agreement to support which is broken by grantee, see notes in 43 L. R. A. (N. S.) 916 and L. R. A. 1917D, 627.

The salient facts leading up to this litigation are as follows: Plaintiff is the father of John D. Whitman. Zepha Whitman is the wife of the latter. In May, 1904, plaintiff was the owner of a parcel of real estate, situated upon the easterly side of South Washington street in the city of Saginaw (which street runs north and south), described as lot 4, except the south 20 feet, in block 33, Hoyt's plat of said city. This property has 40 feet frontage and is 120 feet deep. At this time there was a three-story brick building upon the north 20 feet of the above 40 feet, and the south 20 feet thereof was vacant property, from which no rent was received. At this time plaintiff was conducting a saloon situated in the building on the north 20 feet of said 40 feet, as he had been for a number of years prior thereto. The upper portions of the building were occupied by plaintiff, at and subsequent to the date aforesaid, as living apartments for himself, and for rental purposes, there being a number of rooms over the saloon, which were let out by plaintiff to lodgers. In the spring of 1904, plaintiff instituted divorce proceedings against his second wife, not the mother of defendant John D. His son, the defendant, was at the time working for the Banner Brewing Co. of Saginaw, as a driver of a delivery wagon, and plaintiff was living alone in the saloon building. Some time prior to May 8, 1904, the plaintiff made a property settlement with his wife in the divorce proceedings, by which she was to receive $4,500, and his attorney, Mr. Kirby, $500, making a total of $5,000 in all. The plaintiff, in order to carry out this arrangement, borrowed from the Banner Brewing Co. upon his note, secured by his capital stock in said corporation, $1,000, which was turned over to his wife as a cash payment on the $4,500, and gave her a mortgage for $3,500, dated May 8, 1904. He also gave a mortgage to Mr. Kirby,

his attorney, dated May 6, 1904, to secure the payment to him of the $500 above mentioned; both mortgages being upon the property above referred to. This brings us to the transactions which are particularly involved in this case.

In May, 1904, defendant John D. Whitman left his employment with the Banner Brewing Co. and entered into an agreement with his father, whereby he was to take over the management of the saloon business, and from the proceeds pay off the mortgages heretofore referred to. Plaintiff was, at the same time, to convey said property to his said son, with certain conditions. While there existed a verbal understanding and arrangement between the parties at the very beginning of their relations with regard to these matters, the same were not reduced to writing and signed by the parties until August 10, 1904, being the date upon which plaintiff obtained a divorce from his wife. That contract was as follows.

"This agreement, made and entered into this 10th day of August, 1904, by and between Peter Whitman, party of the first part, and John D. Whitman, party of the second part, both of Saginaw, Michigan.

"Witnesseth as follows: Whereas said first party this day made, executed and delivered to second party a warranty deed of lot number four (4) except the south twenty feet in block number thirty-three (33) Hoyt's plat of the city of East Saginaw, now a part of the city of Saginaw, Michigan, according to the recorded plat thereof, and whereas there is now incumbrance against said property in the sum of $4,000.00 in the nature of real estate mortgages, $3,500.00 of the same running to Ellen Whitman and $500 of the same to J. B. Kirby.

"Now, therefore, it is hereby agreed by and between the parties hereto that said John D. Whitman shall assume the management of the saloon on said property and shall as fast as possible and as soon as money is received from the proceeds of said business apply the same upon the payment of said mortgage indebted-

ness until the same shall be fully paid and discharged and it is further mutually agreed by and between the parties hereto that when said mortgage indebtedness shall be fully paid and discharged that the deed this day executed by first party to second party shall become absolute and the said John D. Whitman shall at that time execute and deliver to said Peter Whitman a good and sufficient life lease of the premises hereinbefore described. It is further understood and agreed that said Peter Whitman, John D. Whitman and his family may reside upon said property and receive their living out of the proceeds of such business without charge being made therefor.

"It is further mutually agreed by and between the parties that said John D. Whitman hereby agrees to execute to said Peter Whitman at any time before said indebtedness hereinbefore referred to shall be fully paid, a reconveyance of said property upon payment to said John D. Whitman, the sum of $460.00 and interest at the rate of six per cent. per annum from May first, 1904, and the further sum of $56.00 for each and every month the said John D. Whitman shall work in and about said saloon from May 1st, 1904, and six per cent. interest per annum computed on said sums to become due said second party each and every month. It is agreed that the right to redeem said property by the payment of said several sums above mentioned is a personal right given said Peter Whitman and not assignable or transferable, and in the event of said Peter Whitman's death before the mortgaged indebtedness hereinbefore mentioned is fully paid then and in that event said John D. Whitman takes and holds absolute title to said premises.

"In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

(Signed) "PETER WHITMAN,
"JOHN D. WHITMAN.

"In presence of
"L. G. DUFF,
"JULIUS B. KIRBY."

This contract was duly acknowledged and recorded in the office of the register of deeds.

A warranty deed of said premises, bearing the same date, was executed and delivered by the plaintiff to John D., duly witnessed, acknowledged and recorded.

The $460 referred to in the contract was the amount which defendant John D. personally advanced on the liquor license for the year beginning May 1, 1904, and the $56 per month refers to the monthly wages which John D. was receiving when he went with his father, all of which was to be returned to him, with interest at 6 per cent. per annum, provided the plaintiff elected to take back the property, "at any time before said indebtedness herein referred to shall be fully paid."

The mortgage given to Mr. Kirby was discharged of record February 10, 1905, and that given to Mrs. Whitman was discharged on January 31, 1908, defendant John D. having paid both mortgages from the proceeds of said business.

On February 17, 1908, defendant John D. and his wife, Zepha, executed and delivered the life lease provided for in the contract, of the premises, to said plaintiff for the expressed consideration of "one dollar and other valuable consideration," and the parties continued in the occupation of said premises, and the conduct of the saloon precisely as theretofore, until May 1, 1914, when the saloon business was abandoned and John D. and wife moved to a farm which he had purchased near Onaway. When John D. quit the saloon business and removed from the building, the whole thereof was turned over to the plaintiff, and the first floor, where the saloon had been, was rented by the plaintiff for $50 a month.

After the last mortgage was paid, there was built upon the south 20 feet of said premises, which had been vacant and unproductive, from the proceeds of the saloon business, and $700 borrowed money, a small brick building, costing substantially $4,200.

This building was erected with the consent of the plaintiff, he and the said defendant John D. talking the matter over, and reaching the conclusion that it was advisable to construct the building. Subsequently, and on September 24, 1913, this south 20 feet, being the property upon which the new building had been erected, was sold for the sum of $5,000, and plaintiff and defendant joined in the deed. And also upon the same date all of the parties entered into a written party-wall agreement, with the grantees in said deed. From the money received from the sale of this piece of property, $1,000 was paid to the plaintiff by John D. and the balance of $4,000 was retained by the latter. Defendants claim that these sums substantially represented, respectively, the value of the vacant lot of 20 feet, and the cost of the building which John D. had erected.

At the hearing plaintiff claimed that he should have received $1,500, instead of $1,000. According to the testimony of defendant John D. he, on July 18, 1911, paid upon his father's note for $1,000 given to the Banner Brewing Co. and secured by his stock the sum of $500. This he claimed was the $500 which was intended to apply upon the $700 borrowed from a sister of the plaintiff, and which was used in the erection of said building. But instead of being paid direct to plaintiff's sister, it was, by an understanding between her and the plaintiff, applied on the note of his father, as above stated. This, according to the testimony of John D., accounts for $1,500, leaving but $200 for the plaintiff to pay upon the $700 borrowed from his sister.

The plaintiff, who at the hearing was nearly 70 years old, remarried in April, 1915.

Plaintiff alleged in his bill of complaint that at the time of making the life lease the defendants agreed to live as they had before in the home of said plain-

tiff, and take care of him and furnish him with a good comfortable home, and upon these representations the said plaintiff, at the request and solicitation of the said John D. and upon his promise that he would always look after and provide said plaintiff with a home, did make and execute to him the said deed; that the accepting of said life lease, and the making of the said deed, were upon the express understanding —and the only consideration for the same was that the said defendants were to make a good comfortable home for said plaintiff, and were to provide for, and take care of, him during his lifetime.

There is some confusion in these allegations of the bill, as the undisputed evidence is that the deed was executed and delivered by plaintiff, on August 10, 1904, whereas the life lease was not made until February 17, 1908. Defendants by their answer denied that the agreement or arrangement was different from that set forth in the written contract of August 10, 1904, or that they, or either of them, ever agreed to take care of the plaintiff, and furnish him with a home, or that plaintiff's rights were other or different than are expressed in said agreement and life lease.

At the hearing there was a sharp conflict between the testimony of the plaintiff and the defendant John D. Referring to a claimed verbal agreement at the time the life lease was executed and delivered by defendants, plaintiff, referring to John D., testified:

"He was to provide for me and keep me the rest of my days, provided that I accepted the life lease."

This was specifically denied by the defendant John D., who claimed that plaintiff's rights were all expressed in the written agreement and life lease. Plaintiff admitted that his memory was somewhat defective, and he testified: "I can't remember as I used to do." Two witnesses testified to statements made by John D. to the effect that he had "a deed of the

place and that he was to give his father a life lease, and had to support him the rest of his days." This testimony was denied by said defendant.

Mr. Kirby, who drew all of the papers and was a friend of both father and son, testified at some length, having been called by the defendants. He testified in part on direct examination as follows:

"I think the life lease is a part of the transaction growing out of the first contract; I do not know of any other paper."

On cross-examination the following appeared:

"*Q.* Do you know at the time when they came there, whether Peter was reluctant to the signing of that first contract? Just to refresh your memory, wasn't it in reference to the wife, the woman this man John D. was living with?

"*A.* I have this recollection, during the time they were negotiating about these papers, John Whitman's wife—whether they were married at that time, I do not know—had an altercation with the old gentleman —she used some instrument—she threw some knife at him, or something like that, and I do know that during the negotiations, the old gentleman was very reluctant, he was fearful she would be taken into the home, and by reason of her attitude drive him from the home, and John said to him, 'Father, I'll protect you in respect to that,' and he had a serious conference about it, and it depressed me seriously; she had assaulted him with a knife or something (I might put it with an instrument), and he did not like to go through the performance, unless he was assured by John he would be protected.

"*Q.* Don't you remember that what you have stated, that that took place after the contract was prepared and signed, and they were working under that contract, and it was just prior to the time when that life lease was made?

"*A.* I remember that it occurred, and that the old gentleman was very reluctant to sign, and then John encouraged him, he said he would protect him, but when that took place, or just when it took place, I couldn't say.

"*By the Court:* *Q.* Whether it was before the life lease was drawn or the other papers, you don't recollect?

"*A.* No. * * *

"*Q.* Do you remember that in any of the controversies that took place between them, after the contract was prepared, that John D. Whitman was to take care of Peter, and that he was to have a home there?

"*A.* I couldn't remember specifically, but I understand they did live under that contract there, after the contract was prepared, and the life lease.

"*Q.* Yes, and he provided for him up to the time he went to Onaway in the spring of 1914; and now to refresh your memory, as I understand it they had several different talks at your office?

"*A.* Yes, sir. * * *

"*By the Court:* *Q.* What do you think he meant when he said he would take care of his father and seeing he did not want?

"*A.* Do you want my conclusion?

"*Q.* If you can cull them from the conversation.

"*A.* I felt this way, from the character of their talk, there was a sort of friendly relation between John and his father; and my understanding was that John meant that he would take care of his father, even though it cost him the association of his wife (I thought he intended to admit that, Judge). I never saw a parent and son more friendly, a son more considerate of his father than John; in reference to these matters, I think they trusted each other implicitly; I think even though she had to get out of the house. That was the serious question and the extent of the talk. I do not know what the fight consisted of, or whether his testimony has shown anything about the altercation (turning to plaintiff). Did John's wife strike at you with something?

"*Plaintiff:* *A.* Yes (showing), there's the scar right there."

On redirect-examination, he testified:

"*Q.* So far as you are concerned these papers that I have shown you represent the agreement between them?

"*A.* Represent the agreement, and what I put in as attorney at that time.

"*Q.* Then they represent the agreement between the parties so far as you knew their agreements to be at that time?

"*A.* You are asking for my present recollection of it now?

"*Q.* I am asking for your understanding of it at the time you drew the agreement.

"*A.* I think that the first contract calls for a life lease.

"*Q.* Yes.

"*A.* I made the life lease.

"*Q.* That was the understanding by you?

"*A.* They came in later and asked me to make that life lease; anything different from that I don't know.

"*By the Court: Q.* If the consideration in that agreement was one dollar and other considerations, do you know what the other considerations were?

"*A.* The general relationship, and the manner in which they have been living, and all things generally, convinced me that there was more than a general taking over the business, there was a continuous chain of circumstances, and my habit was to put in 'one dollar and other valuable considerations,' when the real value could not be obtained."

The defendant John D. Whitman testified at length, and when testifying relative to the erection of the new building, he testified:

"*Q.* Where did you get the means to do it with?

"*A.* Out of the saloon business. My father at that time secured his maintenance and support from me out of the saloon business. * * *

"*Q.* Now, Mr. Whitman, during the time you conducted the saloon business on the ground floor, your father received a portion of a certain amount for his living?

"*A.* Yes, sir.

"*Q.* And then when you went away he had the use and occupation of the building itself?

"*A.* Everything. * * *

"*Q.* Your contract provides among other things that it is understood and agreed that said Peter Whitman,

John D. Whitman, and his family, may reside upon said property, and receive their living out of the proceeds of such business, without charge being made. You understand that part of the contract, that you and your father, and your wife were to live there, and were to have your living out of the business without charge?

"*A.* Yes, sir. * * *

"*Q.* How much money did you give your father out of the proceeds of the bar after 1908?

"*A.* I couldn't say how much.

"*Q.* It was as much as he wanted to take care of himself?

"*A.* Yes, and he had different moneys, he was to Detroit.

"*Q.* That money came out of the saloon business and you let him have it?

"*A.* Yes, just the same as before the life lease was made.

"*Q.* Do you claim that you and your father never talked over, that you were to provide for him the same as before?

"*A.* Nothing but what the life lease calls for.

"*Q.* Did you say anything—didn't you say 'father, I will take care of you and give you money just as before?'

"*A.* No, sir.

"*Q.* But you actually did?

"*A.* Yes. * * *

"*Q.* And while he was down the river in this boat house, where did he get his support and maintenance?

"*A.* Out of the profits of the saloon."

The learned circuit judge who heard the case at the circuit found that the defendant John D. was under contract obligation to properly support the plaintiff during his lifetime; that when said defendant quit the business and went away in the spring of 1914 he violated his contract; that in the sale of the new building said defendant had received sufficient compensation for his services, and decreed that he should reconvey the remaining part of the property, to wit:

the north 20 feet of said lot, to the plaintiff. The defendants have appealed from this decree.

A careful reading of this record leads us to the conclusion that from the time of the making of the contract on August 10, 1904, it was the intention of the parties that the plaintiff should receive his "living," or support out of the proceeds of the business. In fact such was the express language of the agreement. That was a continuing right of the plaintiff, and was not done away with by the making of the life lease. In other words, as testified to by Mr. Kirby, "the life lease is a part of the transaction growing out of the first contract." No doubt, when the contract was made, it was contemplated that the business would be carried on indefinitely. It was carried on for a period of 10 years, and the conduct of the parties was the same during all that period, both before and after the making of the life lease. The practical construction of the contract by the parties is significant. It seems to be the claim of the defendants that the contract was merged in the life lease. We do not so understand it. The terms of the contract are still in force. The value of the property deeded to defendant John D. was probably $10,000. His duties are, we think, set forth in that contract, as well as his rights. The contract is to be read in the light of the circumstances attending its execution. It should be construed so as to effectuate the intent of the parties when it was made. *Kunzie* v. *Nibbelink*, 199 Mich. 308; *Ardis* v. *Railway Co.*, 200 Mich. 400, 411.

At the time of entering into this contract the plaintiff was a man well advanced in years. He had just incurred a heavy indebtedness and had mortgaged his property. He induced his son, John D., to undertake the management of the business and to pay off the indebtedness, and give him "a living out of the proceeds of such business, without charge being made

therefor." Upon the paying off of such indebtedness the deed which he that day executed and delivered to his son should become absolute, but the duty to furnish "the living" continued. From the evidence it is clear that the plaintiff was not to become a member of John D.'s family and eat at his table, but the living was to be provided. The evidence shows that such was the understanding of the parties, and such was the uniform course of dealing down to the spring of 1914, when John D. discontinued the business and moved away, leaving the plaintiff in the possession of the building under the life lease, chargeable with the taxes, insurance, and expense of repairs. We think the evidence shows that the net income from such building has not been sufficient to furnish a living to the plaintiff. It does not meet the question to say that it is the duty of a life tenant to pay such charges. The duty to support remains, under the contract. We cannot follow the opinion and decree of the court below in directing a reconveyance of the premises to the plaintiff. By the terms of the agreement and the paying off of the mortgages, the deed to defendant John D. became absolute, and he was under no obligation to reconvey after he had paid off such incumbrances. Under the evidence we find no fraud in the case. The representations of said defendant were promissory in their character, and the agreement can be specifically performed. The value or cost of the support of the plaintiff, over and above the net income of the property, can be readily determined, as well as that for future support, the same to constitute a lien on the premises. The defendant John D. did not violate the contract in deeding away the south 20 feet of the property, but his duty to support and maintain his father during his life remained. The decree below will be modified in accordance with this opinion; the case will be remanded to the court

below to take an accounting and to determine the amount due plaintiff for his support and maintenance since May 1, 1914, over and above the net income from said premises, and the same will be ordered paid to plaintiff, as well as the amount due annually from time to time for his future support and maintenance, upon the same basis; all of which will be a lien on the premises, to wit, the north 20 feet of said lot. No costs will be awarded to either party in either court, except that each party shall bear one-half the expense of printing the record.

Decree modified.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

In re COBURN AND GLOCHESKI.

1. EVIDENCE—INTERPRETER—AGENT TO CONVERSE.
   An interpreter may be made an agent to converse, and then his translation is receivable as an agent's admission without calling him to the stand.

2. SAME—ATTORNEY AND CLIENT—DISBARMENT PROCEEDINGS.
   In disbarment proceedings, the testimony of witnesses as to statements of defendants made to them through an interpreter, at the time of the alleged misconduct, *held*, admissible.

3. CERTIORARI—APPEAL AND ERROR—WEIGHT OF EVIDENCE—REVIEW.
   On certiorari to review disbarment proceedings, where there was evidence of defendants' misconduct, this court will

On admissibility of evidence given through an interpreter, see note in 17 L. R. A. 813.

not decide, as a question of law, that the evidence was not clear and convincing; that question being clearly within the province of the trial court.

4. ATTORNEY AND CLIENT — DISBARMENT PROCEEDINGS — TRIAL — SUBSEQUENT ACTS—OPEN TO INQUIRY.

A letter introduced in evidence, written by one of the defendants in disbarment proceedings to the complaining witnesses subsequent to the misconduct charged, bearing upon defendants' good faith, even if mailed (which the court ruled was not proven), *held*, insufficient to justify defendants' contention that the proceedings should be dismissed, since an act subsequent to the misconduct complained of would not preclude subsequent inquiry into their conduct.

Certiorari to Kent; Vanderwerp, J., presiding. Submitted June 12, 1919. (Docket No. 16.) Decided October 6, 1919.

Petition by Leon W. Harrington and Harold W. Bryant, *amici curiæ*, for the disbarment of Corie C. Coburn and Roman F. Glocheski. From an order granting the petition, defendants bring certiorari. Affirmed.

Smedley & Linsey, for appellants.

Leon W. Harrington and *Harold W. Bryant, in pro. per.*

STONE, J. This is a proceeding for the disbarment of Corie C. Coburn and Roman F. Glocheski, who for some years have been members of the bar in the courts of this State. The proceeding was instituted at the instance and on the recommendation of the Grand Rapids Bar Association, and was conducted in the circuit court for the county of Kent. That court appointed two members of the bar as friends of the court to make, prefer and prosecute the charges. The petition of the friends of the court is fully set forth

in the record. That part which is material here, after stating that the respondents were members of the bar of this State, and practicing attorneys at law and in chancery in the courts thereof, alleges that on June 7, 1917, one John Moses of the city of Grand Rapids commenced an action by writ of *capias ad respondendum* for damages for an assault and battery alleged to have been committed on him by Ciorba Mikleuis and Popa Ilis jointly, both of said city, and in said writ the *ad damnum* clause was the sum of $1,000; that thereupon and on the same day, said Mikleuis and Ilis were arrested by a deputy sheriff of said county and lodged in the county jail thereof, their bail having been fixed by a circuit judge at the sum of $200 each; that said respondent Glocheski learned of such arrest, through some third party unknown to the petitioners, and visited Mikleuis and Ilis in said jail and was employed as their attorney in said action; that said respondent then and there discovered that said Ilis had certain currency upon his person, and was also the owner of a large sum of money, to wit, $511, and that said respondent Glocheski thereupon accepted a payment of $10 from said Ilis for legal services to be rendered to said Ilis and Mikleuis, and then and there made an arrangement with the sheriff, whereby a cash deposit of $400 was made with said sheriff in lieu of a bail bond, and thereupon said Ilis and Mikleuis were released from said imprisonment, and accompanied said respondent, who advised them to come to his office on the following morning; that in the forenoon of the following day the respondent Coburn, having been employed to assist the other respondent in said case, and claiming to represent said Ilis and Mikleuis, negotiated a settlement, with the attorney for said Moses, of the said action against said Ilis and Mikleuis, and that it was then and there agreed by and between said respondent Coburn and

said attorney for said Moses that the sum of $100 should be paid in full settlement of all claims then existing of said Moses against said Ilis and Mikleuis, and that it was as a part of the same consideration also agreed that said action would be dismissed without costs; and that shortly thereafter, and on the same day, said respondent Glocheski called at the office of said attorney for said Moses, paid the said sum of $100 and was then and there given a full and complete release of said cause of action, duly executed by said Moses, and that a stipulation was then and there entered into between said attorney for Moses and said respondent Glocheski, by the terms of which the said action was to be dismissed without costs; that on said 8th day of June said respondents entered into a joint conference with said Ilis and Mikleuis, and, while acting as their attorneys, assumed to advise said Ilis and Mikleuis of their rights and duties, and to give them legal counsel as to their course of procedure in and about said action and, while acting as such attorneys, made, in substance, the following false and fraudulent representations to said Ilis and Mikleuis in order to induce them to pay to said respondents the sum of $600:

"(*a*) That said Ilis and Mikleuis were liable on account of said action to be fined by said circuit court the full sum of $1,000, unless they procured and paid to said Glocheski and Coburn the said sum of $600.

"(*b*) That said Ilis and Mikleuis would be immediately imprisoned, unless they paid said sum to said Coburn and Glocheski, and would be obliged to return to jail at once.

"(*c*) That said sum of $600 was necessary in order to prevent said Ilis and Mikleuis from either being fined the full sum of $1,000, or immediately return to jail.

"(*d*) That they, the said Coburn and Glocheski, were negotiating directly with the said court, and that the said sum of $600 was required by said court to be

paid in order that the matter might be settled, and the said Ilis and Mikleuis obtain their freedom. And that said respondents at the same time, then and there knowingly, wilfully and fraudulently concealed from said Ilis and Mikleuis the following facts, which were then well known to said respondents:

"(*a*) That the entire matter could be adjusted and settled, and the case dismissed for the sum of $100.

"(*b*) That the said cause of action had, prior to that time, been compromised, adjusted and released, and a stipulation for the dismissal thereof without costs entered into, all upon payment of the full sum of $100 to the attorney for said Moses.

"(*c*) That the said Ilis and Mikleuis were not liable unless, and until after a trial of the said cause of action, a judgment should be rendered against them either for fines, damages, penalties or imprisonment.

"(*d*) That the matter was one which was not a necessary or customary subject of negotiation directly with said court, and was such that it could be entirely adjusted with the said Moses and his attorney.

"(*e*) That the said respondents were about to appropriate to themselves $500 of the said $600 so to be paid. That thereupon, and on the same day, the said Ilis and Mikleuis, believing and relying in good faith, upon the said representations of said respondents, and in order to be relieved of the supposed necessity of returning to jail or suffering a fine, procured and paid the said sum of $600 to the said respondents, of which said sum of $600, $100 was properly applicable to the settlement and adjustment of said cause of action, and $500 thereof, in breach of their fiduciary relation to their said clients, was by the said respondents wrongfully and fraudulently appropriated to their own use."

That said Ilis and Mikleuis are Roumanians, and are unfamiliar with the English language, and with the customs and laws of this State and country, and relied wholly upon the advice and counsel given to them by said respondents as their attorneys, and paid said sum of money, believing the said false representations, and the necessity for such payment.

That said acts and doings of said respondents constitute gross misconduct upon their part in the practice of the profession of law, for which misconduct both should be disbarred from the practice of said profession in this State, and such disbarment was prayed for.

Upon the filing of such petition, an order was duly entered requiring the respondents to appear and answer, and a certified copy of the petition was duly served upon each of said respondents. Each of the respondents answered said petition, specifically denying all fraud and fraudulent representations charged therein. Both answers admit that in the forenoon of June 8, 1917, it was agreed that the sum of $100 should be paid in full settlement of all claims then existing of said Moses against said Ilis and Mikleuis, which should be in full of all costs, and everything connected with said case, and that on the same day said respondent Glocheski called at the office of the attorney of said Moses and paid the said sum, and that a stipulation was then entered into dismissing said cause. But it was denied that such settlement was agreed upon, or made until *after* said Ilis and Mikleuis had left the offices of respondents and had gone with respondent Glocheski to secure the funds to pay whatever might be demanded by the attorney for said Moses, "provided the same did not exceed the sum of $600." The exact time of the settlement was a disputed question.

A lengthy hearing was had upon the issue made and a large amount of testimony was taken. Upon the hearing it appeared that at the first meeting between respondent Glocheski and Mikleuis and Ilis the latter had been directed to bring with them an interpreter at the meeting to be held June 8th at Glocheski's office; and that an interpreter attended and acted as such at that meeting. The right of Ilis and

Mikleuis, at the hearing, to testify to what was translated to them through such interpreter was objected to by respondents, and the ruling admitting such testimony is one of the errors claimed by respondents here.

After a full hearing in the circuit court, the court found as follows as stated in the opinion filed:

"From the foregoing, it will be seen that I am of the opinion that a clear case has been made against the respondents, established by proof, so far as the first charge in the petition is concerned, that is, the Ilis and Mikleuis charge. For this reason I am of the opinion, and I find that the respondents Corie C. Coburn and Roman F. Glocheski, have committed acts and doings which constitute gross misconduct in the practice of the profession of law, for which misconduct, the said Coburn and the said Glocheski should be disbarred in the future from the practice of their profession in this State."

An order or decree of disbarment was accordingly entered, in accordance with the provisions of section 12064, 3 Comp. Laws 1915. The respondents thereafter applied to this court for a writ of certiorari to review the proceedings and judgment, which writ was granted.

In this court it is stated by counsel for respondents that the propositions involved are the following:

(1) That the testimony of Ilis and Mikleuis was incompetent.

(2) That the testimony and record do not show that petitioners have sustained their charges by clear and convincing proof, as matter of law, and that an order of disbarment ought not to have been made.

(3) That the court should have found that respondent Coburn wrote and mailed a letter to Ciorba Mikleuis, as claimed by respondents, and that, therefore, an order of disbarment ought not to have been made.

1. It is urged in argument by counsel that as Ilis and Mikleuis could only converse with respondents

through an interpreter, their testimony was hearsay, and was immaterial and incompetent, and the following is quoted from Wigmore on Evidence, § 668:

"Conversations through an interpreter. When A speaks with B through an interpreter, because of ignorance of B's language, A cannot of his own hearing know what B said; he depends on the interpreter's report. Here no exception has been recognized to the general rule (though it might well have been). The witness A is allowed to testify only to what he heard from the interpreter, and the interpreter must be called to testify to what B said to him."

Also the following in subdivision 3, section 812:

"A person conversing with a third person through an interpreter is not qualified to testify to the other person's statements, because he knows them only through the hearsay of the interpreter. Ordinarily, therefore, the third person's words cannot be proved by anyone except the interpreter himself."

Also section 1810 of the same author.

The following cases are also cited by counsel for respondents: *Diener* v. *Diener,* 5 Wis. 483, 527; *People* v. *Lee Fat,* 54 Cal. 527; *People* v. *Ah Yute,* 56 Cal. 119; *State* v. *Noyes,* 36 Conn. 80.

The following appears in respondents' brief:

"Ilis and Mikleuis were instructed to return to the office of Mr. Glocheski the following morning and to bring with them an interpreter, so that Mr. Glocheski could be informed as to the defense of Ilis and Mikleuis, and their wishes in the matter."

It is urged by counsel for petitioners that it cannot be disputed that the statements of respondents, and the statements of Ilis and Mikleuis, during the conference, were relevant and material, and that the real question is whether they were hearsay; that upon the state of facts as they existed, the statements of respondents made to Ilis and Mikleuis, and interpreted by the interpreter, were admissible as evidence, and

may be testified to by Ilis and Mikleuis, or any other party who was present, and heard and understood the statements; and that the decisions of the courts, as well as the language of the text-writers, support the admission of this testimony, citing Wigmore on Evidence, § 1078, subd. 6:

"An interpreter may be made an agent to converse, and then his translation is receivable as an agent's admission without calling him to the stand. But otherwise, his extra-judicial statements are excluded by the hearsay rule."

Also § 1810:

"Where a witness on the stand is asked to testify to the words of A (uttered out of court) as translated to him by M interpreting between them, the witness is not qualified by personal knowledge of A's utterances, and may not testify; the interpreter M is the only qualified witness, but if A whose utterances are to be testified to is a party opponent, then he may be regarded as having made M his agent to translate, and thus M's translations are admissions usable against A"—citing 2 Jones on Evidence (Horwitz's Edition), § 265; *Commonwealth* v. *Vose,* 157 Mass. 393 (32 N. E. 355, 17 L. R. A. 813).

In the last-cited case Knowlton, J., said:

"When two persons who speak different languages and who cannot understand each other converse through an interpreter, they adopt a mode of communication in which they assume that the interpreter is trustworthy, and which makes his language presumptively their own. Each acts upon the theory that the interpretation is correct. Each impliedly agrees that his language may be received through the interpreter. If nothing appears to show that their respective relations to the interpreter differ they may be said to constitute him their joint agent to do for both that in which they have a joint interest. * * * They cannot complain if the language of the interpreter is taken as their own by anyone who is interested in the conversation. Interpretation, under such

circumstances, is *prima facie* to be deemed correct. * * * In a case like the present, we are of opinion that either party, or a third person who hears the conversation, may testify to it as he understands it, although for his understanding of what was said by one of the parties, he is dependent on the interpretation which was a part of the conversation. The fact that a conversation was had through an interpreter affects the weight, but not the competency of the evidence."

The following cases are cited in support of the claim of petitioners: *Madau* v. *Lumber Co.*, 76 Wis. 120 (43 N. W. 1135); *People* v. *Randazzio*, 194 N. Y. 147 (87 N. E. 112); *Miller* v. *Lathrop*, 50 Minn. 91 (52 N. W. 274); *Sertaut* v. *Crane Co.*, 142 Ill. App. 49; *McCormicks* v. *Fuller*, 56 Iowa, 43 (8 N. W. 800); *Kelly* v. *Benevolent Ass'n*, 2 Cal. App. 460 (84 Pac. 321).

A reference to the cases cited by respondents' counsel will show that most of them can be readily distinguished from the instant case, in the application of the rule contended for. We are of the opinion that the weight of authority sustains the position contended for by the petitioners, and that the court did not err in overruling the objections to the testimony of Ilis and Mikleuis.

The record shows that the interpreter testified to the correctness of the translation objected to.

2. It is contended that the record does not show that petitioners sustained their charges by clear and convincing proof, as matter of law.

As we said in *Re Radford*, 168 Mich., at page 487, so we say here:

"It is well that we keep in mind the fact that this case is before us upon certiorari, under the provisions of section 10497, 3 Comp. Laws; and that it has been often held that the office of a certiorari is not to review questions of fact, but questions of law. And that in examining into the evidence the appellate court

does so, not to determine whether the probabilities preponderate one way or the other, but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would, or would not, have been drawn by the appellate tribunal. *Jackson* v. *People*, 9 Mich. 111 (77 Am. Dec. 491)."

Respondents urge this court to decide, as a proposition of law, that the evidence upon which the trial court found respondents guilty of gross misconduct was not clear and convincing. We think that whether the proofs were clear and convincing was a question of fact peculiarly within the province of the trial court, and not a question of law properly reviewable by this court on certiorari. The cases of *In re Baluss*, 28 Mich. 507, and *In re Clink*, 117 Mich. 619, from which counsel quote, were both cases originating in this court, and where this court weighed the evidence. It is sufficient to say that there was evidence to sustain the charges, and the trial court has found that such evidence was clear and convincing.

3. Finally it is urged that the court erred in failing to find that respondent Coburn wrote and mailed a letter to Mikleuis on June 9 1917. That letter was as follows:

"June 9, 1917.

"CIORBA MIKLEUIS and POPA ILIS,
"City.

"*Gentlemen:* The case of John Moses has been settled. One hundred dollars has been paid to his lawyers giving you a clear slate. The receipt is in the files, and any time you may want it, you can get it, or send for it. Everything is done as you requested. Kindly call at the office at your earliest convenience and oblige,

"Respectfully yours,"

There was testimony that this letter was dictated by respondent Coburn to the stenographer in the office; that it was copied and inclosed in a stamped en-

velope and addressed to the parties at their street and number. The trial court admitted the copy of the letter in evidence, but was of the opinion that the evidence of the mailing of the letter was not sufficient. Whether that ruling was correct or not is not controlling of the case. It is claimed by respondents that the sending of the letter bore upon their good faith, and that if sent, these proceedings should be dismissed.

We do not agree with counsel in this contention. It was an act subsequent to the conduct complained of, and even had it contained a promise to refund the money (which it did not) it would not preclude subsequent inquiry into the conduct of respondents. *In re Radford, supra,* at page 495.

Finding no error in the record, the judgment of the circuit court is affirmed.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

In re BURNHAM'S ESTATE.

BRACKETT'S ESTATE *v.* BURNHAM'S ESTATE.

1. HUSBAND AND WIFE—ESTATES OF DECEDENTS—MARRIED WOMEN—SERVICES—RIGHT OF WIFE TO RECOVER—RULE OF LAW.
   In an action by a married woman against an estate for services rendered to deceased, evidence of an agreement between the husband and the wife emancipating the latter is insufficient to entitle her to recover; it must also ap-

On right of married women to recover for services rendered outside the home, see note in L. R. A. 1917E, 282.

pear that the party receiving such services assented to the arrangement and understood that contract relations between himself and the wife existed, and that she expected compensation.

2. SAME—CONTRACT RELATIONS—EVIDENCE—SUFFICIENCY.
Evidence that deceased told witness that "I want them (claimant and her husband) to have all I got, and I want them to have it to pay for everything she has done for me. Whatever I owe them they can always put in a claim and get it. I have enough property or money so they can always get what's coming to them," *held*, insufficient to prove that deceased supposed that contract relations existed between himself and claimant or that he was dealing with her.

3. SAME—RIGHT OF MARRIED WOMAN TO EARNINGS—STATUTE.
In view of the effect of Act No. 196, Pub. Acts 1911 (3 Comp. Laws 1915, § 11478), defining and regulating the right of married women to their own earnings, which was neither raised nor discussed, as to services rendered after the act took effect, a new trial is granted.

Error to Kalamazoo; Weimer, J. Submitted June 10, 1919. (Docket No. 84.) Decided October 6, 1919.

Anna C. Brackett presented a claim against the estate of Chauncey Burnham, deceased, for services rendered. The claim was disallowed by the commissioners, and claimant appealed to the circuit court. On the death of claimant, the appeal was prosecuted in the name of William A. Brackett, executor. Judgment for claimant. Defendant brings error. Reversed.

Lincoln H. Titus, for appellant.

Alfred S. Frost and *Corwin & Norcross*, for appellee.

STONE, J. This is the second appearance of this case in this court. When here on the former occasion, it will be found reported in 199 Mich. 326. For a

full statement of the history of the case, reference is had to the former opinion. The case was reversed and a new trial ordered for the single error there pointed out. The case has been retried, resulting in a verdict and judgment for the claimant in the sum of $1,302.36, and the defendant has brought the case here upon writ of error. Many errors are assigned by appellant, but in our opinion the single meritorious question presented by the record is, whether there was any evidence, upon the retrial, showing that the arrangement which it was claimed was made between claimant's husband and herself "that she might have whatever she earned" if she would allow Chauncey Burnham to come to the home of William A. Brackett and Anna C. Brackett to live, was ever communicated to Chauncey Burnham, or that such an arrangement was ever accepted by him, or understood, or acquiesced in by him. When the case was here before we said:

"We think the case should have been submitted to the jury upon the claim of Anna C. Brackett for her own services only."

The question now presented was not presented or considered upon the former hearing. The evidence upon the retrial, as well as upon the first trial, upon the right of Anna C. Brackett to have her claim presented to the jury at all, was based upon a claimed conversation between Mr. and Mrs. Brackett, not in the presence of Chauncey Burnham, and was testified to by Mr. Brackett as follows:

"*Q.* Any conversation that you had that was in his presence would not be admissible, but the conversation that was not in his presence would be, so do not say anything in regard to any conversation had while he was present. What, if anything, was said by you to your wife about his staying there when you were talking with her, when Mr. Burnham was not present?

"*A.* I told her if she wanted to keep him she could, and she could have what she could earn."

On cross-examination as follows:

"*Q.* Mr. Brackett, what you have told the jury is what you and your wife have talked about, when Chauncey Burnham was not present, is that right?
"*A.* Yes, sir."

The rule of law in this State seems to be, that under such an arrangement, as claimed between husband and wife, before the wife can recover for services rendered under such circumstances, this agreement must be brought home to the knowledge of the party to be charged, and it must appear that such party assented to, and acquiesced in such arrangement. It is not enough to show that the husband has given the wife her services, but the other party must also understand that contract relations between himself and the wife exist, and that the wife expects compensation. It was, and is, the position of claimant's counsel that this part of the case is sustained by the testimony of the witness Amelia Planck, which was as follows:

"*Q.* And what, if anything did he (Burnham) say to you, how did this conversation come up, and what was said to you?
"*A.* At different times, and one time especially, he was alone in the store and wasn't feeling very well, and I says, 'Why don't you get married?' and he says, 'I don't want to get married. I have got a home over to Mrs. Brackett's and she takes care of me and does all my washing and ironing and everything.' And in the conversation he said, 'I guess I ain't got nobody that I care for, and I want them to have all I got, and I want them to have it to pay for everything she has done for me.' And I said, 'Why don't you make a will?' And he said, 'Because they would fight over a will,' and he says, 'Whatever I owe them they can always put in a claim and get it. I have enough property or money so they can always get what's coming to them.'"

At the close of the plaintiff's evidence defendant's counsel moved for a directed verdict, upon the ground

(among others) that there was no evidence to show that the deceased knew that Anna C. Brackett intended to charge him for the items claimed, or agreed to it. This motion was denied and exception taken.

Defendant requested the court to charge the jury (among other things) as follows:

"2. The plaintiff, or claimant, having failed to produce any evidence that deceased, Chauncey Burnham, knew that Anna C. Brackett, wife of William A. Brackett, claimant, intended to charge him for any services she rendered him, and for which she now claims compensation, and that he assented to the arrangements, neither she, nor her estate, can recover in this action, for in order to bind the estate of Chauncey Burnham, it is incumbent upon the claimant to prove by a preponderance of the evidence that the deceased, Chauncey Burnham, knew that Anna C. Brackett intended to charge him for the items for which she now claims, and that he assented to the arrangements. (Citing cases.) Your verdict will be for the defendant, no cause of action."

This request was refused, and the case was submitted to the jury. The court, in the course of its charge, did charge the jury as follows:

"It must appear to your satisfaction by a preponderance of the evidence that William Brackett, husband of Anna C. Brackett, relinquished to his wife the right to have whatever she might earn in caring for Chauncey Burnham, and that Chauncey Burnham, himself, understood and accepted such arrangement."

The infirmity of the case is that, in our opinion, there was no evidence to warrant the submission of the question to the jury. Neither the testimony quoted, nor any evidence in the case, tended to show that Chauncey Burnham ever knew that the claimant had been emancipated, or knew of the claimed arrangement between the husband and wife, or knew that contract relations between himself and the claimant existed.

This is not a new question in this State. That such evidence is necessary has often been held by this court. In *Mason* v. *Dunbar*, 43 Mich. 407 (38 Am. Rep. 201), Justice COOLEY, speaking for the court, said:

"The plaintiff claims that her husband and herself alternately took charge of the husband's father, who in his extreme old age was blind and imbecile, and required constant care and supervision, day and night, and that it was distinctly agreed between herself and her husband that for her own services she should receive compensation from the father. If such was the fact, and if the father understood the arrangement and assented to it, the court is of opinion that she would be entitled to recover what would be just and reasonable. The husband had the right to give her for this purpose her services, or to refuse to give them at his option; and if he made the gift, the legal right to deal with the father as a stranger might would follow.

"But we are all of opinion that the father must have been made aware of the arrangement, and must expressly or by implication have assented to it before he could have been chargeable with any legal claim in plaintiff's favor. The legal presumption is that the wife is employing her services in her husband's interest; and where she is working with her husband, as was the case here, a great wrong would sometimes be done if each might present and recover on separate claims, when the other party supposed, and had a right to suppose, he was dealing with the husband alone. It is not enough to show that the husband has given the wife her services, but the other party must also understand that contract relations between himself and the wife exist, and that the wife expects compensation."

This case has been approved and followed many times, as is evidenced by the following cases: *Barnes* v. *Moore's Estate*, 86 Mich. 585; *Boughton* v. *Boughton's Estate*, 111 Mich. 26, 28; *Slack* v. *Norton*, 111 Mich. 213, 215; *Decker* v. *Kanous' Estate*, 129 Mich.

146; *In re Barclay's Estate,* 146 Mich. 650; *Heral* v. *McCabe,* 171 Mich. 530, 539.

In *Re Barclay's Estate, supra,* Justice OSTRANDER, in speaking of an objection to the admissibility of certain testimony, said:

"The specific objection to the introduction of this testimony was that such a bargain between husband and wife must be shown to have been brought home to the decedent, and to have been assented to by her. See *Mason* v. *Dunbar,* 43 Mich. 407. If there was an arrangement that claimant should be paid, known and assented to by the husband, to the knowledge of decedent, so that liability to the wife personally was affirmed and liability to the husband was negatived, the rule that 'it is not enough to show that the husband has given the wife her services, but the other party must also understand that contract relations between himself and the wife exist, and that the wife expects compensation' (*Mason* v. *Dunbar*) is not violated."

The difficulty with the instant case is that there was no such evidence, the necessity of which is above indicated. The language:

"And I want *them* to have all I got, and I want *them* to have it, to pay for everything she has done for me. * * * Whatever I owe *them they* can always put in a claim and get it. I have enough property or money so *they* can always get what's coming to *them.*"

Such language falls far short of indicating that Burnham supposed that contract relations existed between himself and the claimant, or that he was dealing with her.

In *Heral* v. *McCabe, supra,* Chief Justice MOORE, speaking for the court, after quoting from *Mason* v. *Dunbar, supra,* said:

"There is not a particle of evidence in the case from which the inference can be fairly drawn that the de-

fendant understood that he was dealing with the plaintiff, and that he was to pay her for her services."

That language is very pertinent here.

Counsel for claimant have called our attention to *Ashley* v. *Smith's Estate*, 152 Mich. 197, and especially to the following language:

"It is urged by defendant's counsel that such contract would not be good unless Smith did know of this, but we think this point not well taken. If she had the right, and was competent to make such contract on her part, and he did make it on his, it would bind him, whatever he may have thought about it."

It would appear from a casual reading of the above excerpt that it is in conflict with the cases which we have cited. But a more careful reading shows that it was not the contract relation that was referred to there, but the right on the wife's part to make a contract. If the contract was actually made between claimant and deceased, and it turned out that she was authorized to make it, another question would arise, which is not the precise question we have been discussing, which is the contract relation. No cases are cited, and we do not think it was the intention to overrule the long line of decisions above cited without reference to them. It is also urged by appellant that the record in that case discloses that the questions here presented were not raised on the trial of that case. An examination of the record verifies that statement.

Many other reasons are urged by appellant why the case should be reversed, especially the weakness of the testimony as to the time and value of the services. We think, however, that enough was shown to take the case to the jury upon those questions.

Other questions raised and discussed will probably not arise upon a new trial. Much as we regret to reverse this case again, we see no escape from it, if our numerous decisions are to be observed.

The judgment will be reversed and a new trial granted because of the error discussed. One of the reasons why we grant a new trial is because the effect of Act No. 196 of the Public Acts of 1911 (3 Comp. Laws 1915, § 11478), entitled "An act defining and regulating the right of married women to their own earnings," has neither been raised nor discussed. What effect that act should have in a case where, as here, no express contract is relied upon, as to services rendered *after* that act took effect, may be a material question. It is claimed that the period of services extended to November 21, 1914. See *In re Scully's Estate*, 199 Mich. 181. Appellant will recover its costs of this court to be taxed.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

MUNROE, BOYCE & CO *v.* WARD.

1. APPEAL AND ERROR—STATUTORY RIGHT—JURISDICTION.
   Where a claim of appeal was not filed within 20 days after the entry of decree, as provided in 3 Comp. Laws 1915, § 13754, the court has no jurisdiction to entertain the appeal.

2. EVIDENCE—BOOKS OF ACCOUNT—ADMISSIBILITY.
   In order to entitle books of account to reception as evidence, it must appear that the party keeping and producing them is usually precise and punctilious respecting

the entries therein, and that they are designed at least to embrace all the items of the account which are proper subjects of entry.

3. SAME—ADMISSIONS.

The books and papers of defendant, offered in evidence by plaintiff, were admissible as admissions on the part of defendant.

4. SAME—BOOKS OF ACCOUNT—ADMISSIBILITY.

A ledger, into which was copied totals from a journal, the original entries being made in small account books and from them transferred to the journal, *held*, too indefinite to warrant its admission as evidence to sustain a claim based thereon.

5. SAME—SECONDARY EVIDENCE.

Testimony as to the contents of books destroyed by fire is competent as secondary evidence.

6. SAME—MATERIAL INTEREST OF WITNESS—CREDIBILITY.

Where the journal and account books had previously been destroyed by fire, testimony by the son of defendant, who copied the items into the journal, as to the contents of the destroyed books, and who had a material interest in the outcome of the litigation, *held*, not so satisfying and convincing as to warrant the appellate court in setting aside the judgment of the trial court rejecting the claim based thereon.

7. PARTNERSHIP—ACCOUNTING.

In a partnership accounting the finding of the court below that the action of one of the copartners in furnishing money and bidding in lumber sold to satisfy a judgment against the copartnership was not open to criticism, but that it safeguarded its interests, *held*, sustained by the record.

8. SAME—ATTORNEYS' FEES—EXPENSES.

Amounts expended for lawyers and other expenses incurred by one of the copartners, in an effort to protect the interests of the copartnership, *held*, reasonable and proper charges to be allowed in a partnership accounting.

9. SAME—INTEREST ON LOAN—INTENTION.

Where money was advanced to a copartnership by one of the partners with the intention that it should be a loan and not a contribution to the capital, interest was properly allowed thereon in a partnership accounting.

Appeal from Ottawa; Cross, J. Submitted June 12, 1919. (Docket No. 62.) Decided October 6, 1919. Rehearing denied December 23, 1919.

Bill by Munroe, Boyce & Company, a copartnership, against Michael Ward for an accounting. From the decree entered, defendant appeals. Affirmed.

Lillie, Lillie & Lillie, for plaintiff.

Ellis & Ellis and *M. Thomas Ward,* for defendant.

The learned trial judge who heard this case filed an opinion at the close of the proofs, which clearly and concisely states facts sufficient for an understanding of the issues which are before us for consideration. It is as follows:

"The bill of complaint was filed in this cause for a partnership accounting. Issue was joined and proofs taken by depositions, before a commissioner, and in open court.

"The plaintiff, a copartnership, composed of Stephen L. Munroe, Sherman H. Boyce and Nelson R. Howlett, of Grand Haven, Michigan, were engaged in the business of manufacturing and selling lumber and timber. Mr. Boyce died in 1904, and Nelson R. Howlett was made executor of his estate. Upon the death of Mr. Boyce, the partnership affairs were not closed, but were continued under the firm name; Mr. Howlett, as executor, represented the estate of Mr. Boyce.

"The defendant, Michael Ward, of Harvard, Michigan, and his brother, James Ward, Sr., under the firm name of Ward Bros., had been engaged for many years in buying and selling timber and logging the same. James Ward, Sr., died and Michael Ward acquired the interests of James Ward, Sr., and continued in the same business.

"Munroe, Boyce & Co. and Michael Ward entered into an oral partnership agreement, and bought timber land and cut the timber into lumber and sold the same. When the timber from a certain tract was sold,

the parties would have a settlement, and each party would share one-half of the profit or loss.

"In November, 1884, the parties purchased a large tract of timber land in the State of Minnesota, and in 1910 they started logging operations upon this tract.

"On the 19th day of September, 1910, the plaintiff and the defendant entered into a written contract with Wick O'Connell & Co. to cut and haul the timber on certain parts of the Minnesota lands, for the sum of $6.75 per thousand feet.

"After operating for a time under this contract it was discovered that the scale of the logs made in the woods was much larger than the scale made at the sawmill, and in the fall of 1911, a new contract was entered into between the parties. By the terms of this contract the final settlement with Wick O'Connell & Co. was to be made after the scale of the lumber at the sawmill.

"Munroe, Boyce & Co. and Michael Ward had no definite agreement as to just what authority James Ward, a son of the defendant, had in reference to the logging operations, but in a general way it was left to him to look after the interests of both parties in the timber transactions in Minnesota.

"On December 1, 1911, the plaintiff employed James B. Alverson to go into the woods in Minnesota, and look after its interests.

"The books of account were kept by James Ward and James B. Alverson. A reference to the books so kept will show that neither party was an experienced bookkeeper. The checks to pay the accounts were signed by James Ward. Reports were made by James B. Alverson to the plaintiff.

"In the fall of 1913, Wick O'Connell & Company were financially unable to go ahead with their contract, so a new arrangement was made with them by James Ward to guarantee the payment of the bills for the logging job. Thereafter the bills of Wick O'Connell & Co. on the logging job were paid by the plaintiff and the defendant, and charged to the account of Wick O'Connell & Co. Checks for the same were given by James Ward, and the items were entered

in the books of account by James B. Alverson or by James Ward.

"The result of the operations under this arrangement was an increase in the cost of the logging operations over and above the original contract price of $6.75 per thousand feet.

"A dispute arose with Wick O'Connell & Co. as to the construction of the terms of the written contract and a lawsuit resulted. A judgment was rendered against Munroe, Boyce & Co. and Michael Ward, and upon appeal the same was affirmed by the supreme court of Minnesota. To satisfy this judgment a levy was made upon the lumber belonging to the parties.

"Disputes arose between Munroe, Boyce & Co. and Michael Ward, and the bill of complaint in this case was filed, and an injunction was issued restricting the defendant from disposing of any of the assets of the partnership, including the lumber on hand.

"After the bill of complaint was filed, and upon application of the plaintiff, the defendant was ordered to file all the books and papers pertaining to the business of the parties, with the county clerk, so that either party could examine the same.

"The plaintiff employed the Michigan Trust Company to make an audit of the books. An audit was made by H. W. Fick, an expert accountant, of the books, etc., of the timber transportations for the years 1911 to January, 1915, and the same was offered in this case, being 'Exhibit N.'

"The report of the auditor was divided into two schedules, marked 'A' and 'B.' Schedule 'A' includes all the items of disbursements which were substantiated by proper invoices, receipts or other written evidence of payment and debit. Schedule 'B' shows the same accounts as are included in Schedule 'A' and also includes a list of items which were not substantiated to the satisfaction of the auditor, by proper invoices, receipts or other written evidences of debt and payment.

"Testimony was taken in regard to all of the items and after a careful consideration of the same, it appears that Schedule 'B' is a correct statement of the amount due the plaintiff, with the following exceptions; the proof is insufficient to substantiate the following items:

July 31, 1914, cash telegrams	$3.77
August 22d, 1914, Dan Campbell	21.00
Checks:	
April 6th, 1911, Postal Telegraph Co.	$2.60
July 9th, 1912, S. A. Story	7.95
September 3d, 1913, A. D. Ellefson	10.00
September 23d, 1913, Thos. Kearney	50.00
December 1st, 1913, James Moonan	207.55
August 29th, 1913, Thos. Kearney	114.10
January 5th, 1915, S. A. Story	1.34

"These items amount to the sum of $418.31 and one-half of this sum should be added to the amount due plaintiff as shown by Schedule 'B,' viz.: $9,364.11, making a total of $9,573.26.

"The testimony shows that the following items listed on page 71, of the report of the auditor, and not listed in Schedule 'B,' should be allowed, viz.:

Aug. 12th, 1914, Marshall Wells Hdwe. Co.	$28.67
Locke No. 279, for labor	78.85
Williams No. 280, for labor	76.95
April 3d, 1914, Parker & Ayres, J. 16	192.00
October 7th, 1914, Parker & Ayres, J. 68	62.00
January 15th, 1914, Ledger B. Folio 176, C. 125 check 1876	6.50
February 22d, 1914, E. A. Kemp & Son, insurance	302.40

"These items amount to the sum of $747.37, and one-half of this amount should be charged to the plaintiff and deducted from the sum of $9,573.26, which leaves a balance of $9,199.58, due plaintiff from defendant, together with interest at five per cent. from March 30th, 1915, to the date of payment.

"Plaintiff had notice of the change of the contract with Wick O'Connell & Co. before all the payments had been made thereon, and cannot now charge the defendant for the amount of the overpayment of the original contract price.

"After the bill of complaint was filed in this cause, the judgment obtained by Wick O'Connell & Co. was affirmed by the supreme court of the State of Minnesota, and the lumber levied upon was sold under an execution to satisfy that judgment. Prior to the sale, Munroe, Boyce & Co. endeavored to have Michael Ward raise his share of the money to pay the judgment, but

the defendant failed to raise the money, and to protect the interests of the parties, one of the partners, Stephen L. Munroe, made an arrangement to attend the sale to see that the lumber belonging to the partnership was sold for at least enough to pay the judgment and costs. Mr. Munroe personally bid at the sale the amount necessary to satisfy the execution and the costs of sale. The amount bid was paid by Mr. Munroe, and the lumber was then turned over to him. Afterwards, Mr. Munroe sold this lumber for the sum of $53,234.79, its fair market value at that time.

"The defendant contends that Mr. Munroe should account to the defendant for one-half of the profits on the sale of this lumber.

"At the time of the purchase and sale of the lumber, the partnership between the parties had not been dissolved, and Mr. Munroe, a partner, could not make a purchase of the property of the firm at an execution sale, against the interests of the other partner.

"Testimony was taken as to the amount paid for the lumber, the amount for which it was sold and the expenses thereof, and although Mr. Munroe made the purchase and re-sale in good faith, yet under the law he will be required to account to the defendant for one-half of the amount received by him on the sale of the lumber, less the amount paid to satisfy the execution and the expenses of the sale.

"The testimony shows that Mr. Munroe incurred the following expenses in looking after the lumber after the same had been attached, until same was finally sold, viz.:

November 2, 1914, expense to Minnesota	$70.00
November 2, 1914, services, Lillie & Lillie	132.85
August 15, 1915, expenses to Minnesota	75.00
August 15, 1915, services, Lillie & Lillie	125.00
August 16, 1915, expenses, S. L. Munroe	42.30
September 9, 1915, telegrams	1.90
September 10, 1915, making lists of lumber	2.00
September 12, 1915, expenses, S. L. Munroe	58.54
September 15, 1915, expenses, S. L. Munroe, Chicago	8.50
September 15, 1915, expenses, S. L. Munroe, Winton	54.00

September 15, 1915, services, Lillie & Lillie	$176.43
September 27, 1915, Mr. Sias, services	15.00
September 29, 1915, insurance	24.93
October 1, 1915, interest	209.74
October 1, 1915, revenue stamps	6.80
October 6, 1915, John H. Moore, services	187.13

"These items amount to the sum of $1,190.12, and added to the sum of $33,980.83, the amount paid to satisfy the judgment, make his total expenditures the sum of $35,170.95, and deducting this sum from the amount received for the lumber, viz.: $53,234.79, leaves a balance of $18,063.84. One-half of this sum, or $9,031.92, Mr. Munroe will be required to pay to the defendant, together with interest at five per cent. from September 29, 1915, to the time of payment of same.

"The tug, boom chains and any other personal property on hand should be divided equally between the parties.

"During the trial of this case it appeared that defendant was mentally incompetent to transact business and a guardian *ad litem* was appointed to represent him. Before the conclusion of the case the defendant died and his administrator appeared and defended the case.

"The partnership being dissolved by the death of the defendant, the partnership affairs should be wound up and closed. The plaintiff will recover costs.

"The amount of the witness fees of the expert accountant is not determined, for the reason no proof was submitted as to the cost of the same. Proofs may be submitted and the amount of the same will be determined on a settlement of a decree herein.

"A decree may be prepared for signature in accordance with these findings."

Thereafter certain amendments were made to these findings, as follows:

"Certain amendments to the findings heretofore filed having been proposed, and upon the consideration of the same it appears that the accounts receivable in the sum of $625.29 were charged to the defendant, and the accounts payable of $27.03 were credited as

paid by the defendant. One-half the accounts receivable belong to each of the parties, and each party should pay one-half of the accounts payable.

"It also appears that certain advancements of money were made by the plaintiffs in September and October of 1915 and January, 1916, after the bill of complaint was filed. These items should not bear interest from the date the bill of complaint was filed, but only from the date of the payment of same. This would make a credit on the interest item of $83.64.

"It also appears that the item of 'September 27, 1915, Mr. Sias, services, $15.00,' should be stricken from the findings, as the same appears in the report of the auditor. This correction gives the defendant a credit of $7.50 in addition to the amount due from Stephen L. Munroe.

"The expert accountant, acting as a witness in the trial of this cause, is not included within the provisions of the statute in regard to employing and paying expert witnesses, therefore no order will be made for the payment of extra fees."

From a decree entered in accordance with this opinion and this amendment, both the plaintiff and defendant have filed notices of appeal.

KUHN, J. (*after stating the facts*). The decree in this cause was signed and filed on the 8th day of February, 1918. The record discloses that the plaintiff's claim of appeal was dated March 18th, 1918. The first question for us to determine is whether or not counsel for plaintiff are in a position to claim that they have the right and benefit of an appeal to this court. Section 13754, 3 Comp. Laws 1915, provides that—

"Any party desiring to appeal from the order or decree of the circuit court in chancery shall, within twenty days after the entry of such order or decree, file or cause to be filed a claim of appeal in writing with the clerk of the court where such decree or order was entered, and shall also within the said twenty days pay a fee of five dollars to the clerk:" etc.

We held in *Guthrie* v. *Leelanau Circuit Judge,* 197 Mich. 321, that the payment of the appeal fee to the register in chancery within twenty days after the filing of the decree was mandatory. The right of appeal is a statutory one, and unless the mandatory provisions of the statute are complied with the court has no jurisdiction to entertain the appeal. See *Bolton* v. *Cummings,* 200 Mich. 234; *J. F. Hartz Co.* v. *Lukaszcewski,* 200 Mich. 230; *Miller* v. *Johnson,* 201 Mich. 535; also *Brevoort* v. *Wayne Circuit Judge,* 203 Mich. 388. We must therefore take the case as if no notice of appeal had been filed by plaintiff, and will therefore consider only the questions which are urged by defendant's counsel for modification of the decree. These questions are thus stated in their brief:

"1. The defendant claims $2,922.05 by reason of money paid out and expended by Michael Ward during the period named, and if interest is allowed to the plaintiff, the defendant would be entitled to the interest on this money during the same period that the plaintiff drew interest on their money they advanced, but we contend that neither side was entitled to interest.

"2. Defendant also claims and gives evidence tending to show that in the year 1911 Michael Ward had charge of this business in locating roads and a way in which the timber could be gotten out from where it was to the mill where it was sawed; that he expended for that purpose in money actually paid out $831.58. (R. p. 675.) He of course would be entitled also to interest, if the plaintiff was entitled to recover interest on the money they advanced.

"3. Defendant also claims that wrongfully and without cause, and when as a matter of fact there was no considerable money due to the plaintiff, they refused to sell this lumber and thereby kept it over, part of it a year and part of it nearly two years, and a large loss occurred in the carrying charge, insurance and so forth.

"4. It also appears in the case, as we have already mentioned, that instead of paying the judgment re-

covered in Minnesota and saving expense, that the plaintiff permitted the lumber to be sold at public auction, thereby incurring an expense of over 700, and that that matter should be charged to the plaintiff; also that the plaintiff should stand whatever expenses he made in that behalf for help or otherwise.

"It is also claimed that the lumber on hand at the time of the sale and the time it was bid off by Munroe, was worth in the market between $12,000 and $15,000 more than it was sold for by Munroe, and that the plaintiff should account for this lumber at the market value, and one-half of that sum should be paid to the defendant.

"5. It also appears by the evidence that at the time that the plaintiff refused to allow lumber to be sold, that there was not, in fact, anything due to the plaintiff on the operating charges; that after that and after they had their injunction, the plaintiff paid certain charges that had been before that time incurred, and the court allowed interest on the money so advanced, and the interest on the money that had been paid for taxes; that this is unjust and contrary to law, and should be deducted, or credited back to the defendant.

"6. It also appears that Munroe, Boyce & Company hired attorneys for their own use and benefit; attorneys who were representing them in this case; that the attorneys were not hired to represent the defendants in any way, but the court allowed them to bring in those attorney fees and charge them in this case as an item against the defendant.

"7. It also appears that Munroe, Boyce & Company put up a fictitious bill that they never intended to charge against anybody, and brought it in and presented it, and a portion of that was allowed against the defendant; that their excuse for doing it was that Michael Ward charged for what he did in 1911, and that James Ward had his expenses, although there was no evidence to show that he ever charged anything that he did not actually expend for the benefit of the company.

"8. In addition to the above there were certain items of money paid out for freight, labor and like expenses, which are shown in the report of the auditor, which were not allowed to the defendant, and which should be allowed, we contend, in this case."

The court made an order requiring Michael Ward to produce his books and papers relating to the Minnesota lumber job, which books and papers the accountant desired for certain items to make up his account and report. Among other books was a ledger, which was offered in evidence and known in the record as "Exhibit H." The ledger was a private book of Michael Ward and was not a record of any partnership transaction. It showed charges against Munroe, Boyce & Co. in the sum of $2,922.05. The ledger was kept by James P. Ward, the son of Michael Ward, who stated that he had entered the balances of certain accounts making up these items in this ledger and that the items were taken from other books, the original entries being made in small account books by his father and transferred by the witness, James P. Ward, to a journal and the totals transferred from the journal to the ledger. These small account books and the journal had been previously destroyed by fire or were lost and were therefore not produced. It is the contention of counsel for defendant that the court erred in disallowing these items, because the ledger furnished adequate proof of the claim against Munroe, Boyce & Co. We are of the opinion that the court reached the proper conclusion in holding that the ledger did not furnish evidence sufficient to sustain the claim of the defendant for the items under discussion. The rule to entitle books of account to reception in evidence was well stated in *Countryman* v. *Bunker*, 101 Mich. 219, as follows:

"In order to entitle books of account to reception as evidence, it must appear that the party keeping and producing them is usually precise and punctilious respecting the entries therein, and that they are designed at least to embrace all the items of the account which are proper subjects of entry."

See, also, *Mally* v. *Excelsior Wrapper Co.*, 181 Mich.

568; *Davis* v. *Buttars*, 201 Mich. 244. We notice that there were no itemized statements made of these amounts in the ledger and that they did not embrace any items of account which were the proper subject of entry. We think that the ledger was entirely too indefinite to warrant its admission as evidence of these claims under the well established rule in this State. The books and papers of Michael Ward were used by the plaintiff simply as admissions on his part, and for this purpose they were clearly admissible.

James P. Ward testified as to the contents of the lost and destroyed books. He attempted to explain from his recollection what the footings of the ledger, entered by him from those books, were made up of in detail. The whole record now being before us, Was this testimony competent and sufficient to establish the defendant's claim now being urged by his counsel? Unquestionably, the original books having been destroyed, his testimony was competent as secondary evidence to be offered in support of the claim. The question before us for consideration at this time is, however, whether or not this testimony was sufficient to satisfactorily prove the claim and warrant us in setting aside and reversing the findings of the circuit judge with reference to it. It is a question of the credibility of a witness and the reliability of this class of testimony, standing alone, in support of the account. Mr. Chamberlayne, in his Handbook on Evidence (Students Edition), § 919, very aptly says that a pertinent fact to be considered by the court in weighing this class of testimony is, not only whether—

"the declarant was possessed of adequate knowledge, but whether he was free from controlling motive to misrepresent. This lack of motive to misrepresent, upon which the subjective relevancy of the evidence is based, is taken or assumed to be established by the automatism of habit, the regular doing of an act

where the declarant has no motive to misrepresent, but has every reason, in discharge of his business, professional, or official duty, to assert the truth."

Considering the fact that the witness, being a son of the defendant, had a material interest in the outcome, we are not prepared to say that the testimony offered in support of the claim is so satisfying and convincing as to warrant us, an appellate court, having simply the record before us, in setting aside the judgment of the trial court, who, in weighing the evidence and passing thereon, had the benefit of hearing and seeing the witness upon the witness stand. We are satisfied that the evidence is not sufficient to warrant us in setting aside the trial court's determination with reference thereto.

What has been said with reference to item No. 1 also applies to item No. 2, as it was sought to prove this item also by the introduction of the ledger account and the testimony of James P. Ward.

Claims Nos. 3 and 4 relate to the action taken by the plaintiff to safeguard the rights of the parties in the lumber which was about to be sold to satisfy the judgment and costs obtained against the parties in the Minnesota courts. We have carefully examined the testimony in reference to these claims and find no merit in them. It clearly appears that plaintiffs did everything in their power to induce the defendant to advance money to satisfy this judgment, but it appears that they did not receive any replies to their letters and telegram sent to Michael Ward in reference to the payment of the judgment or in reference to the sale of the lumber. Everything that Stephen L. Munroe did with reference to the transaction appears to have been done in an effort to safeguard their interest in the lumber, and there is no satisfying evidence that there was any deceit or fraud on his part in the transaction. By taking the step that he did in bidding at

the sale and afterwards selling the lumber, he protected the rights not only of himself, but of Michael Ward, and by the decree of the court below he has been made to account to Ward for his interest in the funds received from the sale of the lumber.

Criticism is made of the fact that certain charges were allowed by the court because of the fact that Munroe, Boyce & Co. hired lawyers and incurred other expenses in their effort to protect the interests of the parties in the lumber. We have examined these items and think that they were reasonable and proper and were properly charged against the copartnership funds by the court.

Contention is made that the court also erred in allowing interest on certain funds advanced by one of the partners towards the business without an agreement clearly expressed or implied. The general rule is thus stated in 20 R. C. L., at page 1021:

"While it seems impossible to lay down any unbending rule on the question whether interest should be allowed or disallowed on partnership accounts, the general rule appears to be that, in the absence of an agreement to the contrary, interest is not to be allowed on partnership accounts until after a balance is struck. Hence, if moneys are advanced by a partner, he is not entitled to interest on the amount in the absence of an express agreement on the subject, or something in the usages of business or the surroundings of the parties from which an intent to allow it may be inferred."

And further:

"If the circumstances indicate that it was the intention of the parties that a partner should advance money as a loan instead of a contribution to the capital, the courts may accord to him a creditor's right to interest."

The following Michigan cases sustain the rule that interest will not be allowed in the absence of agree-

ment express or implied: *Godfrey* v. *White*, 43 Mich. 171; *Sweeney* v. *Neely*, 53 Mich. 421; *Thompson* v. *Noble*, 108 Mich. 19. See, also, *Young* v. *Barras*, 74 Mich. 343, and *Wells* v. *Babcock*, 56 Mich. 276, 282, in which interest was agreed upon. In the most recent case, *Mack* v. *Engel*, 165 Mich. 540, where the question was whether interest should be allowed on advances made by a member of a partnership association, limited, the court said the following:

"As between partners, there is no doubt that a partner who makes advances for partnership purposes beyond the amount of his agreed contribution is entitled to collect interest thereon, at the customary legal rate, even in the absence of any express agreement therefor with his copartners. 30 Cyc. p. 444, note 19; *Bundy* v. *Youmans*, 44 Mich. 376.

"A member of a partnership association, limited, would certainly be in no worse position as to interest upon advances than a member of an ordinary partnership. 2 Cook on Corporations (6th Ed.), § 692."

In view of the previous decisions of this court cited above, the rule thus stated may have been stated somewhat too broadly, as it would seem that unless it satisfactorily appears from all the facts and circumstances in the case that it was the intention of the partners that the moneys advanced should bear interest (which clearly appears in *Mack* v. *Engel, supra*), which would thus create an implied agreement, interest should not be allowed in the absence of an express agreement therefor among the partners. In the case before us, considering all the circumstances under which the advances in question were made—that they were made only after repeated solicitation on the part of one of the partners to the other to advance sufficient funds to protect his interest—it would seem that the legitimate inference to be drawn—and we do draw it—from the testimony, is that it was the intention as to the moneys thus advanced that they should be ad-

vanced as a loan instead of any contribution to the capital, and that therefore the court did not err in allowing interest on these amounts.

We have examined the other claims of counsel and do not find that there is anything that would warrant us in disturbing the findings of the circuit judge.

From a review of the whole record we are of the opinion that the decree as made should be affirmed, without costs to either party.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

RUPRIGHT *v.* MUSKEGON CIRCUIT JUDGE.

1. FALSE IMPRISONMENT—CAPIAS AD RESPONDENDUM—AFFIDAVIT—SUFFICIENCY—PRIMA FACIE CASE.

   In an action for false imprisonment and abuse of civil process, commenced by *capias ad respondendum*, a declaration, supported by affidavit, charging defendant with causing plaintiff's arrest and imprisonment without probable cause, and that the proceeding was subsequently voluntarily dismissed, held, to make a *prima facie* case of false imprisonment.

2. SAME—ABUSE OF PROCESS—PRIMA FACIE CASE.

   A further showing of ill will on the part of defendant toward plaintiff over the title to a gasoline motor that had been patented by plaintiff, and the fact that plaintiff was given his liberty upon condition that he would go away from the county and remain away, *held*, to make a *prima facie* case of the abuse of civil process.

On the question whether the discharge of one accused of crime by an examining magistrate is *prima facie* evidence of want of probable cause, see notes in 64 L. R. A. 481 and 3 L. R. A. (N. S.) 928.

Mandamus by Frederick E. Rupright to compel John Vanderwerp, circuit judge of Muskegon county, to reinstate *capias ad respondendum* proceedings. Submitted July 17, 1919. (Calendar No. 28,843.) Writ granted October 6, 1919.

Charles E. Misner, for plaintiff.

Carpenter & Jackson, for defendant.

BIRD, C. J. On November 23d, one Clifford R. Wassell, of Muskegon, caused the arrest of plaintiff on a *capias ad respondendum* and plaintiff was kept in the county jail by the sheriff for a period of four hours. At the end of that time he was released on his promise to Wassell that he would go and stay away from the county of Muskegon. Later plaintiff's counsel moved to quash the writ on the ground that the order to hold to bail was not sufficient. During the pendency of this motion Wassell's attorneys stipulated a discontinuance of the writ and proceedings. This matter being disposed of, plaintiff caused the arrest of Wassell on a *capias* for false imprisonment and abuse of civil process. Wassell's attorneys moved the court to dismiss the writ on the ground that the affidavit for the *capias* was insufficient. This motion was granted. Plaintiff now asks this court for a writ of mandamus to compel the circuit judge to reinstate the *capias*.

Several reasons were set forth in Wassell's motion to dismiss but the one principally relied upon was "because the affidavit does not show or set out any cause of action." As a basis for the writ plaintiff filed a declaration counting therein on false imprisonment and abuse of civil process, and supported it by his affidavit which shows in substance:

(*a*) That said Charles R. Wassell caused his arrest on a *capias* with an order for bail in the sum of $2,000

indorsed thereon without any probable cause for so doing; that he did not furnish bail and was in consequence imprisoned for four hours in the county jail.

(*b*) That at the end of the four hours' imprisonment he was taken from the jail and given his liberty on condition that he would leave the county of Muskegon.

(*c*) That subsequently the *capias* and proceedings thereunder were dismissed upon application of Wassell's own attorneys and plaintiff was discharged.

(*d*) Plaintiff further makes it appear that the said Wassell was president of the Columbia Motor Company; that the Columbia Motor Company was endeavoring to acquire the title to a gasoline motor that had been patented by the plaintiff, and that much ill feeling existed between himself and the said Wassell on account of the attempt to acquire said motor. Plaintiff shows, by appropriate allegations, that the said Wassell caused his arrest and imprisonment for the purpose of enabling him the better to get control of said motor and said patents.

The declaration filed sufficiently charges defendant with false imprisonment and with abuse of civil process. When plaintiff shows by his affidavit that he was arrested on a *capias* at the instance of Wassell, that the same was without probable cause upon the part of Wassell and that the proceeding was subsequently voluntarily dismissed, he makes a *prima facie* case of false imprisonment. *Burhans* v. *Sanford,* 19 Wend. (N. Y.) 417.

When plaintiff showed these facts and the further fact that he was given his liberty upon condition that he would go away from the county of Muskegon and remain away, and shows the ill feeling between him and Wassell over the motor and the promotion of it, we are of the opinion that he makes a *prima facie* case of the abuse of civil process. *Paulus* v. *Grobben,* 104

Mich. 42; *Marlatte* v. *Weickgenant*, 147 Mich. 266; *Antcliff* v. *June*, 81 Mich. 477 (10 L. R. A. 621).

We are of the opinion that the trial court was in error in holding the affidavit insufficient. Upon the trial court's attention being called to this opinion the writ of mandamus will issue, if necessary, to reinstate the proceedings. The plaintiff will recover his costs in this court.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

PARKE, DAVIS & CO. *v.* GRAND TRUNK RAILWAY SYSTEM.

1. PLEADING—AMENDMENTS—PARTIES—SUBSTITUTION—SERVICE OF PROCESS.

   Where suit was commenced against the Grand Trunk Railway System, under the erroneous impression that it was a corporation, while in reality it was only an operating name used by the real defendant, the Grand Trunk Railway Company of Canada, a motion to amend the pleadings, after plaintiff had made its case on the merits, by substituting the name of the real defendant for the one named was properly denied, in the absence of evidence that service was made upon an officer of the real defendant.

2. SAME—GENERAL ISSUE—WAIVER BY COUNSEL.

   It cannot be said that defendant's counsel waived the defect by pleading the general issue, where it nowhere appears that he was in court on that particular occasion representing the real defendant; the plea being filed for the defendant named in plaintiff's declaration.

Error to Wayne; Tappan, J., presiding. Submitted June 5, 1919. (Docket No. 60.) Decided October 6, 1919.

Case by Parke, Davis & Company against the Grand Trunk Railway System for the negligent killing of plaintiff's horse. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

George J. Haines (*Charles M. Woodruff*, of counsel), for appellant.

Harrison Geer, for appellee.

BIRD, C. J. The Michigan Air Line Railroad Company, which extends from Richmond to Jackson, passes through plaintiff's farm in Oakland county. One of its horses passed on to the railway right of way and track, by reason of a defective fence, and was run down and killed by a passing train. Plaintiff brought suit against the Grand Trunk Railway System to recover its damages. Suit was commenced by declaration and the return of service indorsed thereon shows the following:

"STATE OF MICHIGAN,
"County of Wayne, } ss.

"I hereby certify and return, that on the 11th day of May, A. D. 1917, I served the declaration of which the within is a copy, on Grand Trunk Railway, the defendant named in said declaration, by delivering to George W. Alexander, local treasurer of said railway, said defendant, at the city of Detroit, in said county of Wayne, a true copy thereof and of the foregoing rule to plead, the notice relating thereto, together with a true copy of the notice to appear and plead, attached thereto as hereto attached.

(Signed) "EDWARD F. STEIN,
"Sheriff of Wayne County.
"By EDMOND A. LODGE,
"Deputy Sheriff of said county."

Harrison Geer, of Detroit, an attorney, filed a plea of the general issue on behalf of the Grand Trunk Railway System. Later the matter came on for trial and after plaintiff had made its case on the merits the showing was made by attorneys Geer and Williams that the Michigan Air Line Railroad was one of several independent Michigan railway corporations which were being operated by the Grand Trunk Railway Company of Canada, but that George W. Alexander upon whom service was made was not local treasurer of the Grand Trunk Railway Company of Canada but was secretary of the Michigan Air Line Railroad Company. It was further shown that these Michigan lines of railway so owned and controlled by the Grand Trunk Railway Company of Canada were operated under the name of the Grand Trunk Railway System but that said Grand Trunk Railway System was not a corporation but was simply an operating name used for convenience. It further appeared that Harrison Geer, who filed the plea, was the attorney for the Grand Trunk Railway Company of Canada and had been for upwards of 20 years.

Upon this showing a motion was made by counsel for a directed verdict in behalf of defendant. At this stage of the proceedings plaintiff asked permission of the trial court to amend the proceedings by striking out the name of the defendant "The Grand Trunk Railway System" and substituting therefor the name of "The Grand Trunk Railway Company of Canada." The conclusion of the trial court was that plaintiff's motion to amend should be denied and that defendant's motion for a directed verdict should be granted. Plaintiff brings error.

1. Several errors are assigned. The important one is the assignment directed at the refusal of the court to grant the amendment. Counsel invoke the rule

which has prevailed in many reported cases that where the right party has been sued by the wrong name and service has been made upon the right party, the proceedings are amendable by substituting the name of the right party. This rule is well stated in 31 Cyc. p. 487, as follows:

"As a general rule, under the statutes, a misnomer of a plaintiff or defendant is amendable unless the amendment is such as to effect an entire change of parties. But where the right corporation has been sued by the wrong name and service has been made upon the right party, although by a wrong name, an amendment substituting the true name of the corporation may be permitted. * * * Where a corporation is known by several names and is sued under one of them, an amendment placing the fact of the identity of the corporation in issue is proper."

This rule was followed in *Daly* v. *Blair*, 183 Mich. 351, cited by plaintiff's counsel.

In applying this rule, great care should be exercised to see that the right party has been served with process. Herein lies the inherent weakness of plaintiff's position. Plaintiff asked the trial court for permission to amend by substituting the name of the Grand Trunk Railway Company of Canada. It is clear that this permission should not be granted unless the Grand Trunk Railway Company of Canada had been served with process. The return shows that service was made upon George W. Alexander, local treasurer of the Grand Trunk Railway Company of Canada, but the uncontradicted proofs show that he was not local treasurer of the Grand Trunk Railway Company of Canada but was secretary of the Michigan Air Line Railroad Company. It is not shown that George W. Alexander was an official of the Grand Trunk Railway Company of Canada, or that he was even its agent. It is true a showing was made that the Grand Trunk

Railway Company of Canada was the lessee of the Michigan Air Line Railroad and that George W. Alexander was its secretary, but that proof would not make Alexander an official or an agent of the Grand Trunk Railway Company of Canada. This will clarify if we keep in mind that both, the lessor and lessee, are independent corporate entities. Had counsel asked to amend by substituting the name of the Michigan Air Line Railroad Company for the Grand Trunk Railway System, he would have been in a much better position to have urged the application of this rule because service was made upon the secretary of that company and the damage occurred on that company's road. The cases which counsel cite in support of their argument are cases, so far as the record shows, in which service was made upon the right party but by wrong name. Such a case is *Daly* v. *Blair, supra.* We are of the opinion that the trial court was right in refusing the amendment because plaintiff's proofs did not show that service was made upon the party which he offered as a substitute defendant.

2. Plaintiff also urges that defendant's counsel waived the defect by pleading the general issue. We think not. Counsel filed a plea for the defendant named in plaintiff's declaration, namely, the Grand Trunk Railway System, and while it was shown that there was no such corporate entity as the defendant named, and that Mr. Geer was attorney for the Grand Trunk Railway Company of Canada, it nowhere appears that he was in court representing the Grand Trunk Railway Company of Canada. Mr. Geer was a witness and was cross-examined by plaintiff's counsel. There seems to have been no good reason why Mr. Geer should not have been asked the direct question, whether he was representing the Grand Trunk Railway Company of Canada when he filed the plea. The question, however, was not asked and the proofs

fail to show that Mr. Geer was representing that company on that particular occasion.

The judgment of the trial court is affirmed.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

OTTAWAY *v.* GUTMAN.

1. APPEAL AND ERROR—SUFFICIENCY OF PLAINTIFF'S TESTIMONY—DIRECTED VERDICT—QUESTIONS REVIEWABLE.

   On appeal from a directed verdict for defendant, the question as to whether plaintiff's testimony is sufficiently convincing to support a verdict is not before the court.

2. NEGLIGENCE—PERSONAL INJURIES—AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

   In an action for personal injuries caused by defendant's automobile to plaintiff when it backed upon him and struck him as he was crossing defendant's private driveway on the sidewalk on a public street, his testimony that he looked and did not see any automobile coming, although the day was clear, his eyesight and hearing were good, there were no obstructions in the way, and the garage was 92 feet from the sidewalk, *held*, although improbable, to present a question of fact for the jury.

3. SAME—DIRECTED VERDICT.

   That plaintiff looked in the direction of the automobile so indifferently as not to see it coming, did not make him guilty of contributory negligence, as a matter of law, nor does the improbability of his testimony produce such result.

   BIRD, C. J., and BROOKE, J., dissenting.

Error to Wayne; Webster (Clyde I.), J. Submitted June 4, 1919. (Docket No. 41.) Decided October 6, 1919.

Case by James Ottaway against William Gutman for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

Lau, Edwards, Eyster & French, for appellant.

Schmalzriedt & Toms, for appellee.

BIRD, C. J. (*dissenting*). While walking in a westerly direction on the north side of Leicester court, in the city of Detroit, plaintiff, an elderly man, was knocked down by defendant's automobile, which, at the time, was being backed out of his yard, by his son. Plaintiff testified that as he was approaching the driveway he looked in the direction of the garage and driveway but saw nothing of the automobile until it backed against him, that it knocked him down and broke his hip and resulted in making his left leg considerably shorter than his right one.

At the conclusion of plaintiff's testimony the trial court directed a verdict for defendant for the reason that plaintiff's own testimony showed that he was guilty of contributory negligence. Plaintiff argues that that question was one for the jury. Plaintiff testified, upon direct examination, as follows:

"As I approached along Leicester court, there was a vacant lot near the place where this accident occurred, next to Mr. Gutman's house. There was nothing between the house and the vacant lot that I saw. The garage set back. There is a driveway running up to the garage from the sidewalk. I was crossing that driveway on the sidewalk. I was walking right along.

"*Q.* What were you doing?

"*A.* I was looking. I kept looking and looking to see if there was anything, and I didn't see nothing, and I went across and this struck me. I saw something black and the car hit me.

"*Q.* You looked to see whether or not anything was coming out of the driveway as you approached?

"*A.* I looked and looked all the way along—always looked.

"*Q.* Then when did you first see the car?

"*A.* I did not see it. I saw something black and it struck me. The next time I looked, then at the moment I was struck I saw the car, not before. I don't know what part of the car hit me. It was the front end or the back end of the car hit me. Yes, the back end. It knocked me down."

He further testified, upon cross-examination:

"As I walked down Leicester court I knew that this driveway was there. I had seen it before. I could not tell how wide the lot is just east of Mr. Gutman's house. I never measured it. There is a difference in lots. The house that is next east of Mr. Gutman's sets back from the sidewalk a short distance. It was between 8 and 9 o'clock in the morning, broad daylight. My hearing was good then.

"*Q.* As you came along Leicester court this morning, did you look up this driveway to see whether there was an automobile coming?

"*A.* Yes, sir.

"*Q.* You recall distinctly that you looked?

"*A.* Yes, sir.

"*Q.* Did you see anything?

"*A.* No, sir.

"*Q.* You could see clear to the garage?

"*A.* Yes, sir.

"*Q.* When you were the whole width of the lot, whatever it is, that distance away, you could see clear to the driveway?

"*A.* Certainly.

"*Q.* Now, you looked and did not see anything?

"*A.* Yes, sir.

"*Q.* Then what did you do, after you looked and saw nothing?

"*A.* Why, I kept walking right along.

"*Q.* Started walking right along, and you walked the width of that lot; did you look again?

"*A.* I looked all the way across.

"*Q.* Then you looked all the way, as you walked across that vacant lot, you were looking back at the garage or at the driveway?

"*A.* I was looking that way; I don't know as I was looking at the garage; I was looking that way.

"*Q.* So that you could have seen any automobile which was coming down that driveway?

"*A.* Certainly.

"*Q.* Now, as you got to the driveway, let's just suppose this is a vacant lot (indicating). Now, I am walking across the vacant lot and here is the driveway coming down here (indicating). As you came to the driveway, just before you stepped in front of the driveway, did you look up that way?

"*A.* As I got to the edge of that driveway, I was still looking up towards the back of the lot. I saw nothing coming so I stepped into the driveway, that is, in front of the driveway, to walk across it, and immediately I was struck. Yes, quicker than lightning. It must have come quicker than lightning to hit me and I could not tell how far the garage is back from the sidewalk.

"*Q.* So that as you stood at the edge of the sidewalk, and there was no automobile coming, by the time you stepped onto the driveway or in front of it, this automobile came from—well, somewhere in the rear to the sidewalk and struck you?

"*A.* I say that is where I was hit, right there.

"*Q.* When you were standing at the edge of the driveway you saw nothing?

"*A.* Yes, sir.

"*Q.* By this time did you stop there, Mr. Ottaway, or were you walking right along all the time?

"*A.* I was walking right along all the time. I generally walk a pretty good gait.

"*Q.* From the time that you stood beside the driveway until you stepped in front of it, you were struck by something?

"*A.* I was struck by the car. * * *

"*Q.* I just want you to explain to the jury how this that I am going to say could possibly happen. Now, you are standing right beside this driveway that goes up from the sidewalk, and you testified you were looking up that driveway all the time, and you could see clear to the rear of the lot, that is, to the back of the house anyway, and you saw nothing, you saw no automobile, and the next instant as you stepped up in front of the driveway you were struck by an automobile?

"*A.* Yes, sir.

"*Q.* Now, explain it.

"*A.* Well, now, as you stepped up here to get on the sidewalk that automobile came right from the back of the house, but I could not see it, I never seen it at all, you see, but it came there just like lightning and struck me; the first I seen was something black; the auto did not have—only the width of the house to come.

"*Q.* It had the distance from the sidewalk to the house, and the depth of the house, at least that far?

"*A.* Yes.

"*Q.* And it came that distance and struck you, while you were stepping in front of it?

"*A.* Yes, sir. Well, I was walking along.

"*Q.* No, while you were walking from the edge of the driveway in front of the driveway?

"*A.* Yes, sir.

"*Q.* And that driveway is just as wide as the automobile's wheels are apart, isn't it?

"*A.* I think so."

Had plaintiff been walking along the sidewalk in the usual manner, casually observing what was going on within his immediate view, his version of the collision would have probably stated a case for the jury, but when he states that as he reached the edge of the driveway he was looking up the driveway toward the garage and no car was in sight and that he proceeded to go across it and before he could do so the automobile collided with him, he states a case which, to say the least, imposed upon himself the duty of either going across in safety or of discovering the car and avoiding it. Having failed in either one or the other of these duties it follows that he was guilty of contributory negligence. The record shows that defendant's dwelling was 15 feet and the garage 92 feet from the sidewalk. If the automobile were in the neighborhood of 92 feet distant when he was at the edge of the driveway, it would have had to move with great celerity to collide with him before he reached a place of safety, as two steps would have carried him over the driveway. It does not appear that there were

any obstructions which cut off his view, in fact it appears that there were not, and it appears from his own testimony that the morning was bright, that his eyesight and hearing were good and that he was walking at "a pretty good gait."

We are of the opinion that the trial court was not in error in directing a verdict for the defendant as the testimony stood at the close of plaintiff's proofs. The judgment should be affirmed.

BROOKE, J., concurred with BIRD, C. J.

FELLOWS, J. The court having directed a verdict, we have not before us the question of whether the testimony of the plaintiff was sufficiently convincing to support a verdict in his favor. It may be highly improbable that the automobile could come a distance of 92 feet without plaintiff seeing it had he looked in its direction as he walked along, even though it came "quicker than lightning"; but the credibility of such testimony was primarily for the jury. The place of accident was a private driveway crossing the sidewalk. No one claims that plaintiff would be guilty of contributory negligence because he did not stop, look and listen before crossing such a way. That he looked in that direction so indifferently as not to see the car coming did not make him guilty of contributory negligence, as a matter of law, nor does the improbability of his testimony produce such a result. I think plaintiff made a case for the jury and that the trial judge erred in directing a verdict against him. In my judgment a new trial should be granted with costs to plaintiff.

MOORE, STEERE, STONE, and KUHN, JJ., concurred with FELLOWS, J.

The late Justice OSTRANDER took no part in this decision.

STRAUS LAND CORPORATION *v.* DUPUIS.

1. ASSUMPSIT—DECLARATION—NATURE OF ACTION.
   Where a declaration alleged that defendant promised to sell plaintiff certain land at its cost price, but that he charged more than the cost price, and it is expressly stated that the action is in assumpsit to recover the overpayment, and reliance is had upon defendant's promise, the action is one of assumpsit, and it is immaterial that tortious conduct is alleged by way of aggravation.

2. SAME—TRIAL—INSTRUCTIONS—TORT.
   The conduct of the trial court in treating the action as one of fraud and deceit and in instructing the jury that, for plaintiff to recover, the necessary elements of fraud and deceit must be found, *held*, reversible error.

3. SAME—EVIDENCE—ADMISSIBILITY.
   The action being to recover the overpayment, evidence of the value of the land was inadmissible.

Error to Wayne; Law, J., presiding. Submitted June 5, 1919. (Docket No. 43.) Decided October 6, 1919.

Assumpsit by the Straus Land Corporation, Limited, against Dennis R. Dupuis for an overpayment on the purchase of land. Judgment for defendant. Plaintiff brings error. Reversed.

George E. Brand, for appellant.

J. O. Murfin (*John H. Rodd,* of counsel), for appellee.

BIRD, C. J. Riverview subdivision to the city of Windsor, Canada, was owned in 1914 by defendant and one Dr. Augustus Soper. Because of ill health Dr. Soper went to California in November, 1915, and, after staying there for a time, concluded to remain. He was desirous of disposing of his interest in the

subdivision and defendant was equally anxious that he should, as he wanted a co-tenant who would be helpful to him in managing and disposing of the lots. The opportunity to purchase Dr. Soper's interest was called to the attention of plaintiff, which was a corporation of much experience in buying and selling real estate. It is the claim of plaintiff that defendant offered to sell Dr. Soper's interest at cost price, stating that the cost price was $55,000 and one-half of the mortgage indebtedness thereon, which was approximately $15,300, making the total price $70,300. After investigation the proposition was accepted by plaintiff and the purchase made. Soon afterwards plaintiff learned that the cost price to defendant was not $70,300, but was $52,300, and it brought this suit in assumpsit to recover the overpayment. A trial of the issues before a jury resulted in a verdict for defendant.

1. Plaintiff's counsel complains because the trial court treated its declaration as one for fraud and deceit. This misconception, it is claimed, led the court into errors respecting the admission of evidence and the instructions to the jury. Plaintiff's counsel throughout the trial insisted that the action was purely one of assumpsit and endeavored to keep the conduct of the case within the theory of assumpsit. The trial court was of the opinion that the action was primarily one of tort, of fraud and deceit, and that while the declaration was in assumpsit it was a good declaration in assumpsit only because section 12350, 3 Comp. Laws 1915, made it so, and that to recover plaintiff must establish a case of fraud and deceit, and after doing so the statute would permit it to recover in assumpsit.

We think it appears from the language of the declaration, which will be found in the margin, that it is a

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COUNTY OF WAYNE, SS.

And now comes the Straus Land Corporation, Limited, an Indiana corporation, plaintiff herein, by Selling & Brand, its

declaration in assumpsit. It is expressly stated to be in assumpsit and the facts which are set up therein show that assumpsit or a promise is relied upon. Plaintiff counts upon the promise of defendant, not upon his tortuous conduct in falsely representing the cost price. In short, plaintiff says "You promised to sell me a one-half interest in the subdivision at cost price. You did afterwards sell it to me at what you claimed was the cost price. I paid you for it. Since paying you I have learned that you charged me more than the cost price and I want you to make your promise good and refund to me the excess which I paid you over cost price." This is assumpsit and nothing more.

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attorneys, and complains of Dennis R. Dupuis, of the city of Windsor, county of Essex, province of Ontario, defendant herein, *in a plea of trespass on the case upon promises or assumpsit*, and files this declaration in continuation of suit, the defendant having heretofore been duly summoned.

1. The said defendant was the owner on, to wit, the first day of June, 1916, of an undivided one-half interest in those certain parcels or tracts of land situate, lying and being in the town of Sandwich, county of Essex and province of Ontario, and being composed of lots numbers one (1) to eight (8) inclusive (Description).

2. Said defendant was the owner, as above stated, of an undivided one-half interest and one Doctor Augustus Soper was the owner of the other undivided one-half interest in the premises in the preceding paragraph described, said Doctor Soper being then and now a resident of California.

3. Said premises were incumbered by mortgages, one held by Robert T. Gray, the unpaid balance of which was sixteen thousand six hundred ($16,600) dollars, and four (4) mortgages covering various lots, held by William J. Pulling, the unpaid principal of which was fourteen thousand ($14,000) dollars.

4. The above described property had at one time belonged entirely to the said Doctor Augustus Soper who had sold an undivided one-half interest to the defendant herein.

5. In, to wit, the month of May, 1916, the defendant was introduced to certain of the officers of plaintiff and proposed to plaintiff that the plaintiff buy the undivided one-half interest still remaining in the said Doctor Soper, informing plaintiff,

It shows a reliance upon defendant's promise. The mere fact that matters by way of aggravation are set up does not change the declaration to one of tort. *Hoey* v. *Harty*, 48 Mich. 191. It is clear to us that plaintiff is basing his recovery upon the failure of plaintiff to make good his promise and is not seeking to recover damages for defendant having falsely represented the cost price. Even though it could be said there was an element of tort in the transaction the tort grew out of a contract relation, and when this was the situation at the common law the tort could be waived and assumpsit maintained. 1 Green's Practice, 178. The case under consideration clearly falls

through its officers, that because said Doctor Soper was a sick man, troubled with asthma, who had gone to California and would never return and because there were family ties between said Doctor Soper and defendant, he was willing and glad to help dispose of Doctor Soper's interest without any profit to himself, said defendant; that he (defendant) had an option to purchase the undivided one-half interest of the said Doctor Soper and was desirous of having plaintiff the owner of the other undivided one-half interest in said real estate in place of said Doctor Soper; defendant stated that if plaintiff would buy the undivided one-half interest of said Doctor Soper upon which defendant had such option, he, the said defendant, would let plaintiff have the undivided one-half interest of said Doctor Soper at exactly the price that it would cost him, the said defendant, from said Doctor Soper, and would turn the property over to plaintiff at exactly what he, said defendant, was paying for it.

6. And plaintiff avers that the said defendant represented to plaintiff that the price which he, the said defendant, was paying Doctor Soper was fifty-five thousand ($55,000) dollars in cash, plus the assumption of one-half of the said mortgages on the property, amounting to, to wit, thirty thousand six hundred ($30,600) dollars.

7. And plaintiff avers that it relied upon the representations made by the said defendant as to the price and cost of said property to him and did agree to pay to the said defendant what he asked for said undivided one-half interest, believing that what it was paying to the said defendant was exactly the same amount the defendant was paying to Doctor Soper, as represented by the said defendant.

within the doctrine of the following cases: *Young* v. *Taylor,* 36 Mich. 25; *Barnard* v. *Colwell,* 39 Mich. 215; *Hidey* v. *Swan,* 111 Mich. 161. See also, *Moore* v. *Middlebaum,* 8 Mich. 449. Under this view the charge of the court which compelled the jury to find the necessary elements to recover in an action of fraud and deceit was reversible error.

2. This erroneous view of the character of the declaration was undoubtedly responsible for the other errors which are alleged. It is complained that proof of the value of the subdivision was admitted in evidence. This, of course, was inadmissible under the theory that the declaration was in assumpsit to re-

8. And plaintiff paid to the said defendant fifty-five thousand ($55,000) dollars, substantially, in cash, and did assume the one-half of the said mortgages which said one-half amounted to fifteen thousand three hundred ($15,300) dollars, making the total purchase price seventy thousand three hundred ($70,300) dollars, which plaintiff paid to defendant as the purchase price of Doctor Soper's one-half interest in said property.

9. And plaintiff avers that since such purchase, it has learned that by arrangement between said Doctor Soper and the said defendant long prior to the purchase by defendant of Doctor Soper's remaining one-half interest and without regard to the sale thereof, as part of the consideration of the purchase of the first one-half of said property from Doctor Soper, the said defendant had assumed the entire Gray mortgage and that it was incumbent on said Doctor Soper to pay no part of said mortgage and that it was incumbent upon defendant to pay all of said Gray mortgage.

10. Plaintiff further avers that it has since learned that the price paid by defendant to Doctor Soper for the interest sold to plaintiff was forty-five thousand ($45,000) dollars in cash and the assumption and agreement to pay the one-half of the Pulling mortgage which it was incumbent upon said Doctor Soper to pay, making the full purchase price paid by the said defendant to the said Doctor Soper for the undivided one-half interest sold by the said defendant to plaintiff, forty-five thousand ($45,000) dollars plus seven thousand ($7,000) dollars, or fifty-two thousand ($52,000) dollars, the said defendant having received from plaintiff, in cash, or its equivalent, or by the assumption of mortgages, seventy thousand three hundred ($70,300) dollars.

cover the overpayment. *Norris* v. *Home City Lodge,* 203 Mich. 90. Proof of the value of the interest was immaterial. Whether it was worth more or less than plaintiff agreed to pay for it, plaintiff was entitled to have the interest which it purchased at cost price.

3. Other errors are assigned but the consideration of the case thus far will furnish a solution for them. The case must be reversed and a new trial granted, with costs of both courts to the plaintiff.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

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11. And plaintiff avers that in accordance with the agreement entered into under which plaintiff purchased said undivided one-half interest in said lands from the defendant, plaintiff was to have the same at the price that said undivided one-half interest cost the defendant from Doctor Soper.

12. And plaintiff avers that the said defendant, by his misrepresentations, obtained from plaintiff, to wit, eighteen thousand three hundred ($18,300) dollars, more money than he was entitled to under said agreement, all of which came to the knowledge of the plaintiff after it had paid over said moneys to said defendant.

13. And thereupon, the said defendant, afterwards, and on, to wit, the first day of November, 1916, in consideration of the premises respectively, then and there promised the plaintiff to pay to it the said sum of money so overpaid by plaintiff to defendant on request. That the said defendant has disregarded his said promise and has not, although often requested so to do, paid any of the sums of money, or any part thereof, to the plaintiff's damage of twenty-five thousand ($25,000) dollars, and, therefore, it brings suit.

(Common Counts added.)

E. C. HUMPHREYS CO. *v.* RATHBONE MANFG. CO.

1. CONTRACTS — CONSTRUCTION — INSTRUCTIONS — SET-OFF AND RECOUPMENT.

In an action for the purchase price of a carload of iron, where defendant claimed as an offset damages for plaintiff's failure to deliver iron under another contract made in November, 1917, under which three cars were immediately ordered, although by its terms shipments were not to begin until January, 1918, an instruction by the court to the jury that no orders given by defendant for shipment prior to January should be considered in determining defendant's damages, *held*, correct.

2. SAME—MODIFICATION OF CONTRACT—CONSTRUCTION—WAIVER.

Where plaintiff insisted upon a change in the contract in regard to the terms of payment, to which defendant reluctantly consented, on January 4th, upon plaintiff's promise that shipments would begin immediately, defendant's contention that thereby plaintiff waived the time fixed in the contract for shipments to begin, so as to render it liable for damages for failure to ship on orders given prior to January, *held*, not tenable.

3. SAME.

Where defendant's order, given on January 4th, was later canceled or merged in an order given on January 25th, so that plaintiff was not in default until it failed to make shipment of said order, the construction given the contract by the court that plaintiff would not be in default if shipment was made upon the last day of January, *held*, not prejudicial.

Error to Kent; Brown, J. Submitted June 6, 1919. (Docket No. 31.) Decided October 6, 1919. Rehearing denied December 23, 1919.

Assumpsit by E. C. Humphreys Company against the Rathbone Manufacturing Company for goods sold and delivered. Judgment for plaintiff. Defendant brings error. Affirmed.

Hall & Gillard, for appellant.

Lombard & Hext, for appellee.

BIRD, C. J. Plaintiff is a sales agent for pig iron on a commission basis and has its office in the city of Detroit. Defendant is engaged in the business of manufacturing soft gray iron castings in the city of Grand Rapids. On November 19, 1917, plaintiff sold to defendant a car of number one iron to be paid for not later than January 20, 1918. This car is referred to in the record as the Grand Trunk car. It was delivered to defendant in Grand Rapids. Defendant refused to accept it because it did not grade up to number one iron. Subsequently the price was reduced by agreement 50 cents a ton and defendant accepted it but never made payment therefor.

Some time after the 5th of January, 1918, defendant purchased from plaintiff, by telephone, a car of "high silicon iron," which was also delivered to defendant at Grand Rapids. Defendant took exception to the quality of this car and it was subsequently resold by plaintiff to other parties.

On November 19, 1917, at the same time the Grand Trunk car was contracted for, the parties entered into a written contract by which plaintiff sold to defendant 850 tons of iron of various grades, to be delivered monthly over the first half of the year 1918. No iron was ever delivered under this contract.

These contracts were separate and independent of each other. Plaintiff, being unsuccessful in getting its pay for the Grand Trunk car, began this suit on April 17, 1918, to recover therefor, and also to recover damages for defendant's failure to accept and pay for the car of "high silicon iron."

Defendant gave notice under the general issue that it would set off its damages which arose by reason of plaintiff's failure to deliver iron under the 850-ton contract. The conflicting claims of the parties were tried out before the jury and they found a verdict for plaintiff for the amount of $1,672.70, which was due

on the Grand Trunk car, but refused to award defendant any damages on its matters of set-off. Defendant has assigned error.

To make clear the matters in dispute, it will be helpful to explain that defendant, on the trial, conceded it owed plaintiff $1,672.70 for the Grand Trunk car. The jury were instructed to allow plaintiff this item. The trial court held that no recovery could be had by plaintiff for damages growing out of defendant's failure to accept the car of "high silicon iron" because the oral contract involved more than $100, and was void under the statute of frauds. The question of damages growing out of plaintiff's refusal to deliver iron under the 850-ton contract was submitted to the jury and they, as has been said, refused to find any damages for defendant. The controversy over the Grand Trunk car may be laid aside as well as the controversy over the car of "high silicon iron," as plaintiff has not assigned error. This confines the controversy in this court to the questions growing out of the 850-ton contract. The material portions of this contract are as follows:

"Contract covering sale of foundry iron.
"Quantity: Eight hundred fifty tons.
"Grade: Southern or northern, seller's option.
"Specifications: See other side.
"Price: See other side per ton on 2,240 lbs., buyer to pay freight tax.
"Delivered: Furnace with freight allowed to Grand Rapids.
"Freight: Cash.
"Payment: Net cash 30 days from date of invoice.
"Shipment: In about equal monthly quantities over the first half of 1918, * * * buyer to give seller the quantity of each grade to be shipped on or before December 1st, 1917.
"Seller shall not be responsible for delays caused by strikes, differences with workmen, accidents at works, delays in transportation, or other causes beyond its control.

"Each month's shipment to be treated as a separate contract, independent of the contracts for the shipments of other months.

"If this lot is delivered by installments, settlement is to be made for each lot as delivered, and the time of payment for such settlement as specified above is understood to be the essence of this contract."

1. The following instruction to the jury is assigned as error:

"Under the evidence in this case the plaintiff was under no obligation to ship any iron to the defendant until the month of January, 1918, and no orders given by defendant for shipments prior to that time shall be considered by you in determining the damages which the defendant claims to have suffered in this case."

Very soon after the contract was made, on November 19, 1917, defendant ordered several cars of iron on the contract, notwithstanding the contract did not obligate the plaintiff to commence shipment until January, 1918. After the iron was ordered defendant kept urging plaintiff by letter to fill the order. During the time that defendant was urging plaintiff to fill the order, plaintiff advised defendant that the terms of the contract with reference to payment would have to be changed from 30 days' time to 10-day drafts subject to discount of one-half of one per cent., or the contract would be canceled. Defendant was loth to consent to the change. Many letters were exchanged between the parties in regard to it. Finally defendant consented to the change in payment as applied to the three cars which he had ordered. Plaintiff replied that the concession must go to the entire 850 tons or no iron would be shipped. Mr. Marshall, of defendant's company, then went to Detroit and saw Mr. Shaw, of plaintiff's company, concerning it, and Mr. Shaw was firm in his demand that the change as to payment must extend to the entire contract. This was on the 29th day of December, 1917. Mr. Marshall did not consent

to the change at that time but later, in a letter dated January 4, 1918, he consented to the change of payment as demanded and ordered three cars of number one and two iron. Mr. Marshall testified that Mr. Shaw advised him when in Detroit that if he would consent to the change, as proposed, he would begin shipment immediately.

It is the contention of defendant that the court was in error in charging as he did because plaintiff waived the time fixed in the contract for the shipments to begin in the event that it would waive the change in the payment.

The court instructed the jury, as a matter of law, that the plaintiff had breached the contract and was liable for such damages as defendant has shown it had suffered by reason thereof. The jury were then instructed as set out in the assignment heretofore quoted. The effect of this instruction was to narrow defendant's recovery to the period between January 25th and April 17th, when the suit was commenced. We have read and considered the correspondence (which is too voluminous to print) involved in this contention but we are not persuaded that the parties intended to change the terms of the written contract by the claimed subsequent oral arrangement. But even if they did we are unable to see how it would enhance defendant's damages. It is conceded that defendant did not agree to the change in payment until its letter of January 4th. At that time plaintiff's duty had arrived to make shipments under the contract. Defendant's order of three cars of number one and two iron on January 4th was subsequently countermanded or merged in the order of January 25th for number three iron. Plaintiff's failure to ship this iron placed it in default. This is the order which the court referred to in the instruction complained of. The court, in his instructions, opened the way for defendant to recoup

any losses which he suffered from the date of this order up to the time the present suit was begun. We think this was as favorable as defendant had a right to demand.

2. The contract provides, with reference to the time of shipment, as follows:

"Shipment: In about equal monthly quantities over the first half of 1918, * * * buyer to give seller the quantity of each grade to be shipped on or before December 1, 1917."

The construction which the trial court placed upon this language was that the plaintiff was under no obligation to commence shipments before January 1, 1918, and that if it made shipment upon the last day of the month it was a compliance with the contract.

It is insisted that this was error in view of Mr. Shaw's promise to commence shipment immediately if defendant would consent to the change in payment. Independently of any modification in the contract this construction by the court was undoubtedly correct. Even if Mr. Shaw made the promise that shipments would begin immediately upon the consent being given to a change in payment, and that consent was given on January 4th, and the order given on that day was afterwards merged in its order of January 25th, the plaintiff would not be in default until it failed to make shipment of the order of January 25th.

There are some other assignments argued, but we are of the impression that there is no merit in them. The judgment will be affirmed.

MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred. KUHN, J., did not sit

The late Justice OSTRANDER took no part in this decision.

DOYLE *v.* WIDRIG.

1. CONTRACTS—TRIAL — ORAL AGREEMENT — DISPUTED QUESTION — QUESTION FOR JURY.

   In an action for certain automobile parts and repairs furnished by plaintiff, an automobile distributor, to defendant, a local agent for same, which liability defendant admitted, but claimed a set-off, alleging the making of an oral agreement between plaintiff's manager and himself that he should be allowed a discount on the cost price of cars in addition to that provided in the written contract if he would purchase 25 additional cars, contradictory testimony as to the making of the claimed agreement, *held*, to present a question of fact peculiarly within the province of the jury.

2. SAME—AGENT'S AUTHORITY—QUESTION FOR JURY.

   Evidence that defendant's contract with plaintiff was made in said manager's office, that he had charge of the associate dealers and sold them cars, that he hired and discharged the help and sometimes signed checks, and that plaintiff admitted that next to himself said manager was "it," together with surrounding circumstances, *held*, sufficient to send the question of his authority to make said agreement to the jury.

3. FRAUDS, STATUTE OF—EXCEPTION—ORAL AGREEMENT.

   Where defendant bought 25 additional cars under an oral agreement, and was allowed the claimed additional discount on the last four cars purchased, it cannot be contended that the agreement for said additional discount was void under the statute of frauds (3 Comp. Laws 1915, § 11835), because an oral one involving more than $100, since it comes within the exception therein provided.

Error to Oakland; Rockwell, J. Submitted June 10, 1919. (Docket No. 89.) Decided October 6, 1919.

Assumpsit in justice's court by Thomas J. Doyle against Arthur S. Widrig for goods sold and delivered. There was judgment for defendant, and plaintiff ap-

pealed to the circuit court. Judgment for defendant. Plaintiff brings error. Affirmed.

Monaghan, Monaghan, O'Brien & Crowley, for appellant.

Charles S. Matthews, for appellee.

BIRD, C. J. Plaintiff sued defendant to recover for certain automobile parts and repairs which he had theretofore furnished him. Defendant pleaded the general issue and gave notice of set-off. His claim was that plaintiff owed him on account of certain discounts on the manufacturers' price of cars which he had purchased of him. Their matters of difference were submitted to a jury on plaintiff's claim that defendant owed him a balance of $313, and on defendant's claim that plaintiff owed him a balance of $362.50. The jury found for defendant and allowed him his entire claim. Following this a new trial was applied for and denied. Plaintiff has assigned several errors.

1. It is claimed the verdict was against the great weight of the evidence. Defendant admitted on the trial that he was indebted to plaintiff for parts and repairs in the sum which he claimed, but he insisted that plaintiff was owing him an amount sufficient to wipe out plaintiff's claim and leave a balance due him of $362.50. The contested issue was whether the claimed set-off should be allowed. The proofs show that plaintiff was an automobile distributor for the Dodge Bros. cars for Wayne and Oakland counties, and that defendant had a written contract with plaintiff to work a portion of Oakland county. The contract covered a period of one year from July 16, 1916. Defendant contracted to purchase 25 cars. The discounts from manufacturers' prices were stated in the contract as follows:

"The associate dealer's purchases of complete motor

cars shall be billed to the associate dealer and be paid for by him at the following percentages off the manufacturer's list prices:

6 to 12 cars, inclusive, 15%
13 to 24 cars, inclusive, 16%
25 to 49 cars, inclusive, 17%

"Each percentage of discount as shown above, will apply only to its specific quantity of motor cars, and will not apply on the preceding quantity unit."

Defendant had sold, up to February 1, 1917, 17 cars. About that date one Comstock, who was plaintiff's general sales manager, called upon defendant at Pontiac and advised him that there was going to be a shortage of cars for the year 1917 and that they were going to advance in price, and suggested that he purchase all the cars he could and store them against the summer's need. Defendant claims in this talk Comstock promised him a discount of 18% on all cars he sold in the year if he would purchase 50. Acting on Comstock's advice he purchased 25 additional cars, placed them in storage and insured them. Defendant sold during the year the 50 cars and 4 more. At the end of the season defendant wanted a settlement on the 18% discount basis but plaintiff refused, and at the trial he repudiated the contract of Comstock and denied that he had the authority to make such a contract. The testimony of defendant is in direct conflict with the testimony of plaintiff and Comstock. In addition plaintiff points to the fact that defendant accepted the discount named in the contract on cars up to and including the 49th, and paid for them, and argues that it is improbable that he would have done so if plaintiff was owing him at that time for additional discounts. Defendant, on the other hand, points to the fact that plaintiff allowed him the discount of 18% on the last 4 cars he purchased as proof of his assertion that the agreement was made. Upon cross-examination both parties offered plausible explanations

of their conduct in these respects. There was other testimony which made for and against their respective contentions. It can readily be gathered from the foregoing that the question was peculiarly one of fact and clearly within the province of the jury. The jury could have found either way without being open to criticism. This being true, it would be improper for us to disturb it.

2. But plaintiff says there was no competent testimony before the jury that Comstock had the authority to make the arrangement for the additional discount of 18%. It appears that Comstock was plaintiff's general sales manager and that the contract with defendant was made in his office; that he had charge of the associate dealers and sold them cars; that he hired and discharged the help and sometimes signed checks, and plaintiff himself says as to Comstock's authority, that next to him, Comstock was "it." This testimony, together with the surrounding circumstances, was sufficient to send the question of his authority to the jury.

3. The further question is raised that the subsequent contract was an oral one involving more than $100 and, therefore, void under the statute of frauds. That the contract being oral and void under the statute of frauds, it cannot be used under the rule which permits written contracts to be modified by subsequent parol contracts. The difficulty with this contention is that the agreement appears to come within the exception of the statute which provides that:

"A contract to sell or a sale of any goods or choses in action of the value of one hundred dollars or upwards shall not be enforceable by action, unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged, or his agent in that behalf." 3 Comp. Laws 1915, § 11835, subd. 1.

The initial contract called for only 25 cars. In the agreement with Comstock defendant agreed to, and did, take 25 additional cars which he stored and insured. Besides this plaintiff allowed defendant the claimed discount on the last 4 cars, from which an inference is drawn that plaintiff understood the agreement as he did. The statute of frauds appears to have no application to this agreement.

We discover no reversible error in the proceedings. The judgment of the trial court is affirmed.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

SOLOMON *v.* RICHARDSON.

1. DAMAGES—BREACH OF CONTRACT—SALES—GENERAL RULE.
   The general rule of damages for failure to deliver goods sold is the difference between the contract price and the market price at the time and place of delivery.

2. SAME—MEASURE OF DAMAGES—MARKET VALUE.
   If there were no market price at the place of delivery, then the market price at the nearest place where there was one could be shown, and the difference between this price and the contract price, with the added cost of transportation, would be the measure of damages.

3. SAME—SPECIAL DAMAGES—EVIDENCE.
   Where there was no testimony justifying the trial court in applying any other or different rule of damages than the general one, it was reversible error to apply a rule allowing special damages.

On the question of measure of damages for breach of contract on sale of article that has no market price at place of delivery, see note in 57 L. R. A. 193.

Error to Oscoda; Widdis, J. Submitted June 11, 1919. (Docket No. 1.) Decided October 6, 1919.

Assumpsit by Selig Solomon against Frank H. Richardson for breach of a contract for the sale of lumber. Judgment for defendant. Plaintiff brings error. Reversed.

Joseph H. Cobb and *W. S. Cobb,* for appellant.

Hiram R. Smith (*Glen Smith,* of counsel), for appellee.

BIRD, C. J. The parties to this suit entered into a written contract on December 18, 1915, by which plaintiff agreed to deliver to defendant at Masts Mill, near Mio, Oscoda county, 100,000 feet of sawed lumber at $20 a thousand. The principal item was 1,020 pieces of piling and the balance was special "bill stuff." The delivery was to be made on or before February 15, 1916. About the middle of January plaintiff commenced to make deliveries of the lumber and continued to do so up to February 11, 1916, when a controversy arose between the parties over the inspection and rejection of certain timber which had been delivered. Considerable controversy ensued as to the extent to which the lumber should be rejected, and, not being able to agree, plaintiff advised the defendant that he would not complete his contract. He then brought this suit to recover the contract price for what he had delivered. Defendant pleaded the general issue and gave notice of recoupment. The matter was tried by the court without the aid of a jury. The court found that defendant was entitled to damages for nondelivery in the sum of $1,481.06. Deducting from this plaintiff's credit of $418.84 left a balance in favor of defendant of $1,062.22, for which amount judgment was rendered in defendant's behalf.

1. Defendant claimed, and was permitted to show, over plaintiff's objection, that he was obliged to go several miles from the place of delivery to purchase the balance of the timber, and that his total expenses in securing the same were $1,695.81. This sum included not only the purchase price but items of interest on money used to purchase the timber, interest on his profits which were withheld by the Eastern Michigan Power Company, car demurrage, traveling expenses in looking for the timber and the expense of six idle teams held in the woods several days waiting for the timber to be cut.

It is the contention of plaintiff that the general rule of damages for nondelivery of personal property should have been applied by the court and that the testimony did not justify the court in applying an enlarged rule of damages.

The real controversy is whether a state of facts was shown by the testimony which would justify the court in applying any other or different rule of damages than the general one for the nondelivery of personal property, namely: The difference between the contract price and the market price of the timber at the time and place of delivery.

It was said in *Cuddy* v. *Major,* 12 Mich. 368:

"To create such extraordinary liability there must, in every case, be something in the terms of the contract, read in the light of surrounding circumstances, which shows an intention on the part of the vendor to assume an enlarged engagement, a wider responsibility than is assumed by the vendor in ordinary contracts for the sale and delivery of merchandise."

This rule was followed in *Henry* v. *Hobbs,* 165 Mich. 183. It was there said:

"We do not think, however, that the facts as they appeared in this case would justify an enlargement of the rule. It appears that defendant knew that the apples were to be shipped to South Dakota, but it does

not appear that the plaintiff informed him of the fact. The defendant was not informed that the apples had been resold or that the plaintiff desired them for any particular market, or for any special purpose, or that he had contracted to sell them for any particular price. Unless information of this character was imparted by the plaintiff to the defendant at the time the contract was made, the rule of special damages could not be lawfully applied. 2 Mechem on Sales, §§ 1761, 1762; 30 Am. & Eng. Enc. Law (2d Ed.), p. 216."

The testimony discloses that plaintiff knew at or before the contract was made that the lumber was going to the Eastern Michigan Power Company. The first talk Richardson had with plaintiff about the lumber, an agent of the Eastern Michigan Power Company was with him. Later the contract was prepared by Mr. Richardson in his own name, and at that time he stated to the plaintiff that he had an order from the Eastern Michigan Power Company for the lumber, but it does not appear that he had a contract with that company for the lumber nor that it was sold for any particular price, nor that he had contracted to deliver it to the power company at any particular time, nor that it was to be used for any special purpose other than its dimensions would indicate. The court stated, in making his finding, as bearing upon this question, that it was difficult to secure such timber in the vicinity of Masts Mill, but we are unable to find that there is any testimony to support this conclusion. The defendant claimed upon the trial that it had a contract with the Eastern Michigan Power Company, but it was not produced, and the testimony in relation to it was subsequently stricken out. Looking at the negotiation of these parties at the time the contract was made, we are unable to see anything in the contract or in the circumstances attending the making of it, that would take the case out of the ordinary rule, especially in the absence of proof that there

was no market value at the place of delivery. There was no showing by defendant that there was no market price at the point or immediate vicinity where the delivery was to be made. This should appear before proof is made of special damages. If there were no market price at the place of delivery, then the market price at the nearest place where there was one could be shown. The difference between this price and the contract price, with the added cost of transportation, would be the measure of defendant's damages. 35 Cyc. p. 638.

The judgment is reversed and a new trial ordered, with costs of this court to plaintiff.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

CITY OF BAY CITY *v.* SAGINAW-BAY CITY RAILWAY CO.

1. CONSTITUTIONAL LAW—TITLE OF ACT—SUFFICIENCY.
   Act No. 514, Local Acts 1903, annexing the city of West Bay City to, and consolidating the same with, the city of Bay City, and providing that the rights, privileges, or franchises granted by the common council of Bay City should extend over the entire consolidated city, *held*, not unconstitutional because not within the object expressed in its title.

2. MUNICIPAL CORPORATIONS—FRANCHISE IN STREETS—EXTENDING CORPORATE LIMITS—EFFECT.
   Where a franchise is granted to use the streets of a munici-

pality, and thereafter the territorial limits of the municipality are extended, the franchise immediately attaches without any further action on the part of the municipality to the newly acquired territory.

3. CONSTITUTIONAL LAW—EXTENDING CORPORATE LIMITS—IMPAIRMENT OF CONTRACT—EXPIRED FRANCHISE.

Where a street railway company was operating in the cities of West Bay City and Bay City under separate franchises, expiring at different times, and the two cities were consolidated by Act No. 514, Local Acts 1903, upon the expiration of its franchise in the former city, the provisions of the franchise of Bay City immediately went into effect in the annexed territory, as provided in said act, the effect not being to impair a contract within the inhibition of section 10, Art. 1, Constitution of the United States, since the West Bay City franchise had already expired.

Appeal from Bay; Wiest, J., presiding. Submitted June 3, 1919. (Docket No. 8.) Decided October 6, 1919.

Bill by the city of Bay City against the Saginaw-Bay City Railway Company to restrain the operation of its street railway in certain territory. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Robert H. Lane, for plaintiff.

James E. Duffy (*Russell H. Neilson*, of counsel), for defendant.

MOORE, J. This suit was commenced by plaintiff filing a bill of complaint in chancery asking for an injunction restraining defendant from operating its street railway in the territory formerly West Bay City, and claiming that, the franchise granted by West Bay City having expired on October 10, 1917, the defendant was operating its road upon the territory in question without right.

Defendant maintained that both by operation of law and by the express terms of section 220 of Act No. 514, Local Acts of 1903, same being the consoli-

dation charter, the terms and provisions of the franchise granted by the city of Bay City on September 2, 1902, became effective and in force in the annexed territory formerly West Bay City, and that it was lawfully occupying the streets and operating its railway.

Plaintiff maintains that defendant's claims are untenable, and further that if section 220 of said Act No. 514 gives the rights claimed by defendant, the legislature in passing it intended by an express act to convey privileges, and in that respect the local act violated the Constitution and is void. Plaintiff also claims that if section 220 gives the rights claimed by defendant, the title of said Act No. 514 does not justify such grant and the act in that respect is void, as violating the Constitution. Plaintiff also claims that if the franchise does extend as claimed by defendant, that defendant must obtain the consent of the common council and three-fifths of the abutting property owners upon the streets where it operates before it could continue operation in the territory formerly West Bay City.

Defendant maintains that upon annexation of West Bay City to Bay City, and the consolidation of the government of the two cities, the franchise granted by the common council of the city of Bay City on September 2, 1902, attached to and reached all the municipal territory, both old and new, save that the rights under the franchise granted by the common council of the city of West Bay City were expressly preserved to defendant and continued in force.

The trial chancellor dismissed the bill of complaint. The case is brought here by appeal and the contentions of the plaintiff in this court are the same as in the court below.

The annexation and consolidation of the former cities of West Bay City and Bay City was completed under Act No. 514, Local Acts 1903. The title of said act is as follows:

"An act to annex the territory embraced within the city of West Bay City, to that of Bay City, and to consolidate the city of West Bay City with the city of Bay City, under the name of Bay City; to specify and fix the boundaries of the city; to consolidate the school system and the library systems of the said cities of West Bay City and Bay City; to provide for the assuming and payment of all the indebtedness and liabilities of the present cities of Bay City and West Bay City, and their school and library systems and to provide for the ownership of all their corporate property and rights; to define the corporate rights, powers and privileges of said city of Bay City and to repeal all acts and parts of acts inconsistent herewith."

Section 220 of said act reads as follows:

"SEC. 220. All ordinances, by-laws, regulations and rules of the common council of the cities of Bay City and West Bay City now in force, and not inconsistent with this act, shall remain in force, until amended or repealed by the common council under this act, within the respective territories for which they were originally adopted: *Provided,* That all rights, privileges or franchises heretofore granted to any person, persons or corporations shall be continued in force by this act, but the common council of Bay City shall have all the powers, rights and privileges relative thereto as are now vested in the respective councils of said cities of Bay City and West Bay City, and save as herein provided the rights, privileges or franchises granted by the common council of Bay City shall extend over the entire consolidated city."

Section 235 reads as follows:

"SEC. 235. Upon the consolidated city becoming organized by the election and qualification of the officers elected at the election to be held on the first Monday in April, nineteen hundred five, as hereinbefore provided, all former acts relating to the present cities of Bay City and West Bay City inconsistent with the provisions of this act, shall thereupon be superseded and repealed, except as otherwise expressly provided for by this act, but such repeal shall not affect any act or rights secured, created or established, or the title to any property acquired or any proceeding or

transaction, tax, assessment, contract or public improvement had or commenced prior to the time this act takes effect, but every such act, claim, right or proceeding shall remain as valid and effectual as if this act had not taken effect."

The dates, terms and expiration of the franchises are as follows:

"West Bay City franchise, granted for 30 years, October 10, 1887. Expired October 10, 1917. Bay City Consolidated Railway Co., granted for 30 years, July 24, 1893. Expires July 24, 1923. Bay City United Traction Co., granted for 30 years September 2, 1902. Expires September 2, 1932.

"The defendant, the Saginaw-Bay City Railway Company, is the owner and assignee of the above named franchises, and is now operating and conducting the street railway system in Bay City. There is no advantage or importance claimed by either parties to this litigation in or with the ordinance to the Bay City United Traction Company, September 2, 1902.

"The principal difference in the terms and conditions of the West Bay City franchise, and the Bay City United Traction Company franchise of September 2, 1902, is as follows:

"*First*—The time when each expires.

"*Second*—The 1902 franchise provides:

" 'Said grantee, its successors and assigns, shall petition the common council and obtain its consent, and the consent of three-fifths of the abutting owners of property on any street or part of street, before it shall erect any poles, string any wires or lay any track upon any such street in said city.' Section 1, Franchise of 1902, page 469, Charter of Bay City.

"The West Bay City franchise does not contain any provision whatever requiring defendant to petition and obtain the consent of the common council of Bay City and the consent of three-fifths of the abutting owners of property on any street before erecting poles, stringing wires or laying tracks, etc.

"*Third*—The 1902 ordinance provides:

" 'The said grantee, its successors and assigns, shall keep and maintain the street inside of the track and for an aggregate of two feet and four inches outside thereof in good order and

repair, and to keep the same clear from filth and dirt and snow.' * * * Section 6, Franchise 1902, page 472, Charter of Bay City.

"The West Bay City franchise does not contain any provision requiring defendant to pay any expense of pavement between the rails and for fourteen inches upon either side."

Is the title of Act No. 514, Local Acts 1903, broad enough to justify the grant for which defendant is contending? The trial judge thought it was and we agree with him. See *Westgate* v. *Township of Adrian*, 161 Mich. 333; *Attorney General* v. *Township of Springwells*, 143 Mich. 523, and the cases cited therein.

The important question in the case is, What was the effect upon the franchises when West Bay City became a part of Bay City? It is said:

"And where a franchise is granted to use the streets of a municipality, and thereafter the territorial limits of a municipality are extended, the franchise immediately attaches without any further action on the part of the municipality to the newly acquired territory." 4 McQuillan on Municipal Corporations, § 1674.

The question is not new in this State, *People* v. *Railway*, 162 Mich. 460, and *City of Detroit* v. *Railway*, 173 Mich. 314. It may be well to recall some of the language of Justice STEERE in the last named case:

"Counsel for relator broadly contend that the effect of any change in a municipal boundary is no longer an open question in this State, but that it was put to rest by the decision of this court in *People* v. *Railway*, 162 Mich. 460 (139 Am. St. Rep. 582). * * *

"This court, speaking through Chief Justice MONTGOMERY, said:

"'We think it not unreasonable to hold that this mutual contract was made in view of the power of the legislature of the State to increase or diminish the territory within the city, and that neither the city nor the company contemplated that in case of an extension of the lines of the company within the city, either by purchase or acquisition from another company, an increased fare should be demanded'—citing and reviewing *Town-*

ship of West Bloomfield v. *Railway*, 146 Mich. 198 (117 Am. St. Rep. 628), and *Indiana R. Co.* v. *Hoffman*, 161 Ind. 593 (69 N. E. 399).

"The opinion concluded as follows:

"'We construe the ordinance to include any street railway constructed or purchased by the defendant which shall be within the city of Detroit as the limits of said city may from time to time be fixed by the legislature.'

"We think it can be said with certainty that, in a case where the question was pertinent and squarely presented in the briefs of counsel on both sides, argued and reargued, this court, in harmony with *Indiana R. Co.* v. *Hoffman, supra,* and the authorities there cited, now supported by the more recent case of *Peterson* v. *Power Co.*, 60 Wash. 406 (11 Pac. 338, 140 Am. St. Rep. 936), has unequivocally declared it a general rule in this State that city ordinances, designed for the city at large, operate throughout its boundaries, whatever changes may be made in them, and that grants by such ordinances, though accepted and amounting to contracts are to be construed as made and accepted in contemplation of, and subject to such rules, unless the contrary is clearly expressed. * * *

"It is unquestionably the law, as a general proposition, that in purchasing the Greenfield and Fairview lines respondent acquired all rights originally granted by the franchises for such lines; and it is equally a general rule of law that those rights, once granted and accepted, could not be destroyed or abridged by subsequent general or local legislation. But it does not follow that respondent might not be in a position when those rights were purchased, by reason of other and previous contract obligations, so that as against certain parties and in certain localities all those rights could not be enjoyed or enforced by it. * * *

"That contract and previous contracts, embodied in ordinances to which it is supplemental, define respondent's right of existence in the city of Detroit. Its primary rights in the city territory are by city grant. It has united, built up, and developed as an entirety a street railway system within the city, extending to and beyond its limits. It has absorbed by purchase and made a part of that system the township lines in

question with their grants, and as a result of such unification and practical combination, even though in name and form it may retain the original corporate organization of the subsidiary companies, it has made them, as to the city and within the city, an integral part of the whole and subjected them to the restrictions contracted for in the original city ordinances, thus defining and limiting its own rights under the township grants, within city territory, as subordinate to and dominated by said city ordinances."

Counsel say these cases were overruled in *Detroit United Railway* v. *Michigan*, 242 U. S. 238 (37 Sup. Ct. Rep. 87). They contend the last-named case is controlling of the instant case and requires that a decree should be entered as prayed in the bill of complaint. Some language used in the opinion may be helpful.

It was said, speaking of the franchises involved:

"These several village and township grants were for terms that have not yet expired, and contain provisions for five-cent fares within the territory covered by them."

In speaking of the two cases appealed from this court which were heard as one:

"In each case plaintiff in error seasonably and expressly insisted that the several township and village grants above referred to were subsisting and valid contracts when the legislature of Michigan passed the acts extending the city limits, and that those acts, if so construed or applied as to affect or modify the contracts, were in conflict with section 10 of Article 1 of the Constitution of the United States. And it is upon the overruling of these contentions that the cases are brought here, under section 237, Jud. Code. * * *

"Coming then to the merits: Not only is it not disputed, but it is not open to serious dispute, that the original village and township grants were contractual in their nature. It appears that the recipients of those grants, like their successor, the plaintiff in error, became incorporated under the street railway act of 1867, of which section 13 provides that consent

for the construction and maintenance of a street railway is to be given by the corporate authorities in an ordinance to be enacted for the purpose, and under such rules, regulations and conditions as may be prescribed by such ordinance, but that no such railway shall be constructed until the company shall have accepted in writing the terms and conditions upon which they are permitted to use the streets. By section 14, after any city, village or township shall thus have consented to the construction and maintenance of street railways or granted rights and privileges to the company, and such consent and grant shall have been accepted by the company, the consent shall not be revoked or the company deprived of the rights and privileges conferred. And by section 20 the rates of toll or fare to be charged by the company are to be established by agreement between it and the corporate authorities, and are not to be increased without consent of such authorities. It is plain, as was pointed out by this court in *Detroit* v. *Railway Co.*, 184 U. S. 368, 385 (22 Sup. Ct. Rep. 410), that the legislature regarded the fixing of the rate of fare as a subject for agreement between the municipality and the company. And in these cases, as in that, the terms of the several ordinances are such as clearly to import a purpose to contract under the legislative authority thus conferred."

And the court held:

"Because of the provision of section 10 of article 1 of the Constitution of the United States, it was not within the power of the State of Michigan by any subsequent legislation to impair the obligations of those contracts, and since the judgments of the Supreme Court of that State gave such an effect to the annexation acts of 1905 and 1907, in conjunction with the ordinances of 1889, as to impair those obligations, the judgments must be reversed."

While the Federal court reversed this court in the two cases named it placed its decision upon the ground that the practical effect of the decisions was to impair the obligation of contracts. The opinion indicates that the court agrees with this court in holding that the

acquisition of the suburban lines was in effect an extension of the city railways. In the instant case, before the bill of complaint was filed the West Bay City franchise had expired. There was no claim that any of its provisions in the nature of a contract were annulled by the provisions of the Bay City franchise. The defendant concedes that under its present franchise it must comply with all of its provisions as indicated in a letter addressed to the common council reading in part as follows:

"In accordance with section No. 220 of the consolidation charter of 1905, the rights, terms and conditions of the franchise under which the Saginaw-Bay City Railway company is operating on the east side of the river will, after October 10, 1917, extend over the territory on the west side of the river and the company will then be operating its street car lines upon both sides of the river under the franchise granted to the company upon the east side of the river.

"The duties and obligations of the Saginaw-Bay City Railway Company, as expressed in these franchises, will, therefore, have to be performed by the company on both sides of the river in the same manner.

"After October 10, 1917, the company will be obliged to pay for the construction and maintenance of the pavement between its rails and for 14 inches outside of its rails, the same as has been done in the past on the east side of the river. All of the restriction and regulation in the franchise under which the company is now operating on the east side of the river, will have to be borne by the company on the west side of the river."

We do not deem it necessary to discuss the other questions raised by counsel, though we have considered them.

The decree is affirmed with costs to the defendant.

BIRD, C. J., and STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

PHELPS *v.* BREVOORT.

1. BOUNDARIES—AGREEMENT—ACQUIESCENCE—CONTROVERSY.
   To establish a boundary line by agreement and acquiescence, not only must there have been an express agreement, and monuments erected and acquiesced in, but a doubt or controversy must have existed as to the true line; otherwise the statute (3 Comp. Laws 1915, § 11975) prohibiting the conveyance of land by parol renders the agreement inoperative.
2. SAME—ADVERSE POSSESSION.
   Where there was no dispute between the parties as to the true line and no agreement as to the location of a fence erected by one of the parties separating their several holdings, the party advantaged by the erroneous location of the dividing line may not profit by the mistake.
3. SAME—DESCRIPTION.
   A description in a deed "600 feet in width," *held* to mean 600 feet at right angles.
4. EVIDENCE—DEEDS—AMBIGUITY—PAROL EVIDENCE.
   Where there is no ambiguity in an instrument, parol evidence is inadmissible to vary or explain its meaning.

Error to Wayne; Mayne, J., presiding. Submitted June 4, 1919. (Docket No. 37.) Decided October 6, 1919. Rehearing denied December 23, 1919.

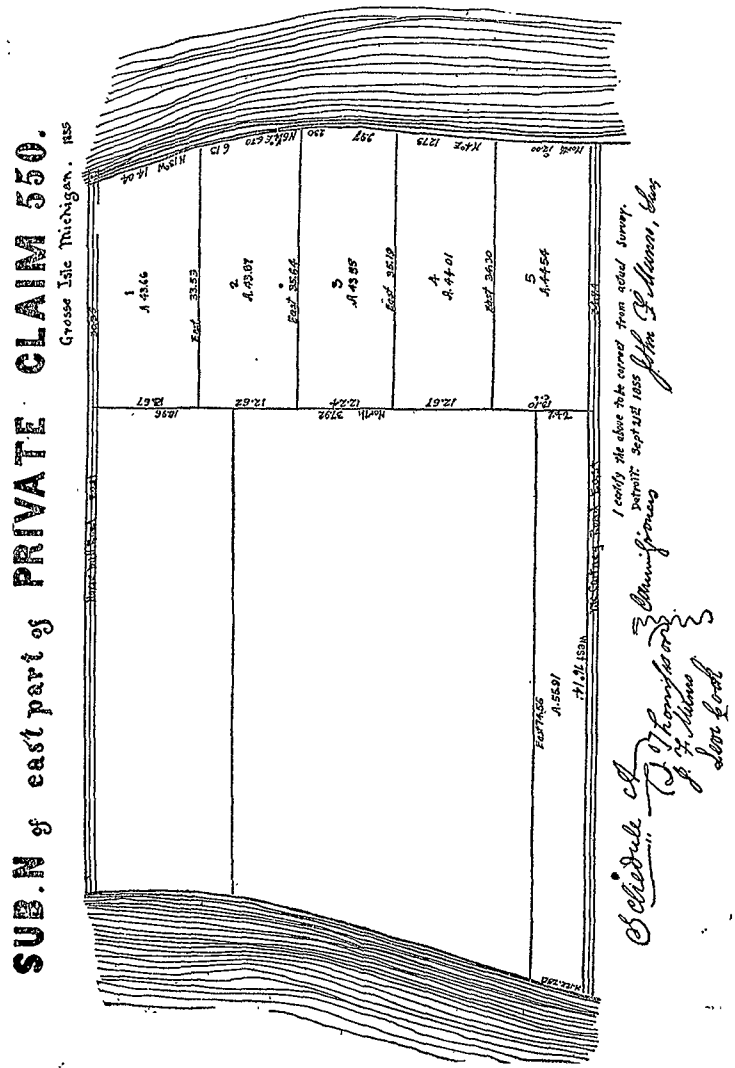
Ejectment by Ralph Phelps and another against Henry N. Brevoort and another. Judgment for plaintiffs on a directed verdict. Defendants bring error. Affirmed.

Millis, Griffin, Seely & Streeter, for appellants.

Orla B. Taylor, for appellees.

In an action of ejectment plaintiffs seek to recover possession of a strip of land about 20 feet wide and about 2,200 feet in length located on Grosse Isle, Wayne county, Michigan. On October 20, 1859, by a

decree of partition in the circuit court for the county of Wayne, Private Claim No. 550 was subdivided. The map of said subdivision, Schedule A, is herewith subjoined. Lot 1 of said subdivision was by the terms



of the decree assigned to the ancestor of Judge Henry N. Brevoort. He, together with his brother, Thornton E. Brevoort, inherited the whole of lot 1 and the interest of Thornton E. Brevoort passed to Henry N. Brevoort by warranty deed April 9, 1886. On December 15, 1894, Henry N. Brevoort sold the whole parcel by land contract to Rod A. Demme. This contract was discharged May 19, 1896, and a mortgage given by Brevoort to Demme on the same day. On December 6, 1897, Brevoort executed a deed to said Demme of a portion of said lot 1, described as follows:

"Land in the township of Monguagon, described as the southerly 600 feet in width of lot 1 of the subdivision of the east part of Private Claim 550 on Grosse Isle, according to the plat thereof filed in the clerk's office for Wayne county, in chancery (File No. 533), together with the rights and privileges appertaining thereto in the water front of said premises hereby conveyed to the channel bank of the Detroit river, also all rights, reversionary or otherwise, appertaining to said premises in the road or highway across the easterly end of said premises, also a right of way across the northerly 300 feet of said lot, 60 feet wide, the said right of way to be bound on the north by the Mill road; on the west by westerly line of lot 1; on the south by the northerly line of the premises hereby conveyed, and on the east by a line parallel to said westerly line of said lot 1 and 60 feet distant from it, subject to a mortgage of $19,000 given by first party to second party; also subject to any taxes since May 19, 1896, date of unrecorded land contract for sale of said premises to second party."

The title to said description through mesne conveyances now rests in the plaintiffs. On March 18, 1898, Brevoort executed a mortgage on the balance of lot 1, described as follows:

"Land in the township of Monguagon, described as the northerly 300 feet in width of lot 1 of the subdivision of the east part of Private Claim 550 on Grosse Isle, according to plat thereof in File No. 533 in the

circuit court for the county of Wayne, in chancery, together with the rights and privileges appertaining thereto in the water front of said premises hereby conveyed to the channel bank of the Detroit river, also all rights, reversionary or otherwise, appertaining to said premises in the road or highway across the easterly end of said premises, and subject to a right of way 60 feet in width of the west end of the premises hereby conveyed as said right of way described in deed recorded in Liber 434 of Deeds, page 325."

On July 18, 1898, Brevoort executed a land contract on said last mentioned parcel to one Nehemiah C. Hinsdale, the description being as follows:

"Land situated in the township of Monguagon, county of Wayne, State of Michigan, to wit: The northerly 300 feet in width from front to rear of lot No. 1 of the subdivision of the east part of Private Claim No. 550 on Grosse Isle, according to the plat thereof filed in the clerk's office for Wayne county, in chancery (File No. 533), together with the rights and privileges appertaining thereto in the water front of said premises to the channel bank of the Detroit river, also all rights, reversions or otherwise appertaining to said premises in the road or highway known as the Horse Mill road, excepting and reserving from the above described premises a strip of land 60 feet wide from the westerly or rear end thereof."

Hinsdale failed to perform his contract and Brevoort retook possession of said premises and on May 4, 1900, executed a lease thereof to one Sherman, the description being as follows:

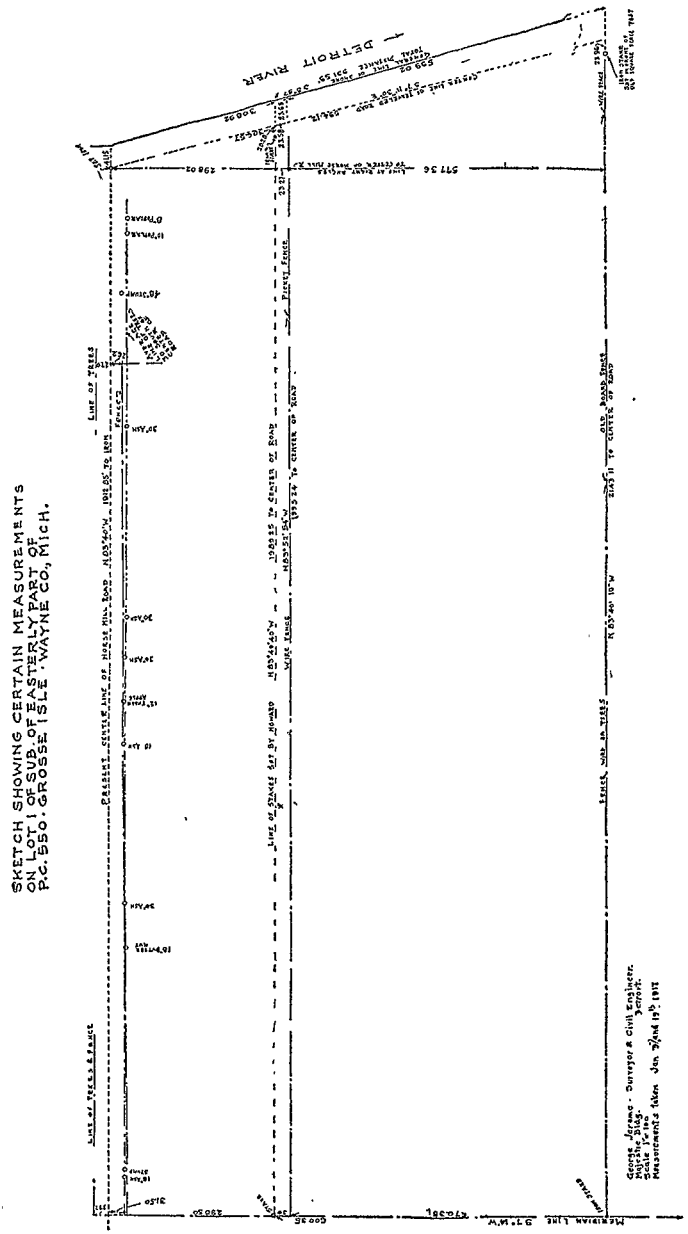
"The following described premises, situate and being in the township of Monguagon, county of Wayne and State of Michigan, to wit: A strip of land three hundred feet wide from front to rear of the northerly side of lot No. one of the subdivision of said lot northerly side of lot No. 1 of the east side of Grosse Ile, being part of Private Claim No. 550. Also a strip of land immediately adjoining the above mentioned parcel on the south, being six hundred feet front to rear of said lot No. one, said last mentioned parcel to be

used for the pasture of horses and cattle only, for the term of one year from and after the first day of May, 1900, on the terms and conditions hereinafter mentioned, to be occupied for farming purposes."

It will be noted that the premises described in this lease include the property theretofore sold by Brevoort to Demme. This is accounted for by the fact that neither Demme nor his successors in title ever actually occupied the premises conveyed to them, and Mr. S. S. Babcock, the agent for the owner, had given Judge Brevoort permission to use said land for pasturage. At the time Brevoort deeded to Demme no fence separated the southerly 600 feet of lot 1 from the northerly 300 feet. During the time the northerly 300 feet was held by Hinsdale under his contract with Brevoort he caused to be erected a fence east and west dividing the southerly 600 feet from the northerly 300 feet. It appears that some years prior to the building of this fence and in 1895 when Demme was interested in the whole of lot 1 he had caused Surveyor Howard to make a measurement of the southerly 600 feet of frontage on the river road, which road ran at an angle in a northwesterly direction. Here there was set by Howard a stake. The fence built later (1898), by Hinsdale, was not built upon the line indicated by Howard's stake, but upon a line some eight feet south thereof. At the time Hinsdale built said fence there was no agreement between him and the then owner of the southerly 600 feet as to its location. The location of the old fence and the line contended for by plaintiffs is shown on the following survey:

The land between the old fence and the dotted line being that in dispute. The court, after hearing the proofs, made the following finding:

"*First*, that the Broadhead line has been duly established for the purposes of this suit. *Second*, that the premises conveyed were to be 600 feet in width, meas-


SKETCH SHOWING CERTAIN MEASUREMENTS
ON LOT 1 OF SUB. OF EASTERLY PART OF
P.C. 550. GROSSE ISLE, WAYNE CO., MICH.
DETROIT RIVER
Pickets Fence
Line of Trees & Fence
Meridian Line S 1° W
George J. Grant - Surveyor & Civil Engineer.
Detroit, Mich.
Scale 1" = 100
Measurements taken Jan. 9th & 10th 1917

ured at right angles to the line drawn and connecting due north and south, the northern and southern boundaries, or drawn at right angles to the Broadhead line. *Third,* that the defendant, Judge Brevoort, was holding the premises conveyed by law presumptively in the interests of the grantees of his conveyance, and in subordination to his own covenants in the instrument of conveyance. For that reason adverse possession does not attach until there has been some positive, unequivocal assertion of the title on his part. I fail to find such an assertion of title. Therefore, there is no question for the jury to decide. The jury will be directed to return a verdict for the plaintiffs against the defendant."

The judgment entered upon the verdict so directed is now reviewed in this court by defendants.

BROOKE, J. (*after stating the facts*). It is the first contention of appealing defendant, Neele Davis Brevoort, that she has title to the property in question through adverse possession of herself and her grantor. This contention is based upon the theory that the fence built in 1898 was built by agreement between the then owners of the adjoining parcels. In support of this contention the following authorities are cited from this State: *Bower* v. *Earl,* 18 Mich. 367; *Bennett* v. *Robinson,* 27 Mich. 26; and *McCall* v. *Wells,* 55 Mich. 171. It seems to us a sufficient answer to this claim may be found in the fact that Judge Brevoort did not deed the northerly 300 feet to his wife, the defendant Mrs. Neele Brevoort, until September 15, 1908, and that he had occupied the southerly 600 feet for at least eight years under the verbal authority from Mr. Babcock and had himself released it to Sherman by a description which clearly recognized the rights of the plaintiffs' grantors in the whole of the lands described in the deed from Brevoort to Demme. A careful examination of the testimony of Judge Brevoort convinces us that he never had any intention of tak-

ing possession of any property which he had sold to Demme or of holding adversely to Demme and in contravention of his own covenants. He very probably believed that the fence built by Hinsdale was located upon the true line and this error seems to have been common among those interested in both parcels. It is, we think, quite clear from this record that, at the time the fence was built, there was no agreement between Hinsdale, the then owner under contract of the northerly 300 feet, and the owners of the southerly 600 feet. Moreover, there never was a controversy between the owners of the northerly 300 feet and the owners of the southerly 600 feet as to the true line. We have frequently held that title to lands may not rest in parol and that where a division of lands is effected as a settlement of a disputed boundary,—

"There must be, not only an express agreement, and monuments erected, which have been acquiesced in, but there must have been a doubt or controversy as to the true line; otherwise the case comes within the prohibition of the statute." *Olin* v. *Henderson,* 120 Mich. 149, 158.

See, also, *DeLong* v. *Baldwin,* 111 Mich. 466; *Turner* v. *Angus,* 145 Mich. 679; *Sheldon* v. *Railroad Co.,* 161 Mich. 503; *Parsons* v. *Bills,* 163 Mich. 415; *Lake Shore, etc., R. Co.* v. *Sterling,* 189 Mich. 366. From these authorities it is apparent that where there is no dispute between the parties as to the true line and no agreement between them as to the location of the fence separating their several holdings, the party advantaged by the erroneous location of the dividing line may not profit by the mistake.

We find the description in the deed from Brevoort to Demme to be entirely free from ambiguity. The words, "600 feet in width" mean 600 feet at right angles. As defined in Webster's dictionary the word "width" is a "certain measure between the sides meas-

uring in a direction at right angles to that of length." Where there is no ambiguity in an instrument parol evidence is inadmissible to explain or vary its meaning. *Longe* v. *Kinney*, 171 Mich. 312, and cases cited.

It is unnecessary further to notice claims of the appellant as the above conclusions are controlling of the issue presented.

The judgment is affirmed.

BIRD, C. J., and MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

ROBINS v. DIRECTOR GENERAL OF RAILROADS.

1. RAILROADS—NEGLIGENCE—DEATH OF CHILD—CROSSING ACCIDENT—EXCESSIVE SPEED—QUESTION FOR JURY.
   In an action against a railroad company for the negligent killing of a boy 5 years and 2 months old at a public street crossing near the central part of a city, where hundreds of persons, including children, crossed daily, testimony that the train was running at from 40 to 60 miles an hour and that the electric bell was out of order, *held*, to present a question of fact for the jury as to defendant's negligence.

2. SAME—EXCESSIVE SPEED—UNANTICIPATED ACT.
   Where the train was running at an unlawful rate of speed, it cannot be held, as a matter of law, that the accident was caused by the sudden and unanticipated act of the child.

3. SAME—KILLING OF CHILD—NEGLIGENCE OF MOTHER.
   The mother of a boy 5 years and 2 months old is not, as a

On excessiveness or inadequacy of damages for personal injuries resulting in death, see note in L. R. A. 1916C, 820.

matter of law, guilty of negligence in permitting him to remain out of her sight for a few minutes on the porch of a hotel while she went into the office, during which time he wandered upon the tracks and was killed.

4. SAME — EVIDENCE — FINANCIAL ABILITY OF FATHER — ADMISSIBILITY.

Testimony of the father as to his financial ability, *held*, admissible for the purpose of bearing upon the probability of the child being put to work earning money for the father.

5. SAME—DAMAGES—EXCESSIVE VERDICT.

A verdict of $1,275 for the negligent killing of a boy 5 years and 2 months old, *held*, not excessive.

Error to Lenawee; Hart, J. Submitted June 13, 1919. (Docket No. 74.) Decided October 6, 1919.

Case by Laura A. Robins, administratrix of the estate of Theodore James Robins, deceased, against William G. McAdoo, director general of railroads, for the negligent killing of plaintiff's decedent. Judgment for plaintiff. Defendant brings error. Affirmed.

Herbert R. Clark, for appellant.

B. D. Chandler, for appellee.

MOORE, J. This suit was commenced to recover damages because of the death of plaintiff's son who was killed in the city of Hudson at the intersection of the tracks of the New York Central Railroad Company and Market street. The negligence charged was the running of its passenger train across Market street at an excessive rate of speed and in not maintaining at said crossing a properly equipped electric bell. It is also charged that the engineer and fireman were not keeping a proper lookout. The population of the city of Hudson is about 2,800, and the Market street crossing is near the central part of the city and near

the center of population, and within two blocks of the business center. Theodore James Robins on the date of his death was five years, two months, and eight days old. He was a bright, active boy in good health. At the time of the accident, Mr. and Mrs. Robins were living in Detroit. They were returning to Hudson to live and had shipped some of their goods there. Mrs. Robins with her children was stopping at the Brant Hotel which is situate on Market street about 80 feet south of the tracks of the New York Central railroad. At the Market street crossing the railroad company had maintained an electric bell. It was claimed this bell was out of order, that it would nearly always ring when trains were approaching from the west, but from the east it seldom rang and on the day of the accident the plaintiff contended and submitted proof that on the approach of the train this electric bell was not ringing.

It is claimed that just prior to the accident the mother of decedent was upon the porch of the hotel unpacking some goods and decedent and his little brother were in a swing upon the porch of the hotel, that about 10 minutes before the accident the mother stepped into the office of the hotel and was there at the time of the accident. It is claimed the train which killed the boy was about 10 minutes late. It consisted of a locomotive and 7 or 8 coaches, and it is claimed it did not slow down for the Market street crossing, but ran across the street in question at a speed estimated by witnesses for the plaintiff at 40 to 60 miles an hour. Just before the accident the decedent and his little brother were seen upon the sidewalk between the hotel and the railroad track. Two men crossed the track just in front of the train on the east side of Market street, and an older man passed in front of the train on the west side of Market street, and decedent followed him across the track and was struck

by the locomotive when near the north side of the track and instantly killed.

Several written requests were preferred by defendant all of which were given except two, which asked for a directed verdict. The jury returned a verdict for the plaintiff for $1,275. Defendant made a motion for a new trial which was overruled. The case is brought here by writ of error.

We quote from the brief of counsel for appellant:

"The principal and meritorious questions in the case are these:

"(1) Was the accident not due to the sudden and unanticipated act of the child, an act that the railroad company could not foresee or provide against?

"(2) Was the mother of deceased not guilty of contributory negligence such as to preclude recovery?

"(3) Was the railroad company guilty of any negligence that was the proximate cause of the accident?

"(4) Was there any evidence upon which a jury could base a verdict for damages?

"(5) Did the court err in permitting the father of deceased to testify as to his financial means?

"(6) Was the verdict not against the great weight of the evidence?

"(7) Did the court not err in permitting plaintiff to amend her declaration by adding the question of lookout as a ground of negligence?"

It is claimed by defendant that it was the sudden and unanticipated act of the boy and no act of negligence of the defendant that caused the accident, counsel citing *Hoover* v. *Railway Co.*, 188 Mich. 313, and *Coessens* v. *Railway*, 136 Mich. 481, and *Czarniski* v. *Transfer Co.*, 204 Mich. 276. A reference to the earliest of these cases will show that it was held that the car was running at a lawful rate of speed, which differentiates it from the instant case, as made by the testimony on the part of the plaintiff. In the case of *Hoover* v. *Railway Co., supra,* the child was killed while a trespasser in the station yard of the railroad

company. A different case from the one before us. There is some language in the opinion that may be helpful here:

"Back of that lies the rule that at places where there is reason to anticipate that persons, including children, may be upon the track, as in cities and towns, the train cannot be operated upon the presumption that the track is clear and need not be watched, but a proper lookout must be maintained with that degree of care which a person of ordinary prudence and caution, having in mind both the safety of the train with its passengers and persons ahead likely to be injured by it, would commonly exercise under like circumstances, according to the probability of danger at the portion of the track being traversed."

In the other case cited it was held to be a question for the jury whether defendant was negligent. In the instant case there was a great deal of testimony that the train was run at a high rate of speed at a crossing frequented by hundreds of pedestrians daily, including children, with a crossing bell out of order so that it did not ring. This feature of the case is governed by *Nissly* v. *Railway Co.*, 168 Mich. 676 (Ann. Cas. 1913C, 719). There is a full discussion of the rights of an infant and the duty of a railway company in the case of *Huggett* v. *Erb*, 182 Mich. 524 (Ann. Cas. 1916B, 352), with a citation of many authorities; *Block* v. *Railroad Co.*, 202 Mich. 341; *Fischer* v. *Railway Co.*, 203 Mich. 668; and *Green* v. *Railway Co.*, 110 Mich. 648. The last case also holds that the mother should not be held as a matter of law to be guilty of contributory negligence.

Was it error to allow the father to testify to his financial ability? The court cautioned the jury that this testimony could only be used as bearing upon the probability of the child being put to work earning money for the father. We think with the limitations put upon the testimony it was not reversible error.

Was the verdict so large it ought to be set aside? The case of *Black* v. *Railroad Co.*, 146 Mich. 568, justifies the amount of the verdict. The case was tried with great care. We discover no reversible error.

The judgment is affirmed with costs to the plaintiff.

BIRD, C. J., and STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

PEOPLE *v.* EAMAUS.

1. CRIMINAL LAW—CONTINUANCE—ABSENT WITNESS—AFFIDAVITS—ABUSE OF DISCRETION.

   The denial of a continuance in a criminal case cannot be said to have been an abuse of discretion on the part of the trial judge, where the affidavit gave no intimation as to what testimony the witness, whose presence was desired, would give bearing upon the issue to be tried. BIRD, C. J., and KUHN, J., dissenting

2. APPEAL AND ERROR—RECORD—CONTENTS—ASSUMPTION BY COURT.

   Where the record in a criminal case does not contain a report of the argument of counsel for defendant, the Supreme Court will assume that the argument was made exactly as indicated in the charge of the court.

3. CRIMINAL LAW—ARGUMENT OF COUNSEL—INSTRUCTIONS.

   Argument in a criminal case by defendant's counsel asking the jury how they would like their son convicted under the testimony in the case, *held*, improper.

On the propriety of arguments to juries citing statements in affidavits for continuance, see note in L. R. A. 1918D, 57.

Exceptions before judgment from Kalamazoo; Weimer, J. Submitted June 12, 1919. (Docket No. 98.) Decided October 6, 1919.

Stuart Eamaus was convicted of keeping a house of ill-fame. Affirmed.

W. J. Barnard, for appellant.

Frank F. Ford, Special Assistant Prosecuting Attorney, for the people.

BROOKE, J. Respondent was convicted of keeping and maintaining a house of ill-fame in the city of Kalamazoo. Though impleaded with another, his wife, he demanded and received a separate trial. He now reviews his conviction under exceptions before sentence. His counsel relies for reversal upon the following points:

(1) Error in denying motion for continuance.
(2) Errors in the admission and rejection of testimony.
(3) Error in the charge of the court.

1. It appears from the record that respondent was arraigned, waived examination, and the return was filed on June 4, 1918. On June 6 the information was filed. On the same day a motion for a continuance was made supported by the affidavit of respondent in which it is stated that one Hatte Mook is a material witness for respondent and that said respondent after a full statement of his case to his counsel is advised and believes that he cannot safely proceed to trial without the testimony of said Hatte Mook. The affidavit further discloses that said Hatte Mook lives near Lyons, Michigan, and is ill. Accompanying the application was a physician's certificate in the following terms:

"LYONS, MICH., 6/6/1918.

"To Whom It May Concern:

"This is to certify that, in my opinion, owing to certain conditions of her heart, that it would be very imprudent for Mrs. Hatte Mook to undergo any examination in court of a legal nature as the least excitement would be liable to prove fatal to the said lady.

"WM. R. GRANT, M. D.,
"Lyons, Michigan."

Respondent was placed on trial on the 17th day of June, 1918, at which time his counsel excepted to the refusal of the court to grant the application for a continuance to the September, 1918, term. Error assigned upon said ruling raises the first question for consideration. It is to be noted that the affidavit for continuance gives no intimation to the court as to what testimony Hatte Mook could give bearing upon the issue to be tried. In the case of *People* v. *Anderson,* 53 Mich. 60, it is stated:

"The affidavit for continuance shows that the respondent has fully and fairly stated to his counsel what he expected to prove by John Morgan, and was advised that Morgan was a material and necessary witness, without whose testimony he could not safely proceed to trial."

The court refused the continuance for two reasons:

"First, that the affidavit did not conform to the rule (Circuit Court Rule 55), in not stating what was expected to be proved by the witness."

On review in this court it was said:

"On the whole we are not prepared to say this was a fatal error."

In the case of *People* v. *Foote,* 93 Mich. 38, the fourth assignment of error was that the court erred in not delaying the trial to enable respondent to secure the attendance of two witnesses. In passing upon this assignment the court said:

"It was entirely within the discretion of the court to refuse a delay for the purpose of procuring witnesses, and we see no abuse of that discretion. When the request was made, the circuit judge and counsel for the people and the respondent retired to an adjoining room to see if they could arrange some disposition of the matter. What took place there does not appear upon this record. We have not, therefore, all the facts before us. The judge was possessed of all the facts, and was in a far better position than are we to judge of the propriety of a delay."

The same question was considered in the case of *People* v. *Burwell*, 106 Mich. 27, where it is said:

"The application for a continuance was within the discretion of the circuit judge. The application did not state what respondent proposed to prove by the witnesses whose presence he desired. Several of them were produced and testified."

The affidavit for continuance in the case at bar is subject to the same infirmity pointed out and criticized in the foregoing authorities. The matter being one primarily for the exercise of a sound discretion by the court and no abuse thereof having been made to appear, we are of opinion that the assignment of error based upon the action of the court is without merit.

2. We have carefully examined the assignments of error based upon the admission or exclusion of testimony and find no reversible error therein.

3. Error is assigned upon the following excerpt from the judge's charge:

"Considerable time was spent yesterday by counsel for the defense in addressing the jury in an appeal which, for the want of a better term, is commonly termed an appeal to sympathy, an appeal for sympathy, and you were asked repeatedly by counsel for respondent in the course of his remarks how you would like to have your son convicted under the testimony in this case. That is not the question at all.

You are not called upon to consider it. It would be entirely improper for you to consider how you would like to have your son convicted under the testimony in this case. It is entirely safe to assume that there is not one of you who would like to have your son convicted under the testimony in this case. It is not likely that any of you who are fathers would like to have your son convicted. You are not here for that purpose. It would be entirely improper for you, as jurors, to analyze and consider the evidence in this case in the light of such a proposition, in the light of any such an attitude or with any such frame of mind. You are here to consider the evidence that has been presented, whether or not under the evidence it appears beyond all reasonable doubt this man participated in the keeping of a bawdy house, a house of prostitution, a house of ill-repute. You should dispel as far from your minds as you can as to what you would like to happen to your sons, those of you who have sons, under like circumstances. That appeal can no more properly be made by counsel for the respondent than it can be by the prosecuting attorney. The respondent would have no right to ask you what you would like to happen to your sons in connection with any feature in this case. It would be error for the prosecutor to make such an argument, and the court would have to reprove and reprimand him if he undertook to do it. So what is improper for him is improper for the defense."

The balance of the charge is not printed in the record. Counsel's criticism of the excerpt quoted is that the same is argumentative and improper. He asserts that no objection was made to any part of his argument to the jury either by counsel for the people or by the court. He claims:

"If counsel made an improper argument it was the duty of the court to stop counsel so that the stenographer might take down the language used and give counsel the benefit of any exception he might wish to take and to inform and apprise this court of the kind of argument that was being indulged in."

He further claims as a matter of fact that no such argument as that criticized by the court was made by him. The record does not contain a report of the argument of counsel and only that portion of the judge's charge complained of. Under the circumstances we must assume that the argument was made exactly as indicated by the charge. If made, no argument is needed to emphasize its impropriety.

We find no error and the conviction is affirmed.

MOORE, STEERE, FELLOWS, and STONE, JJ., concurred with BROOKE, J.

BIRD, C. J. (*dissenting*). I do not agree with Mr. Justice BROOKE that the trial court did not abuse his discretion in denying the motion for continuance because the affidavit contained no statement of what respondent expected to show by the absent witness. It has been the understanding of the profession in this State that upon the first application for a continuance, on account of an absent witness, it was not necessary for the applicant to disclose what facts he intended to show by the witness. It is, however, necessary to make that showing upon a second application.

Circuit Court Rule No. 41 provides that:

"No motion for the continuance of a cause made after the first day in term shall be heard, unless a sufficient excuse is shown for the delay, and *on a second application* by a party for the continuance of a cause, the party so applying shall state, in addition to the usual requisites, the facts which he expects to prove by the absent witness, and shall also state with particularity the diligence he has used to procure his attendance." * * *

Green's Michigan Practice, in laying down the rule as to the requisites of an affidavit for continuance, has this to say:

"The motion must be supported by affidavit. Where the absence of a witness is relied on it must show

satisfactorily to the court: 1. That the witness or testimony is really material; 2. That the party applying has used reasonable diligence; and, 3. That the witness or testimony can be had at the time to which the trial is to be postponed. *On a second application for continuance* it must state, in addition to the usual requisites, the facts which the party expects to prove by the absent witness, and with particularity the diligence he has used to procure his attendance. 1 Green's Michigan Practice, § 762."

Tiffany's Justice Guide, § 291, in stating the rule, says:

"The party is not bound to state what he expects to prove by the absent witness, unless the conduct of the party is such as fairly to cast a well-grounded suspicion upon the good faith of the application to adjourn. In such case if he refuse to disclose what he expects to prove, the adjournment may be refused."

In the case of *McNaughton* v. *Evert*, 116 Mich. 141, which was certiorari to a circuit court commissioner, Mr. Justice HOOKER, in considering a like question, said:

"Although three motions to adjourn were made, there is nothing to show what might be proved by the witness, and the only evidence that what he might testify to is material is the statement of the defendant himself, under advice of counsel. *In other courts it is usual to require an application for a second continuance to set up these facts.*"

In support of the trial court's conclusion the following cases are cited: *People* v. *Anderson*, 53 Mich. 60; *People* v. *Foote*, 93 Mich. 38; *People* v. *Burwell*, 106 Mich. 27. The most that can be claimed for the *Anderson Case* is this: If upon a first application the trial court insists upon being advised what facts are expected to be shown by the absent witness, and the applicant refuses to disclose them, the application may be denied. In the *Anderson Case* the application was denied by the trial court upon the grounds:

(1) That the affidavit did not conform to the rule [Cir. Ct. Rule 55], in not stating what was expected to be proved by the witness; and (2) that the complaining witness was a non-resident who had come voluntarily to testify and could only be retained by putting him under recognizance.

The court in passing upon the question said:

"It does not strike us that the convenience of a prosecuting witness should govern in crowding a respondent to a speedy trial without preparation. And where, upon the face of the record, it is manifest, as it is here, that defendant has actually had no time for preparation, we cannot but doubt whether some further time should not have been given to obtain testimony. Had respondent made a second affidavit showing distinctly the importance of Morgan's testimony, there is strong reason for holding that the action of the court cut him off from a constitutional right. There are several authorities, however, which hold that the respondent may be called on to show what he expects to prove, and without deciding whether this can always be required, we are not prepared to say that it is error to require it unless respondent gives some adequate reason why he should not be compelled to disclose his defense. On the whole we are not prepared to say this was a fatal error."

It is quite evident that the trial court in the *Anderson Case* misconceived the contents of Circuit Court Rule No. 55, as the provisions of that rule were the same as those now contained in Rule No. 41.

The *Foote Case* does not appear to be in point. The *Burwell Case* followed the *Anderson Case,* assuming it was necessary under the rule for applicant to disclose what facts he expected to show by the absent witness. In his foot notes to Rule No. 41, Judge Searl, after referring to the *Anderson* and *Burwell Cases,* makes the following comment:

"But Circuit Court Rule No. 55 in force when the *Anderson Case* was decided, required, as does the

present rule, the party asking for second continuance only, to show the facts which he expects to prove; and it would seem plain that the *Anderson Case* was wrongly decided. See *People* v. *Evans,* 72 Mich. 367." Searl's Michigan Court Rules, p. 194.

It does not appear in the instant case that the trial court requested the applicant to disclose what facts he expected to show by the absent witness. If no such request were made and the denial was not placed upon applicant's refusal to state them, even the *Anderson Case* would not support his denial.

The defendant was informed against on June 6th and pressed to trial on June 17th. The application for continuance was regular in form and sufficient in substance, and I think it should have been granted. Eleven days is rather a brief time in which to prepare to defend oneself against a serious charge. The urgency appears to have been that the prosecuting attorney desired to use certain soldiers as witnesses, who were to leave soon for France. Under these circumstances it was proper to reasonably expedite the trial, but this urgency should not go so far as to amount to a denial of justice to the defendant. Mr. Justice CAMPBELL in commenting on a similar case said:

"It does not strike us that the convenience of a prosecuting witness should govern in crowding a respondent to a speedy trial without preparation." *People* v. *Anderson, supra.*

I am of the opinion that there was an abuse of discretion in denying the application. I am also of the opinion that in so far as the cases cited are in collision with Rule No. 41 and the recognized circuit court practice, they should be overruled.

The judgment should be reversed and a new trial ordered.

KUHN, J., concurred with BIRD, C. J.

The late Justice OSTRANDER took no part in this decision.

PEOPLE v. EAMAUS.

1. CRIMINAL LAW—EVIDENCE—MAINTAINING HOUSE OF ILL-FAME BY AGENT—ADMISSIBILITY.

In a prosecution for keeping and maintaining a house of ill-fame, evidence that defendant, though making her home elsewhere, did, within the time charged, control, manage, conduct, keep, and maintain said place as a house of ill-fame, through the agency of another, *held*, properly admitted.

2. SAME—CONTINUANCE—ABSENT WITNESS—ABUSE OF DISCRETION.

The denial of a continuance in a criminal case cannot be said to have been an abuse of discretion on the part of the trial judge, where it was not made to appear what defendant expected to prove by the absent witness. BIRD, C. J., and KUHN, J., dissenting.

Exception before judgment from Kalamazoo; Weimer, J. Submitted June 12, 1919. (Docket No. 97.) Decided October 6, 1919.

Etta Eamaus was convicted of keeping a house of ill-fame. Affirmed.

W. J. Barnard, for appellant.

Frank F. Ford, Special Assistant Prosecuting Attorney, for the people.

STEERE, J. Defendant was convicted in the circuit court of Kalamazoo county of keeping and maintaining a house of ill-fame at 215 East Kalamazoo avenue on May 23, 1917, and on divers other days and times between that day and May 23, 1918. The case is brought here for review on exceptions before sentence.

The grounds for reversal urged and relied upon as stated in the brief of defendant's counsel are:

"(1) Denying motion for continuance.
"(2) Errors in admission and rejection of testimony."

No rejection of testimony, adverse to defendant's interest, is pointed out and we find none in the printed record. The only claimed erroneous admission is that the court permitted testimony "with reference to what took place at 215 East Kalamazoo avenue on the 27th day of March and before the respondent had any control over the premises." The testimony of the prosecution was directed to showing that defendant, though making her home elsewhere and not openly participating in the social and business activities at 215 East Kalamazoo avenue did in fact during March, 1918, as also before and after within the time charged, control, manage, conduct, keep and maintain that place as a house of ill-fame through the agency of a woman whom she had in direct charge as keeper. As to the month of March, a witness named Bernice Heustis testified that she went to the house at defendant's solicitation and was there in charge for her "from the early part of March until the middle of May, 1918"; that it was a furnished house and defendant owned all the furniture of every description; that witness ran the house on a percentage basis for defendant, who paid the bills for rent, fuel, gas, laundry, etc., occasionally visiting the place but communicating with her largely by phone, messengers, and letters, saying of the income:

"I made a settlement with her with reference to money taken in every night. I would send it over by a messenger boy or she would come over after it."

There was abundant testimony both direct and circumstantial to plainly prove, if believed, that defendant was by the indirect methods indicated maintaining and keeping at the time and place charged a house of ill-fame, frequented for the purpose of prostitution and

lewdness. In fact her resort in conducting the business to messengers and letters, sent by them to her agent, proved to be her nemesis. She was a forceful letter writer and sometimes went into details. An identified letter of some length from her to the woman in charge sent at a time when conditions were apparently somewhat disturbing begins as follows:

"Here is linen. Say, listen, I want to say this on phone. Mother here, cannot talk just now, but I've this to say, that all the damn neighbors on Kala avenue can go to hell or they can call the police. * * * I'll run my own business regardless of any one street."

Of the two alternatives which she proposed the latter was adopted and defendant, with others, was arrested for the offense of which she was convicted. She was taken into custody under a warrant from the municipal court of Kalamazoo on May 24, 1918, and the warrant returned that day. She demanded an examination before the committing court which was set for June 3d. On that date she waived examination and was bound over for trial to appear in the circuit court of Kalamazoo county on June 6th. On that date she was arraigned under an information charging her with the offense stated, to which she pleaded not guilty. She then interposed a motion for continuance based upon the sickness of an alleged material witness named, "Mrs. Hatte Mook," who lived "near Lyons, Michigan, in the city of Ionia, county of Ionia, State of Michigan." The application was accompanied by a verified physician's certificate as follows:

"W. R. GRANT, M. D.,
"LYONS, MICH., 6/6/1918.

"To whom it may concern:

"This is to certify that in my opinion, owing to certain conditions of her heart, that it would be very imprudent for Mrs. Hatte Moot to undergo any ex-

amination in court of a legal nature, as the least excitement would be liable to prove fatal to the said lady.

"WM. R. GRANT, M. D.,
"Lyons, Michigan."

The motion was denied, followed by application to this court for a writ of mandamus to compel the trial court to set aside the order of denial and grant defendant's motion, which was refused. The case was brought on for trial June 10th, when objection was interposed for defendant and exception taken to her being compelled to proceed to trial at that time. It was shown that Mrs. Hatte Mook (or Moot), the witness whose absence and sickness were urged as ground for continuance, was the mother of defendant and present in the city of Kalamazoo in the latter's residence at 224 West Water street at the time of defendant's arrest, she then stating to the officer that her sick mother was there with her.

It is conceded by defendant that applications for continuance are within the discretion of the trial court, but urged that refusal to grant defendant's motion was an abuse of discretion constituting reversible error.

Defendant's affidavit for continuance is general in form, stating without any disclosure of her identity that Hatte Mook living "near Lyons, Michigan, in the city of Ionia," is a material witness for her as she is advised by counsel, etc., but gives no intimation of what it is expected to prove by this witness or her relation to defendant. According to defendant's letter she would not even talk with 215 Kalamazoo avenue over the telephone when her mother was present. The opinion certificate of Dr. Grant, of Lyons, that it would be very imprudent for Mrs. Moot to attend court as a witness owing to the condition of her heart, while destitute of definite facts, seems to furnish a life certificate of immunity from "any examination in

court of a legal nature." If so, defendant's recourse was to take her depositions, but no steps were taken to that end or further showing offered when the case was called for trial several days after the motion was denied.

In *People* v. *Anderson,* 53 Mich. 60, this court declined to disturb the denial of a continuance by the trial court on a general showing of the absence of a material witness, where the time between the arrest and trial was about the same as here, and the application certainly as meritorious so far as the two records disclose, for there defendant was confined in jail from the time of his arrest without counsel or means to make preparation for his defense until three days before his trial, when friends procured him an attorney. This court there said after a review of the situation: "On the whole we are not prepared to say this was fatal error," and affirmed the conviction. That the trial judge is in a more advantageous position to observe and understand the merits of the showing as applied to the situation in those matters involving an exercise of discretion than a printed record affords has more than once been recognized by appellate courts, and it must therefore be clearly shown that the court unfairly and prejudicially abused such exclusive authority before a discretionary ruling will be disturbed. *People* v. *Foote,* 93 Mich. 38; *People* v. *Burwell,* 106 Mich. 27; *Roney* v. *Healy,* 170 Mich. 46. In the *Roney Case* the rule and reason applicable to the situation here are thus concisely stated by Justice OSTRANDER:

"Unless there was a clear abuse of discretion, the ruling of the trial court must stand. *McNaughton* v. *Evert,* 116 Mich. 141. * * * I think the trial court committed no error in refusing the postponement. * * * because it was not then, and is not now, made to appear that Mr. Hally would or could give testimony concerning a material disputed issue of fact."

The conviction will stand affirmed and the cause remanded for further appropriate proceedings by the trial court.

MOORE, BROOKE, FELLOWS, and STONE, JJ., concurred with STEERE, J.

BIRD, C. J. (*dissenting*). I think this case should be reversed and a new trial ordered for the reasons stated in *People* v. *Eamaus, ante,* 442, filed herewith.

KUHN, J., concurred with BIRD, C. J.

The late Justice OSTRANDER took no part in this decision.

MACKENZIE *v.* FRANK M. PAULI CO.

1. NUISANCE—ABATEMENT—EQUITY.

Equity courts ought not to prohibit the conduct of a lawful business by a defendant on his own unrestricted premises except as a last resort to restrain an otherwise unavoidable nuisance existing in violation of a complaining party's rights.

2. SAME—INJUNCTION—MODIFICATION OF DECREE.

On appeal from a decree perpetually enjoining defendant from continuing its woodworking mill in the vicinity of plaintiffs' homes, on the ground that the same constituted a private nuisance, there being a showing that the objectionable features constituting a nuisance can largely be avoided by alterations, etc., the decree is modified to imposing correction of, and enjoining, the offensive features in the conduct of defendant's business.

For authorities passing upon the question of duty and liability of one maintaining temporary obstruction in street for purpose of loading and unloading vehicle, see note in 24 L. R. A. (N. S.) 97.

On municipal power over nuisances relating to trade or business in general, see note in 38 L. R. A. 640.

Appeal from Wayne; Gilday, J., presiding. Submitted June 6, 1919. (Docket No. 2.) Decided October 6, 1919.

Bill by David Mackenzie, Janet Mackenzie, E. A. Bridge, J. H. Trybom, Mrs. E. B. Trybom, A. J. Oostdyk, Mrs. Carrie C. Oostdyk, the Bewick Company, Alice E. Craige, trustee, Michael W. Dempsey, William J. Young, and Mary Editha O'Brien, against the Frank M. Pauli Company to abate a nuisance. From a decree for plaintiffs, defendant appeals. Modified, and affirmed.

Oxtoby & Wilkinson (*Oscar C. Hull,* of counsel), for plaintiffs.

Sherman D. Callendar (*T. A. E. Weadock,* of counsel), for defendant.

STEERE, J. The above named 12 plaintiffs are separate owners and occupants of lots in the eastern part of the city of Detroit, Michigan, either within the territory bounded by VanDyke, Lafayette, Shipherd and Agnes avenues, in said city, or in the immediate vicinity thereof, and have united in this bill of complaint to obtain an injunction for abatement of a private nuisance they charge defendant has developed and is maintaining in said territory, to their annoyance and damage.

The Frank M. Pauli Co., defendant, is a corporation engaged in general contracting, principally confined to carpenter contracts and woodwork, in connection with which it maintains and operates on lots in the above bounded block fronting on Shipherd avenue, about half way between Agnes and Lafayette, a lumber yard and planing mill, or "interior trim factory" as defendant prefers to name the mill portion of the plant. The relief asked in plaintiffs' bill and granted by the trial

court is an injunction perpetually and absolutely restraining defendant from "maintaining its mill and lumber yard on the land where it is situated and from operating its mill and using the property for the purpose of a mill and lumber yard."

There are no restrictions to use or kind of buildings resting upon defendant's land where the activities objected to are carried on. The whole block was originally unrestricted though restrictions are found in a few transfers of recent date. Various portions of the block have been and are yet more or less used for business purposes. Plaintiffs base their claim of right to relief solely upon the proposition that the operation of defendant's mill, or factory, is to them a nuisance as and where operated and located, near their homes and property in a residential section of the city, which they are entitled to have abated as such.

The specific allegations in plaintiffs' bill as to objectionable features in defendant's factory and business as operated and conducted in that locality are, in brief, disturbing and distracting noises from the machinery, loud shouting of or to the workmen and sounding of a heavy gong at certain hours as notice to employees of resumption and discontinuance of work, sawdust and smoke which at times is emitted from the mill and blown by the wind over that neighborhood, extra fire risk from the nature of the business and manner of conducting it, using for private purposes and obstructing Shipherd avenue and the alley running north and south through said block at the rear of defendant's property, and the noisy, offensive congregation in and use of said alley by defendant's employees who often gather there and loudly indulge in profane and foul language close at the rear of the homes of certain of the complaining parties, to their annoyance.

Plaintiffs emphasize the fact that the general lo-

cality in which defendant's plant is maintained is not a manufacturing or factory district; that the surrounding section of Detroit, covering an area of about three-fourths of a mile east and west by one-half mile north and south, bounded by East Grand Boulevard on the west, Jefferson avenue on the south, Burns avenue on the east, and Kercheval avenue on the north, is in its prevailing characteristics distinctly a large residential district of the city.

This district is bounded and traversed by some 15 north and south streets, or boulevards, and by five running east and west, named Jefferson, Lafayette, Agnes, St. Paul, and Kercheval avenues. It is now a populous, well built-up portion of the city, fairly shown to be in its general character a residential district east of Grand Boulevard and south of Kercheval avenue. There are scattered through it business places on certain of the streets, consisting as a rule of small shops, stores and other lines of business to supply local trade, such as meat markets, groceries, bakeries, drug stores, shoe repair, tailor and bicycle shops, public garages, etc. Kercheval avenue on its north has a double-track car line along it and is concededly a business street, as are certain portions of Jefferson and Lafayette avenues.

The quality and character of neighborhoods and streets varies materially in different portions of that part of Detroit. Burns, Iroquois and Seminole avenues in the so-called "Indian Village" are recognized as amongst the finest and most desirable residential streets in the city, and Seyburn avenue, 70 feet wide, running north and south less than 175 feet west of Shipherd, is described as an attractive, strictly residential street with many fine homes upon it. The lots on its east side extend through to Shipherd, with the residences upon them fronting west on Seyburn. Other parts of the district are of a different quality and less

attractive, having flats, apartment houses and tenements mixed with private residences and occasional business activities. The small block in question surrounded by Agnes, VanDyke, Lafayette and Shipherd avenues, is of the latter character. According to the plat furnished with this record its size is approximately 640 feet north and south by 350 feet east and west, with an alley running centrally through it north and south 20 feet in width from Agnes street south for about 450 feet, where it crosses an east and west 10-foot alley, and, with a jog to the east, continues south 18 feet in width to Lafayette avenue. North of the east and west alley are, as originally platted, 14 lots 60 feet wide, seven fronting east on VanDyke avenue and seven west on Shipherd with their rears on the 20-foot alley. Some of these lots have in times past been subdivided and parts sold, mostly in 30-foot lots. Agnes avenue on the north is 60 feet wide, VanDyke on the east 66 feet, Lafayette on the south 50 feet, while Shipherd on the west is of a disputed width, which the record leaves uncertain, defendant claiming it to be only 22 feet wide and in effect an alley, while plaintiffs claim a width of 30 feet and the blue-print furnished the court, on which it is marked "Shipherd avenue" with no width given, would indicate, in proportion to the other streets, nearer 40 feet. It is paved with concrete, has a cement sidewalk along it and residences fronting upon it, there being several between Agnes and Lafayette avenue.

Plaintiffs Oostdyk, Mackenzie, Bridge, Dempsey, Trybom, and O'Brien, own lots in the east half of this block fronting on VanDyke and extending back to the alley, those of the three last mentioned being directly across the alley from defendant's factory which extends about 90 feet along it. Plaintiffs Craige and Mackenzie own land on the east side of VanDyke avenue, the Beckwith Company owns land on the east

side of Shipherd avenue extending from Lafayette avenue north to within about 60 feet of defendant's property, while plaintiff Young owns land on the west side of Shipherd. Two belated participants named Nehls and the Parker Estate Co., not named as plaintiffs in the bill but who subscribed to it, own land on the east side of VanDyke avenue. Except that of Young and the Parker estate the holdings of all plaintiffs have residences upon them.

Frank M. Pauli, who testified to being engaged in the building business in Detroit for 35 years, was in the employ of others during the earlier period of his activities and just when he became a building contractor for himself is not disclosed, but in 1909 he purchased a 30-foot lot in this block fronting on Shipherd avenue, extending east a depth of 168 feet to the alley, from two contracting carpenters named Brown and Farr who had some time before erected upon the alley a comparatively small one-story wooden building, 50x30 feet, used by them in their contracting business as a carpenter shop, or interior trim factory, which was equipped with a shaper, band-saw and rip-saw. For some time Pauli used this building and equipment as it was when purchased, employing in it "about six" men. The following year he bought a 30-foot half lot just north of his first purchase, which had upon it a cottage fronting Shipherd avenue with a barn at the rear upon the alley, and began to expand his business in that locality.

The so-called Frank M. Pauli Co. had been in existence about eight years and was incorporated about five years prior to the hearing of this case, in May, 1918. Its stockholders were principally members of the elder Frank Pauli's family, his son Frank G., who had previously worked for his father, becoming a member of the organization and active in its management. As its contracting business expanded defendant

gradually increased its real estate holdings and enlarged its plant until at the time this suit was begun it had acquired five adjacent 30-foot lots and constructed additional buildings upon them both brick and wood, the whole constituting a mill or factory equipped with various kinds of woodworking machinery, operated by electric motors of different sizes, in which it employed over 30 men, and was then employing in its contracting activities in the city a force of about 150. The brick factory building in which is located most of its machinery is 30x97 feet, two stories high, located on the rear of the lots directly across the alley from the rear of lots owned and occupied for residential purposes by plaintiffs Bridge, O'Brien, Dempsey and Trybom. North of its factory building is a lumber shed, 45x168 feet, with a storage capacity of 27 carloads. It uses five motor vehicles, the largest being a 3-ton truck 21½ feet long with a 12-foot body, and has five lumber wagons for handling material. Its increased capacity was not only sufficient to keep up with requirements of its building contracts but to do factory wood work for others, including a contract to make "Liberty Cases" for the government, and defendant was planning to further enlarge when this suit was begun.

When Pauli, Sr., made his first purchase that portion of the city was sparsely settled and scantily improved in comparison with its present condition. He for some time employed but few men and used but little machinery, the business being conducted with comparatively little noise, dust or confusion, but after the company was incorporated, men, material and machinery were increased with a marked increase of dust, smoke, noise and obstruction of the street and alley until objections and complaints began to be made by those living in the vicinity which were apparently resented and treated with scant consideration until a

somewhat belligerent status developed between certain of plaintiffs and Pauli, Jr., and the employees under him. Plaintiff Bridge testified that the men were a "noisy bunch" and the sound of the mill became such that when unwell he could not remain in his own home and on several occasions had to go over to his sister's home and stay there to escape it; that when he complained to Pauli, Jr., about it the latter seemed to take delight in telling him "that they were going to put in new machinery and other things." Certain of the women living nearby who complained of the dust, noise and conduct of the workmen when congregated in the alley back of their homes, indulging in profane and indecent language, were answered at times as they claimed with abuse and insult, which some of the more militant sought to suppress by turning a camera and the hose on Pauli, Jr., and some of his men, giving rise to admittedly unparliamentary reflections by the latter.

Amongst its varied equipment of mechanical appliances for shaping wood defendant has about 20 saws for different purposes—such as a jig-saw, rip-saw, swing-saw, cut-off saw, etc. A swing-saw put in operation in 1915 and a gong installed to signal employees are particularly dwelt upon by plaintiffs as producing penetrating sounds which they found intolerable. The loud ring of this particular saw is emphasized by various witnesses as the culminating annoyance from defendant's factory, being described by them as "fierce," such that "no one can stand it," resembling "the last squeal of a dying pig" or the note of "these peanut-stand whistles which the city stopped" magnified "about a thousand times," a "high-pitched, screeching whistling" sound which "goes through the house whether the windows are closed or not and you cannot get away from it." It was shown that defendant's factory work starts at 7 o'clock a. m. when the gong

is sounded; that the employees commence to gather before that time, often as early as 6:30, and usually in the alley when weather permits, where they indulge in loud and offensive language to the disturbance of those living nearby; and again at the noon hour to eat their lunches there, the refuse of which they throw around in the alley and sometimes into some of plaintiffs' nearby back yards; that defendant has monopolized said alley to a large degree for use in connection with its factory, piling refuse, lumber and other material there, leaving its wagons in the alley overnight and occupying it for other purposes of its business; that the men working there in the open frequently throw down boards and other articles from above, shout orders and curse, to the annoyance and often exclusion of plaintiffs and the public generally from said alley, which defendant uses as though it were its private property. It was shown that defendant also now produces in its factory a large amount of wood refuse and sawdust which it at times dumps from the second story of its factory into wagons in the alley; that when the sawdust pit is full the dust is allowed to run out into the alley and be carried by the wind about the neighborhood and into plaintiffs' houses and yards.

Without further details it may be said that the evidence well supports the conclusion of the trial court that in the conduct of its business defendant has in several of the particulars complained of been guilty of maintaining a private nuisance against the rights of plaintiffs which it is within the jurisdiction of a court of equity to enjoin at their instance.

The trend of the story as a whole indicates that under Pauli, Jr.'s, management the business has been enlarged and conducted largely on the theory that the owner has a right to do as he pleases with his own, forgetful of the fact that defendant was not the ex-

clusive owner of the street in front or alley at the rear of its property, and in disregard of the principle underlying the law of nuisances, concisely embodied in the old legal maxim *sic utere*, etc., which enjoins upon each the duty to so make use of its own as not to injure another.

That defendant's business as conducted at the time this suit was begun and tried had developed into a private nuisance in certain of the particulars complained of, which should be and properly was enjoined by the trial court, we are well satisfied; the more serious question for consideration is just how far the injunction should go, for the restraining decree issued by the trial court, from which defendant appeals, completely and perpetually closes down its factory and destroys its established business in that locality.

Application was made to the trial court for a rehearing and modification of the decree, limiting it to enjoining the claimed objectionable features complained of without absolutely prohibiting the business to be continued. Insisting that the matters complained of were greatly exaggerated, defendant claimed and proposed to further show that by abandoning certain usages, changes in machinery and resort to more careful management and modern methods, the business can be continued without being a legal nuisance. As the case now stands there is a measure of showing that the objectionable features constituting a nuisance can largely be avoided by alterations, discontinuance of certain objectionable things, and improved appliances. Pauli, Sr., is not shown to have actively participated in the hostilities which developed and was apparently a fair and candid witness as to the situation when on the stand. In the application for a rehearing he offers with suggestion of method to do whatever the court may direct to eliminate the par-

ticular things complained of and held by the court a legal nuisance, which the trial court when deciding the case found consisted principally of "smoke from the smoke-stack of the factory, dust and sawdust from the planing mill, noise from the machinery and the manner in which defendant conducts its business, namely, doing a large portion of their work upon the public alley and street on either side of their factory." While the latter usage has at times amounted to a nuisance proper to enjoin, it does not follow from it that the continuance of a legitimate business on defendant's private premises should be suppressed also because of the nuisance in the highway; though if such practice was essential to the business it is conceivable such might be the indirect result. The pertinent law upon that subject is plainly stated in 1 Wood on Nuisances (3d Ed.), p. 314, as follows:

"Neither has a merchant or trader or manufacturer, or any person, no matter how great the necessity of his business, any right to use any part of the highway for the deposit, exhibition or sale of his goods. Neither has he a right to conduct his business in such a way as to keep goods constantly standing on the walk, or teams constantly or for any considerable portion of the time employed in front of his premises engaged in loading or unloading goods, and the fact that the same is necessary in the course of his business is no excuse; it is his duty to carry on his trade where he will produce no serious annoyance to the people, as public convenience and necessity are paramount to the ends of trade or individual necessity."

Upon the question of whether the injunction goes too far in the first instance, we start with the universally recognized rule that equity courts ought not to prohibit the conduct of a lawful business by a defendant on his own unrestricted premises except as a last resort to restrain an otherwise unavoidable nuisance existing in violation of a complaining party's rights.

"Where a business can be so carried on that it will not constitute a nuisance an injunction restraining the carrying on of such business will not be issued, but the court will so frame its order that the business may be continued provided it is so conducted as not to create a nuisance." Joyce on Nuisances, § 90.

The duty of the court in that particular is thus well summarized from abundant authority in 14 Enc. of Pl. & Pr. p. 1148:

"A court of equity is always reluctant to grant a perpetual injunction against the carrying on of a legitimate business. Where the court finds that such an establishment as conducted, is a nuisance, it should allow the defendants to show, if they can, that, by the use of proper methods and appliances, it is possible to continue the business in the same place without its being a nuisance. Where this can be done, a decree absolutely enjoining the defendants from further conducting such business is too broad; the injunction should be limited to such uses as create the nuisance, leaving the right to carry on the business in a proper manner."

In *Chamberlain* v. *Douglas,* 24 App. Div. 582 (48 N. Y. Supp. 710), involving an injunction restraining the operation of machinery in a planing mill by steam power. the court said:

"Injunctions restraining the carrying on of a legitimate and lawful business should go no further than is absolutely necessary to protect the rights of the parties seeking such injunction. When a person is engaged in carrying on such business he should not be absolutely prohibited from doing so, unless it appears that the carrying on of such business will necessarily produce the injury complained of. If it can be conducted in such a way as not to constitute a nuisance, then it should be permitted to be continued in that manner."

In *Green* v. *Lake,* 54 Miss. 540, where the nuisance complained of was the noise and refuse from a mill,

interdiction of which by the trial court was modified to restraining certain offensive features, it was said:

"A perpetual injunction against the lawful use of property in a city ought not to be decreed if the owner can apply to his steam power and machinery such alterations and appliances as will relieve them from the special and unusual annoyances complained of in the case. * * * If the grievances can be removed by the aid of science and skill, a court of equity will go no further than to require those things to be done. The legislature and the local municipal authorities have ample power to regulate the business of the city so as to produce as little inconvenience and annoyance to the different classes of its population as possible. Noisome and offensive trades may be assigned to certain limits."

To like effect see, also, *Collins* v. *Wayne Iron Works,* 227 Pa. 326 (76 Atl. 24); *McCarty* v. *Carbonic Gas Co.,* 189 N. Y. 40 (81 N. E. 549, 13 L. R. A. [N. S.] 465, 12 Ann. Cas. 840); *Miller* v. *Webster City,* 94 Iowa, 162 (62 N. W. 648); *Windfall Manfg. Co.* v. *Patterson,* 148 Ind. 414 (47 N. E. 2, 37 L. R. A. 381); *McMenomy* v. *Baud,* 87 Cal. 134 (26 Pac. 795); *Lorenzi* v. *Market Co.,* 19 Idaho, 674 (115 Pac. 490); *Weaver* v. *Kuchler,* 17 Okla. 189 (87 Pac. 600). This court has consistently recognized such to be the general rule. *Gilbert* v. *Showerman,* 23 Mich. 448; *Edwards* v. *Mining Co.,* 38 Mich. 49; *Shepard* v. *People,* 40 Mich. 487; *Ballentine* v. *Webb,* 84 Mich. 38 (13 L. R. A. 321); *Northwood* v. *Asphalt-Paving Co.,* 126 Mich. 284 (54 L. R. A. 454); *Washington Lodge* v. *Frelinghuysen,* 138 Mich. 350.

In *Ballentine* v. *Webb, supra,* where this court modified a decree perpetually enjoining the maintenance of a slaughter house devoted principally to butchering hogs received in carload lots to the number of about 300 a week, it was held that defendant's business when properly conducted was not of such a character as to

constitute a nuisance in the neighborhood where situated and complainants were not entitled to an injunction because its existence there depreciated the value of their property, and directed that the decree should be modified to elimination of specific objectionable features in conduct of the business, found by the court to constitute nuisances, saying in part:

"Defendant's business, established under the circumstances of this case and conducted by him on his own premises, will not be enjoined, because it cannot be carried on without some degree of offense and annoyance to those living near it. It is only when it reaches the point of discomfort where it becomes injurious to health that the injury can be said to be irreparable so as to call forth the extraordinary power of a court of chancery to destroy it."

It is not claimed that defendant's wood-working industry is a nuisance *per se*. Inherently, it is not when properly conducted unhealthy, filthy or unwholesome, nor disagreeable and offensive to persons generally. The bare fact it may not be acceptable as a near neighbor to plaintiffs and may produce some discomfort or inconvenience to those nearby will not in itself justify its total elimination by injunction. The court has no concern with the indicated effort of plaintiffs to banish business from this block. Most of them invested in this unrestricted subdivision some time after defendant's and other business enterprises of more or less magnitude were established there, purchasing advantageously and at an opportune time. Those nearest defendant's plant conceded their holdings have much advanced in value since they purchased. None of them expressed a desire to sell at the admittedly handsome profit obtainable or were willing to name a price they would accept. This unrestricted property had been purchased to a marked extent by those who did and do use their lots for residence and business purposes in combination, the business generally being

at the rear of lots, with residences on the front. The block is not and never has been a high-class exclusively residential district. Tenements, flats and apartment houses predominate. All plaintiffs owning property in the block, except Miss O'Brien, have at times rented a part or all of it to tenants, as a business matter. Miss O'Brien bought her lot in 1913, directly across the alley from defendant's plant and adjacent to a property which had cottages in front and a long established wholesale bakery upon the alley at its rear. This bakery ran four ovens, had at times baked as high as 12,000 loaves of bread per day, employed at the time of the trial 14 persons in the bakery proper, had seven salesmen and 32 automobiles which were preceded by the use of from 18 to 25 horses. Across the alley from the bakery and north of defendant's property Mr. Dyar, a riding master by vocation, owns, as he described it, "90 feet frontage and 165 feet depth." His residence, 56 Shipherd, and two tenement houses being on the front, with a riding academy located at its rear on the alley. He testified that during the nine years he had conducted the business he kept from 10 to 58 horses stabled on the premises with the feed for them there; that he was then reducing his riding school business and having constructed on the property a public garage 90x70 feet which would be used for strictly business purposes. At 46 Shipherd, between Dyar's and Pauli's places of business, is the home of a philosophic colored citizen named Buster who appeared as a cheerful witness for defendant. He testified that he owned his home, had resided there with his family for about five years in peace with his immediate neighbors, defendant's operations had not injured his health or bothered him, nor had there been any trouble between him and the lumber shed next to his place; that he was content with existing conditions, having in mind that if a private residence was

substituted as his immediate neighbor there was a possibility, as he stated, "I might be undesirable to them and they might be undesirable to me."

Defendant's machinery is exclusively operated by electrical power, each machine by an independent motor. No fuel is consumed for power purposes. The smoke problem in connection with its heating plant would be no different than that of any business building or apartment of equal size. That and the matter of fire risk are proper subjects in the first instance for municipal control. A smoke consumer has been installed by defendant under direction of the city authorities and an extension of its chimney or change of fuel may, and defendant claims will, obviate the charged smoke nuisance. The offensive conduct of employees and use of the highways amounting to nuisances can and must be eliminated.

The sounding of a gong or whistle on defendant's premises to indicate the starting or stopping of work or for other purposes as was the custom can and must be discontinued, as must also the noisy use of the swing-saw or other appliances more recently installed in the enlargement of defendant's plant which occasioned the shrill, penetrating and disturbing sounds complained of. The escape of sawdust and other light refuse from defendant's mill to be carried by the wind around the neighborhood and upon plaintiffs' premises must be prevented and, in fine, the offensive things in the conduct of the business specifically pointed out and found by the trial court to constitute legal nuisances will be enjoined.

It is claimed for defendant that by change of construction, methods and appliances which it proposes these objectionable features can be eliminated. Defendant's business as originally and for some years conducted occasioned little if any complaint and cannot be held to have been a legal nuisance. Plaintiff

Trybom, a recent advent who moved into the block in 1914 and first complained of the noise to Pauli, Jr., in 1915, told him, "You were not a nuisance when we came, but you are going to be a great nuisance with your heavier machinery." Plaintiffs' counsel says, "It is difficult to say just when defendant's mill became a nuisance." That during its expansion certain features and usages in its operation became such is clearly evident. Its cramped locality, character and the history of its management are such that threatened further enlargement there, either in buildings, machinery or force, must be restrained.

We conclude that upon the record the decree in the first instance should be modified to imposing correction of and enjoining those offensive features in the conduct of defendant's business particularly complained of and found to be nuisances, in harmony with the course adopted in *Ballentine* v. *Webb*, and *Northwood* v. *Asphalt-Paving Co.*, *supra*.

The modified decree prepared for settlement may in form and general outline follow defendant's proposed substitute in the printed record. So modified the decree of injunction will stand affirmed with costs to defendant in this court.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, and STONE, JJ., concurred. KUHN, J., did not sit.

The late Justice OSTRANDER took no part in this decision.

MAIN *v.* GRAND RAPIDS, GRAND HAVEN & MUSKEGON RAILWAY CO.

1. EVIDENCE—REBUTTAL—TRIAL—COMMENT BY COURT.
   Where, in a personal injury case, a physician, called by defendant, testified as to what plaintiff said to him about her headaches, that she said "something of that sort," that he "gathered that inference," the trial court properly permitted her, on rebuttal, to testify as to what she said instead of confining her answers to whether or not she so stated as the doctor testified, and on objection it was not error for the court to comment, "The trouble was that the doctor himself only was able to give his impression or inference from what she said."

2. DAMAGES—FUTURE DAMAGES—RULE.
   Future damages are limited to such as the evidence makes reasonably certain will necessarily result from the injury sustained.

3. SAME—PERMANENCY—EVIDENCE—INSTRUCTIONS.
   Where there was no evidence that plaintiff's injuries were permanent, except as to a slight scar upon the face, instructions that plaintiff would be entitled to recover for future damages without distinct differentiation or direct instruction that under the evidence there was no element of permanency for them to consider, except as to the cut upon the face, *held*, reversible error.

Error to Kent; McDonald, J. Submitted June 5, 1919. (Docket No. 49.) Decided October 6, 1919.

Case by Elva Main, an infant, by her next friend, against the Grand Rapids, Grand Haven & Muskegon Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Carroll, Kirwin & Hollway, for appellant.

John W. Powers, for appellee.

On mental suffering arising from contemplation of disfigurement or mutilation as element of damages for personal injuries, see notes in 15 L. R. A. (N. S.) 775 and L. R. A. 1916E, 893.

STEERE, J. Plaintiff recovered a verdict and judgment against defendant in the circuit court of Kent county for personal injuries sustained in a rear-end collision between two of defendant's cars at a substation called Walker, on its line.

The accident occurred on Decoration day, May 30, 1918. Plaintiff, a young married woman then 20 years of age, had on that day been visiting with her husband near the village of Coopersville and in the evening took one of defendant's cars to return to their home in Grand Rapids. When the accident occurred plaintiff's husband was sitting with his back to the smoking compartment in the front end of the car which they took, while plaintiff sat on the opposite seat facing him. The car in which plaintiff was a passenger reached Walker station about 9 o'clock where it stopped, and just as it was starting to move forward another came around a curve west of the station at its rear and ran into it with sufficient violence to knock off its tail lights, throw passengers standing in the aisle flat upon the floor, shorten the electric circuit and put out all its lights, break the glass in the partition of the smoking compartment, and drive the struck car along the track a distance of 2½ or 3 city blocks before it stopped. Plaintiff's account of the accident and her injuries, confirmed in outline by her husband, is in part as follows:

"I was seated on first seat facing the smoker. It threw glass into my face and cut my face, and hurt the back of my neck; it threw my neck backward; the broken glass cut my face, the glass broken was that between the smoker and the other car; this is the scar (indicating scar), and it made me awful nervous; made me shake. That condition lasted until the next day about noon; I did sleep a little while that night but not very long. My head ached; and the next week I had headaches; right across my forehead and across the back of my neck, just below my hair; I have these about a week, sometimes three times, some-

times only once a week; I had them about the same the week following the accident."

At the time of the trial, four months later, she had a discolored scar upon her face about half an inch long.

Upon the trial it was admitted by defendant that there was a collision at the time and place claimed, one car running into the rear of another, and that the plaintiff, who was a passenger on the car which was run into, received some injuries, the extent of which was in dispute. In extenuation of the collision it was claimed and shown by defendant that it was a dark, foggy night and the rail slippery, making it difficult to stop cars promptly. Of this counsel for defendant said to the jury in his opening statement:

"Of course that does not relieve us from responsibility and that we concede, but as bearing upon the question of negligence of this defendant, we shall show you these facts, and as I have said, we have admitted and do admit the responsibility to this plaintiff to the extent of the injuries suffered; and will depend on you to award such sum as is reasonable and just between the parties to this suit."

The jury awarded a verdict of $1,500 and judgment was rendered thereon, after which defendant moved for a new trial on various grounds, the most strenuously urged being that the verdict was excessive.

Upon the claim that the verdict was excessive and contrary to the weight of evidence the court said in part:

"The jury evidently accepted plaintiff's theory of the case, that is, they found that the defendant was negligent and that its negligence was the proximate cause of her injuries; that plaintiff was in good health prior to the accident but afterwards suffered from severe headaches and nervousness, and that she received a cut upon the face which would be a permanent disfigurement. * * * The cut upon the face

was in a noticeable part of the cheek and was of a permanent character. There is no exact rule by which damages for such injuries can be determined. Their determination should rest in the sound judgment of the jury, who saw the disfigurement and heard all of the testimony. * * * It seems to me that under the circumstances the verdict is not unreasonable or excessive."

Under its various assignments of error defendant asks reversal on three principal grounds which may be stated as follows:

First, That the court erred in giving plaintiff's fifth request to charge, and by the charge permitted the jury to speculate in their award of future damages to plaintiff for permanent injuries, including headaches she might thereafter suffer, of which defendant contends there was no evidence that such would necessarily result.

Second, That the court erroneously permitted plaintiff against objection to testify in rebuttal of testimony by Dr. Baker, a witness of defendant who had professionally examined her as to her injuries, as to what was said, instead of confining her answers to whether or not she so stated as the doctor had testified, and when ruling upon the objection saying in the presence of the jury:

"The trouble was that the doctor himself only was able to give his impression or inference from what she said. I think under these circumstances this question is proper."

Third, That the jury rendered an unreasonable, substantial and excessive verdict for a trivial injury.

Defendant's second objection has little merit. Dr. Baker, who examined plaintiff shortly before the trial, had testified she then stated to him she had headaches at intervals before the trial and more than once a month, "something of that sort," he could not recall just what she said but he "gathered that inference"

from the conversation he had with her on the subject. When called in rebuttal her attention was called to that portion of the doctor's testimony with the inquiry, "What is the fact?" To which objection was made and the court allowed her to answer, with the comment complained of. She then replied, "He asked me how often I had headaches before May 30th, and I told him once a month." In view of the doctor's testimony as to the inferences he gathered without recalling just what language she used, we see no error in permitting the answer she gave to the question asked.

The other two somewhat related grounds call for more serious consideration. The injuries alleged in plaintiff's declaration for which she claims damages are that she—

"became, now is, and always will be permanently injured in her neck and spine and her nervous system is and always will be weakened and impaired, and her face was, now is and will be permanently disfigured, and she will suffer in the future great bodily pain, mental distress and annoyance because of her injuries and disfigurement."

Defendant contends that the court by its charge in effect authorized the jury to award damages for plaintiff's claimed headaches and nervousness as permanent injuries, as to which there was no proof, and also to conjecture as to its recurrence or possible continuation of which there was no testimony amounting to a reasonable certainty. Of the issue upon that proposition the trial court said in denying defendant's motion for a new trial:

"The plaintiff's evidence showed that prior to her injury she had no headaches except during her menstrual periods, but that afterwards they were severe and of frequent occurrence. The defendant claimed that they were due to other causes. These claims present a question of fact for the jury and were prop-

erly submitted. There was no evidence that the headaches and nervousness were of a permanent character, and the jury was not permitted to so find, but it was their business to determine from the evidence the length of time that they would continue."

The charge as it appears in the record does not contain in direct language any mandate that the jury is not permitted to so find, beyond what may be inferable from the instruction as to how that subject may be considered. Instructing the jury that there was no proof of damages for loss of time, services and medical expense, the court stated the elements of damage to be considered under the evidence and pleadings—

"would be pain and suffering, at the time of the accident and afterwards, or for such time as you find she may continue to suffer from headache and her damages from humiliation for disfigurement."

When the subject of damages was next referred to the court said in part:

"The damages to be awarded as compensation in cases of this nature, are contingent on the extent, nature and permanency of the injuries suffered * * * and if you find that defendant's employees were negligent, that the injuries suffered are not serious but superficial then the sum of damages to be awarded should be much less in extent than if they were serious and permanent."

The only further direct reference in the charge to headache and nervousness as elements of damage appears in plaintiff's request number 5 given by the court, as follows:

"If you shall find a verdict for the plaintiff, then in estimating the damages you are to consider the health and condition of the plaintiff before the injury complained of, as compared with her present condition and how long her present condition may continue; and if you find that the plaintiff's nervous system has been impaired, and that she is now subject to sick headaches, and that condition is the natural and prox-

imate consequence of the injury sustained by the defendant's negligence, then you are to consider the same in awarding damages, and if you find that the plaintiff's nervous system has been impaired and she suffers from headaches as alleged in her declaration and that such condition is the result of the injury complained of, then you will consider also in estimating damages how long such condition may continue as far as the evidence shows."

Of the claimed disfigurement, the only evidence of injury or physical impairment resulting from the accident apparent at the time of the trial was a superficial scar on her face about a half inch in length, the discoloration of which had become less noticeable than at first, as she admitted, and which would eventually fade, as physicians testified, to a white line almost imperceptible except on close inspection. At the time of the accident she with her husband took another car and returned to Grand Rapids, there transferring to a city car from which they walked two blocks to their home and retired without finding it necessary to call for or consult a physician. The next morning plaintiff walked from her home to that of her sister, a considerable distance, and from there went down town to the office of Dr. Buhl, over a drug store, to have him treat her face. Dr. Buhl was not called as a witness, and as far as shown she did not thereafter call or consult any physician in regard to her injuries, until her medical witness, Dr. Slemons, examined her preparatory to being called as such. She testified that otherwise than by its appearance the scar occasioned her no annoyance, pain or discomfort. Before and up to the time of the accident she had been employed in a cigar factory operating a machine, and was so employed at the time of the trial. About a week after the accident she resumed her employment in the factory and worked about three weeks when they went north on their summer vacation for two weeks and

on their return she remained at home for the rest of the summer, during which time she did her own housework, visited her sister and went down town once in a while, and returned to her employment in September, over two weeks before the case was tried. She testified that she did not go to work sooner because of frequent severe headaches and nervousness, saying: "I didn't feel like working when I did work, and I wasn't able to work." Three physicians examined plaintiff shortly before the trial, two of whom were called as witnesses by defendant and one by her. Each observed that she had a goiter. Dr. Slemons, called by plaintiff, testified, as did the others, that aside from the scar referred to he found "no other physical defect or impairment the result of the accident." In his opinion the headaches and nervousness with which she suffered, propounded in a hypothetical question, were the result of the accident and not attributable in any sense to her goiter, but he could not tell from the questions propounded and conditions stated, or from his own examination that her headaches or nervousness would be permanent, saying: "The scar is a superficial condition and the headaches are a nervous condition." Defendant's medical witnesses testified in substance that in their examination they found no sufficient physical injuries to have produced the symptoms and conditions complained of and conceding the headaches, nervousness, etc., to be as claimed, such conditions were not in their opinions traceable to the accident, but entirely attributable to toxic secretions and resulting physical disturbances caused by her goiter.

The cut and resulting scar, called by plaintiff's medical witness "a superficial condition," and the headaches, designated by him as "a nervous condition," with whatever pain, suffering and humiliation they caused were issues of fact for the jury involving injuries for which they could award damages according

as the facts were found. There was evidence that the cut upon her face resulted in a scar of permanent character, the extent and duration of which were for the jury, including for their consideration an element of damages for permanent disfigurement. No proof of permanency and no such element of damages were for their consideration in the issue as to headaches, nervousness, etc. The court told the jury plaintiff would be entitled to recover, under the evidence and pleadings, as the facts were determined by them, "for pain and suffering at the time of the accident and afterwards," or "for such time as you find she may continue to suffer from headache and her damages for humiliation," and that "the damages to be awarded as compensation in cases of this nature are contingent on the extent, nature and permanency of the injuries suffered"; and later, without distinct differentiation or direct instruction that under the evidence the element of permanency was not for the jury, except as to the cut upon her face, the jury were instructed that if they found plaintiff suffered from headaches as alleged in her declaration, resulting from the injury complained of, "then you will consider also in estimating damages how long such condition may continue as far as the evidence shows." If from this the jury might not infer they were authorized to find such injuries permanent, the instruction, as claimed to mean, is not in compliance with the accepted rule in this and other jurisdictions applicable to that class of cases entitling plaintiff to recover damages presently for the reasonably certain consequences which will result from an unhealed or yet remaining injury not shown to be permanent. As broadly stated, it furnishes no clear standard for the jury to follow and opens the door for indulgence in conjecture and speculation as to what the result *may*

be to the point of permanency, of which there is no competent proof. The instruction upon that phase of the case should plainly confine its consideration by the jury to such damages as are proximately shown by the evidence with reasonable certainty to result from the existing injury.

"Only such future damages can be recovered as the evidence makes reasonably certain will necessarily result from the injury sustained." 13 Cyc. p. 139.

Such is the settled rule in this State. *Brininstool* v. *Railways Co.*, 157 Mich. 172; *Marshall* v. *Railroad Co.*, 171 Mich. 180; *Kethledge* v. *City of Petoskey*, 179 Mich. 301; *Matthews* v. *Lamberton*, 184 Mich. 493; *Norris* v. *Railway*, 193 Mich. 578. In the *Norris Case* it is said:

"The rule is well settled by these cases that future damages are limited to such as the evidence makes reasonably certain will necessarily result from the injury sustained, and the instruction should have been given in the language there approved."

The judgment is reversed, with costs to defendant, and a new trial granted.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

CITY OF GRAND RAPIDS *v.* KRAKOWSKI.

1. PRINCIPAL AND SURETY—BONDS—SURETY FOR HIRE—LIABILITY—FIDELITY INSURANCE.

   A corporate surety for hire, unlike a gratuitous surety, may not invoke the rule of *strictissimi juris*, but its rights and duties are to be measured as in actions on contracts of insurance.

2. SAME—STATUTORY BOND—FORM—VALIDITY.

   A bond, conditioned upon the faithful performance of the duties of his office, and to account for all moneys, etc., coming into his hands as such, given by the clerk of the superior court of Grand Rapids, naming said city as obligee instead of the people of the State of Michigan, as required by the statute, is nevertheless valid as a common-law obligation.

3. SAME—DUTIES OF CLERKS OF COURTS—SCOPE OF FIDELITY BONDS.

   It is not an unfair assumption that their bonds, conditioned for the faithful performance of the duties of their office, embrace every duty and obligation imposed upon clerks of courts of record by statute, direct lawful order, usage or rules of practice in the courts they serve.

4. TENDER—PRACTICE—MONEY PAID INTO COURT.

   By long-settled practice in this State, money may be paid into court as a tender at any time before plea, as a matter of course, no statute or rule requiring any consent or special order by the court to authorize such payment before pleading, but if a defendant wishes to pay money into court after pleading he must obtain a judge's order for that purpose.

5. SAME—COMPLIANCE WITH RULE—TECHNICAL IRREGULARITY—EFFECT.

   Requirement to enter a common rule as to the payment of a tender to the clerk of the court before pleading, which was not complied with, *held*, to be merely a technical irregularity, and that the purpose was served by the statement or voucher accompanying the check, which was accepted and cashed, stating the title and nature of the suit to which the payment applied, the amount and purpose of

the payment, with the amount to be applied on certain assessments, to recover which the action was brought.

6. PRINCIPAL AND SURETY—BONDS—MONEY PAID AS TENDER—LIABILITY OF SURETY CO.

A surety company was liable upon its bond, conditioned for the faithful performance of the duties of his office by the clerk of a court of record and to account for "all moneys received by him as such officer, or paid into said office while he is acting as such officer," for money paid to him as a tender in an action then pending in said court, which he received and appropriated to his own use.

Error to superior court of Grand Rapids; Dunham, J. Submitted June 11, 1919. (Docket No. 73.) Decided October 6, 1919.

Assumpsit by the city of Grand Rapids against Alexander E. Krakowski, principal, and the Southern Surety Company, surety, on a bond. Judgment for plaintiff. Defendant surety company brings error. Affirmed.

Jewell & Smith, for appellant.

Ganson Taggart (*James H. Campbell,* of counsel), for appellee.

STEERE, J. Defendant Alexander E. Krakowski was clerk of the superior court of Grand Rapids from January 1, 1912, until December 27, 1917, when he was removed from office because of discovered defalcations. The superior court of Grand Rapids was organized under Act No. 49, Pub. Acts 1875, which provided for a clerk required to give a bond, approved by the judge of said court, to the people of the State of Michigan in the penal sum of $10,000 conditioned for faithful performance of the duties of his office and to account for all moneys, records, etc., coming into his hands as such clerk. Krakowski was first appointed to fill a vacancy, the term for which ended May 1,

1912. When appointed he gave a bond running to the city of Grand Rapids in the sum of $10,000 with the defendant surety company as his bondsman. This bond ran through the unexpired term for which he was appointed and was approved by the judge of said court. On May 1, 1912, a new bond of like form with the same surety was given running to May 1, 1914, the clerk's term of office being for two years. This was approved by the common council instead of by the judge of the court, and was renewed by continuation certificates at the expiration of each term to the end of his incumbency. The forms for renewal were furnished by the surety company to be used by its agent who solicited the business, as he explained, "for the convenience of the company and its agents, the same premium being charged as for a new bond," which was regularly paid by the city.

This action was brought by plaintiff on said bond to recover from Krakowski and his surety the claimed amount of his defalcations, which the testimony showed occurred from time to time in each term. He interposed no defense and judgment by default was entered against him for the amount claimed. The defendant surety company pleaded the general issue with various notices and was furnished with a bill of particulars amounting to $4,914.21.

As the case developed upon the trial and is presented here, defendant contests but one item of the claimed defalcations, being a deposit of $2,798.77, made with Krakowski as clerk of the court, by the Grand Rapids & Indiana Railway Company on January 16, 1914, as a claimed tender paid into the superior court in an action by the city of Grand Rapids against said railroad company for certain special taxes, the validity and amount of which was the subject of litigation in that court and case. Before this action was begun the Grand Rapids & Indiana Railway Company as-

signed to the city all its right, title and interest in the money which it had deposited as a tender with Krakowski as clerk. No order or rule of the court was filed or entered in relation to such deposit. The payment was made by a voucher bank order stating what it was for, payable to "the order of clerk of the superior court of Grand Rapids." Krakowski indorsed it as such clerk and was paid the amount which he appropriated to his own use, making total default as to the same. At the time of the deposit he entered it in the cash book, and in the ledger regularly kept in connection with his office as follows:

"City of Grand Rapids *vs.* G. R. & I. Railroad Company, 1914, January 16, tender $2,798.77 page 38 cash book."

He also gave to the railroad company's attorney the following receipt:

"No. 316. Superior Court of Grand Rapids, Mich.,
"January 16, 1914.

"Received of James H. Campbell, attorney, the sum of two thousand seven hundred and ninety-eight and 77/100 dollars for tender in the case of the city of Grand Rapids *vs.* G. R. & I. Railway Company.

"$2,798.77 (Signed) ALEXANDER E. KRAKOWSKI,
"Clerk and register of said court."

The bond sued upon is concededly not in form or to the obligee prescribed by statute, but its validity as a bond, or common-law obligation, is not questioned. The condition of said bond is as follows:

"Now, therefore, the condition of the foregoing obligation is such, that if the said Alexander E. Krakowski, shall and does faithfully perform the duties of his said office, and does on demand deliver over to his successor in office, or other proper officer or agent of said municipal corporation, all books, papers, moneys, effects and property belonging to said corporation, or appertaining to his office, which may be in his custody and received by him as such officer, or paid into said

office, and will on demand pay over and account to said municipal corporation, or to any proper officer or agent thereof, all moneys received by him as such officer, or paid into said office while he is acting as such officer, then these presents and all herein contained shall be null and void; otherwise in full force and virtue."

The material facts are practically undisputed, and the case was tried by the lower court without a jury. Plaintiff had judgment for the full amount claimed.

Counsel for the defendant surety company state their contentions as to the item of claimed tender by the railroad as follows:

"(*a*) This money is not recoverable under the first condition of the bond, because it did not belong to the city, for the reason that money paid to the clerk of a court of record without an order of the court remains the property of the person paying it, until accepted by the opposite party, or until control thereof is taken by the court.

"(*b*) This money would not be recoverable by the railway company (therefore not recoverable by the city by virtue of its assignment) under this bond running to the city only, there being no privity of contract and no right to sue thereon given by the statute.

"(*c*) There is no liability under either condition of the bond, whatever the ownership, because there was no official duty on the part of the clerk to receive this deposit of money and, consequently, his doing so was not an official act which could create liability against the surety on the bond in question."

The contention between the city and railway company which occasioned the deposit in question with Krakowski as a tender into court arose over a special street improvement tax for $3,016 levied against the railroad on certain lands, a portion of which the latter claimed not to own. It tendered to the city the amount which it conceded was a proper tax on its land. This was refused by the city and an action followed to recover the full tax claimed. After notice

of appearance and before pleading, counsel for the railway company paid the admitted amount to the clerk of the court in which the suit was brought for the purpose of keeping the tender good, and notified the city attorney of the fact.

It is conceded by defendant's counsel that had there been an order of the court recognizing this tender no question could be raised as to the clerk having received the money in performance of an official duty, binding him officially and his bondsman. In whatever form presented defendant's denial of liability is bottomed on its primary contention—

"that this record does not show a case where the party had a right to make the payment into court, and that some order of the court, at least, was necessary. The least that could be required under these circumstances was the filing or entry of such an order as, under the old practice, was ordinarily entered in the common rule book."

While the distinction is not of controlling significance here, as the case more directly turns on the law of tender in this State and whether the terms of the bond cover this money paid into the clerk's office for the purpose of a tender, yet as bearing upon defendant's relations with plaintiff it is to be borne in mind that defendant is engaged in the surety business for profit, its compensation being in proportion to the kind and amount of security sold. Its agent solicited from plaintiff the business of writing this bond and the city paid the premiums. Defendant may not, therefore, as could a gratuitous bondsman, invoke strictly technical relief under the rule of *strictissimi juris*. For pay and as a purely business transaction it accepted and adopted the provisions of this bond, contracting to perform according to the terms of the fidelity insurance it wrote. Its rights and duties are to be measured as in actions on contracts of insurance.

Ladies of Maccabees v. *Surety Co.*, 196 Mich. 27. In that connection it is not to be overlooked that the conditions of this obligation imposed upon defendant's principal not only faithful performance of the duties of his office, to account for and pay over all moneys received and held by him as such officer, but also "all moneys * * * paid into said office while he is acting as said officer." Whether or not legally and technically within the scope of his official position to receive, hold and account for this money as such officer, it certainly was paid into said office while he was acting as such officer, and paid to him in his office accompanied by a voucher fully advising what it was for and why paid to him at that time and place.

The substance of defendant's contention is that this payment of a claimed tender was but a private transaction between the railway company and Krakowski as an individual; that the money deposited with him was never in his hands by virtue of his office, because not received in performance of any duty of his office prescribed by statute or order of the court of which he was clerk. Various aspects of this proposition are ably argued for defendant in technical detail with many citations of authorities, largely from other jurisdictions. The question is primarily to be tested by Michigan practice and decisions as applied to the conditions of this bond. It was executed for and by Krakowski as a public officer, in assumed compliance with statutory requirement. It is conditioned for faithful performance of the duties of his office in terms harmonizing with the spirit and intent of legislative requirement for protection of both public and private interests which might be detrimentally affected by the negligence, peculation or other malconduct of such officer. None of its provisions is prohibited by statute or against public policy. It is valid as a common-law obligation even though the obligee

be other than designated by statute. *Bay County* v. *Brock*, 44 Mich. 45; *Board of Education* v. *Grant*, 107 Mich. 151; *People* v. *Newberry*, 152 Mich. 292; *Kuhl* v. *Chamberlain*, 21 L. R. A. (N. S.) 770, note (140 Iowa, 546, 118 N. W. 776); 32 Cyc. p. 58.

Concededly there is no direct statutory provision expressly directing in detail the manner of paying money into a court of record to keep good a tender, or as a tender, to the opposite party in a suit pending in such court; neither was any order made in this case by the judge of the court in relation to the money deposited, and it is contended for defendant that in the absence of an order by the court or some express statutory provision no official duty rested upon the clerk to receive the money and no liability fell upon his surety for any defalcation as to it. Decisions are cited from other jurisdictions in support of this proposition, and there are decisions tending to the contrary.

It would be a narrow, if not novel, interpretation of statutes providing for clerks in courts of record to hold that they had no duties or responsibilities in that capacity except as each of the many daily duties of their office great and small, which long usage and the nature of their position demands, was specifically designated by detailed provision of statute, or even by some direct order of the court. In performance of the many routine, non-judicial functions of the court they in a sense are a part of and represent it, for they are required to perform duties which without them would be incumbent on the judge of the court. To them is confided the care and custody of the court's office, files and records, with the responsibility for their correct and safe keeping, and various other necessary ministerial duties which by combination of written and unwritten law enacted or developed by custom and long usage appertain to courts of record. It is not an unfair assumption that their bonds con-

ditioned for the faithful performance of the duties of their office embrace every duty and obligation imposed upon the clerk of a court of record by statute, direct lawful order, usage or rules of practice in the courts they serve. Though not in all particulars controlling here, the case of *Howard* v. *United States*, 102 Fed. 77, 42 C. C. A. 169, affirmed 184 U. S. 676, in a general way expresses and elaborates such view, and holds that a bond of the clerk of the United States circuit court conditioned "faithfully to discharge the duties of his office" embraces every duty and obligation imposed on the clerk "by law or the lawful order, usage and practice of the court."

The payment into court in this case was primarily to keep good a tender made before action and not wholly under the statute, which provides for a tender after suit is brought. The distinction seems, however, of little importance here as the payment was in fact made to Krakowski after suit was brought and by long-settled practice in this State money may be paid into court at any time before plea as a matter of course, although it is said of a tender before suit that when the same is regular and supplemented by payment into court the money is relinquished to the plaintiff, and the trial court was right in refusing plaintiff a judgment for the sum tendered. *Wetherbee* v. *Kusterer*, 41 Mich. 359.

No statute or rule in this State requires any consent or special order by the court to authorize such payment before pleading. If a defendant wishes to pay money into court after pleading he must obtain a judge's order for that purpose. In Green's Practice (of 1866) (2d Ed.), p. 313, the adopted manner of making payment is thus stated in part; italicized as shown:

"Money may be paid into court at any time before plea pleaded, as *a matter of course;* or *after* plea, on

obtaining a *judge's order* for that purpose. (1) If before plea, a rule should be entered for that purpose in the book of common rules. (2) The money must be then paid to the clerk, who will give a receipt for it. * * * If the defendant wish to pay money into court after pleading, he must get a judge's order for that purpose and serve it on the plaintiff's attorney, and pay the money as above indicated. * * Under the former mode of pleading, when a tender before suit brought was pleaded, the money must be paid into court, and notice of the payment given with the plea; (6) otherwise the plaintiff might treat the plea as a nullity and proceed to judgment. (7) * * * According to our present practice, the money tendered should be paid into court, and notice thereof given under the plea of the general issue."

In 1 Abbott's Practice (of 1901), § 1035, the practice is stated as follows:

"In cases where the claim of the plaintiff is for a sum certain, or capable of being ascertained by mere computation, the defendant may, in order to prevent the expense of further proceedings, pay into court such a sum of money as he acknowledges the plaintiff ought to recover. The payment is usually made to the clerk of the court, and is equivalent to a confession of the plaintiff's claim to the amount paid in and a tender of such amount. When made at the time of, or prior to, the plea, no rule or order is necessary, although it would be proper to preserve evidence of the fact, but when, after plea, the defendant desires to pay money into court, a motion should probably be made for leave. The payment may be made upon all the counts in the plaintiff's declaration or upon only a part of them."

The method of paying money into court as stated by text writers on Michigan practice is substantially in harmony with the old common law practice as laid down by early English and American authors upon that subject. *Vide* 1 Burrill's Practice (2d Ed.), 407, and 1 Tidd's Practice (4th Am. Ed.), p. 621, which dealt with the more technical refinements of earlier

practice in the court of the King's bench and common pleas. Of the then practice in such proceeding it is said in part:

"The motion for leave to bring the money into court is a motion of course and should regularly be made before plea pleaded * * * the money should be paid to the signer of the writs who acts in this instance as deputy to the master and will give a receipt for the money. * * * The rule for bringing in the money is drawn up, in this court, by the clerk of the rules in term time, or within a week after, on the motion paper and receipt being left with him as instructions."

Accepting Abbott's Practice as authority, no rule or order was necessary, as the deposit was made with the clerk prior to the plea, but conceding that it is yet in accordance with good practice, a relaxation of former more strict requirements is indicated in Rule No. 11 of Circuit Court Rules of 1897 (in force when this deposit was made) which provides:

"(*a*) Every rule to which a party would, according to the practice of the court, be entitled of course, without showing special cause, shall be denominated a common rule; * * * All common rules and all rules by consent of parties shall be entered with the clerk at his office, in a book to be provided by him for that purpose to be called 'common-rule book.'

"(*b*) Except as required by statute, such rules may be filed with the clerk with the like effect as if entered as above provided."

In so far as the filing or entry of a common rule would furnish any useful information to the clerk or his office, that purpose was served by the statement, or voucher, accompanying the so-called "voucher check," which he accepted and cashed, stating the title and nature of the suit to which the payment applied, the amount and purpose of the payment, with the amounts intended to be applied on each assessment to recover which the action was brought. Under such

circumstances failure to file a formal common rule, which would ordinarily furnish less information, was but a technical irregularity in practice, affording no adequate ground for evading liability under the plain conditions of defendant's contract of surety that Krakowski should "faithfully perform the duties of his said office," and on demand account for not only money and other property coming into his custody as such officer, but all moneys "paid into said office," to him, acting as such officer and fully advised of its purpose, and was received by him ostensibly in his official capacity by virtue of his office.

The judgment is affirmed.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

SWACZYK *v.* DETROIT EDISON CO.

1. DEATH—ACTION—DEATH ACT—SURVIVAL ACT—TEST.

   The recognized test in this State distinguishing between the two causes of action, survival and instantaneous death, is whether the active cause of death continued to operate directly upon the injured person until life was extinct; that he did not regain consciousness is not a test of instantaneous death.

2. SAME—ELECTRICITY—INSTANTANEOUS DEATH—EVIDENCE—QUESTION FOR JURY.

   Testimony by a disinterested witness that deceased lived about an hour after he found him lying on the ground in contact with a "live wire," which was supplemented by the testimony of two boys, companions of deceased, to the same effect, *held*, to present a question of fact for the jury as to whether death was instantaneous.

3. SAME—ELECTRICITY—INSPECTION—NEGLIGENCE—TRIAL.
In an action for the death of a boy caused by his coming in contact with a live wire which defendant had left attached to a lunch wagon standing in front of a vacant lot after service was discontinued, and which fell to the ground after said wagon was moved by a third party without defendant's knowledge or consent, the trial court was not in error in submitting the case to the jury on the issue as to whether such time had elapsed since the wires fell upon the ground and became a public menace that defendant should have observed their dangerous condition and remedied it, in the exercise of reasonable care and vigilance in the conduct of its business under the circumstances shown, and in view of the dangers connected with the business in which it was engaged.[1]

4. SAME—PLEADING—DECLARATION—INSPECTION.
Although the declaration did not contain the words "inspect" or "inspection," the conclusion of the trial court that there was enough in the declaration to warrant the submission to the jury on that issue, *held*, justified.

5. SAME—NEW TRIAL—WEIGHT OF EVIDENCE.
Held, that the verdict for plaintiff was not so against the weight of the evidence as to require a reversal.

6. DAMAGES—DEATH—SURVIVAL ACT—EXCESSIVE VERDICT.
In an action under the survival act for the death of a boy 13 years old, by electrocution, where the evidence shows that he lived only about an hour after the injury, and the distinction between the "survival act" and the "death act" in this case is largely technical, there being no long period of suffering of mental and physical distress warranting a large verdict to the actual survivor, the verdict for $6,500 *held*, to a degree excessive, and reduced to $5,000, for which amount judgment is affirmed conditional on acceptance.[2]

Error to Wayne; Hosmer, J. Submitted June 3, 1919. (Docket No. 10.) Decided October 6, 1919.

Case by Stanislaus Swaczyk, administrator of the

[1]On the general rule relating to duty of electric company to prevent contact of wires carrying electric current, see note in 52 L. R. A. (N. S.) 587.

[2]On excessiveness of damages for personal injuries resulting in death, see comprehensive note in L. R. A. 1916C, 820.

estate of Stanley Swaczyk, deceased, against the Detroit Edison Company for the negligent killing of plaintiff's decedent. Judgment for plaintiff. Defendant brings error. Affirmed, conditionally.

Oxtoby & Wilkinson (*McKee Robinson,* of counsel), for appellant.

Clarence P. Milligan, for appellee.

STEERE, J. Defendant appeals from a judgment for $6,500 rendered against it in this action of tort for the death on March 21, 1917, of plaintiff's son, Stanley Swaczyk, a boy 13 years of age, caused by his coming in contact with a live service wire of defendant lying on the ground in a vacant lot on the west side of Russell street between Medbury and Palmer avenues, in the city of Detroit. The wire extended from an electric light pole in an alley at the back of the lot to an idle lunch wagon which had stood when in use at the sidewalk line on Russell street but at the time of the accident had been moved back on the lot some distance, causing a slack in the wires.

Prior to March, 1917, this vacant lot was resorted to as a playground by children of the vicinity at their pleasure and frequently crossed for a short cut in travel by any one finding it convenient so to do. At one time it was temporarily occupied for a carnival. Later this lunch wagon was moved upon the lot and placed for business purposes on the sidewalk line of Russell street. A Mrs. Parsons had a permit to use it for a restaurant from November 1, 1916, to November 1, 1917. She applied to defendant for electric service at the wagon, which was furnished her with the customary connection and meter from December 21, 1916, to January 25, 1917, when it was discontinued and the meter removed. The unoccupied wagon was left on the lot and the service wires to it from

the pole in the alley were left connected by defendant in anticipation that some one might thereafter use the wagon at that point and require electric service, it being customary in such cases, as defendant's evidence showed, to leave such wires connected when removing the meter, in readiness to give prompt electric service to the next occupant. As the wagon then stood and the wires were left no question is raised but that they were put up in a proper manner and left in a reasonably safe condition. It was said to be a frequent occurrence for defendant to furnish electric service in the city of Detroit for a longer or shorter time to portable or temporary structures, such as lunch wagons, fruit stands, small real estate offices, election booths, etc., leaving the wires connected in case of vacancy as was done in this case.

About March 1, 1917, a contractor and builder named Robert Keyes took possession of the lot and commenced the erection thereon of a steel and concrete building for the Central Boiler Works. No basement was contemplated and he began work by excavating a trench for the foundation along the north side of the lot. About a week after work began he found the lunch wagon in his way and moved it back on the lot towards the alley. It was a heavy wagon and he moved it with a crew of men and team, about 40 feet back from Russell street. As this was done he had the slack in the electric wires from the pole in the alley wound up and hung over the glass insulators of the wagon, leaving them extending from the pole to the wagon sufficiently high that men and teams could pass and work under them as before. Building material, such as lumber, steel, brick, etc., was scattered over the lot and Keyes had erected a work shed on the west side of it for storage of cement, tools and other things requiring shelter. Some time before this

accident the coiled slack in the wires which he had hung on the insulators at the wagon had in some way gotten off and for a portion of the distance between the pole and the wagon lay on the ground, to which no attention was paid by Keyes or his employees, as the wires did not happen to be in their way and they did not know they were electrically charged. Keyes testified that he saw them lying on the ground for at least a week before the boy was killed, and there was testimony by two of deceased's playmates that these wires had lain upon the ground much longer; that after the wagon was moved back and the wires partly fallen to the ground some of the boys used to swing on them near the wagon.

At the time of the accident plaintiff's decedent, Stanley Swaczyk, was playing tag on this lot with two other boys and ran in between the work shed Keyes had built and a closeby building on the adjoining lot, belonging to the Grand Rapids Blower Pipe Company. The slacked electric wires lay along the ground at this place with what is called a "coil"; in behind the building. The boy was first seen to be in trouble by a watchman of the nearby American Car & Foundry Co., named Sackett, who had just quit for the day and was going from his work diagonally across the vacant lot. His first impression was that the boy had fallen from the building, as he saw him lying in there on some brick and cement blocks with his head back, apparently making efforts to get away. Sackett called the other boys, at the same time going around some mud and water to get nearer. He said the boy at that time "laid different ways—kind of rolled down the block," and the other boys who had come at his call dragged this boy out to him. Asked as to how the boy acted, he replied, "He looked at me and I could see he wanted to say something. I felt very sorry for him." Asked if he was then alive,

he replied, "Oh, yes," because he moved his hands, and was breathing, and spit something out of his mouth and moved his tongue. Sackett carried him to a lumber pile about 50 feet away, observed he was "in pretty bad shape" and told one of his playmates to run over to the nearby Foundry Co.'s office for help and sent the other to tell the injured boy's parents. Help not coming promptly, he himself ran to the Foundry Co.'s office and telephoned for medical aid which arrived about the time he got back to the injured boy who was yet alive, as he testified. Unsuccessful efforts were made by and under directions of the doctor to resuscitate him, in which Sackett assisted, remaining while the doctors were working over him and until he was pronounced dead, about an hour later.

At commencement of the trial counsel for defendant interposed objection to the introduction of any testimony under plaintiff's declaration on the ground that it combined two distinct causes of action in one count—under the survival act and under the death act—insisting on such objection "until counsel amends to make it one or the other." Counsel for plaintiff then amended, or elected to claim under the survival act, and the trial proceeded upon that alleged cause of action.

Recovery under the death act having thus been eliminated, counsel for defendant then contended by objection, motion and request to charge, that recovery could only be had, if at all, under the death act, asking a directed verdict for that reason, which was refused.

Defendant's most strenuous contention is that the evidence shows the boy was instantaneously killed, any subsequent manifestations of life witnesses testified to being "but spasmodic muscular movements" after life was extinct, and, viewed most favorably, the verdict was against the great weight of evidence. In his reasons for denying defendant's motion for a new

trial on that and other grounds the learned circuit judge who heard the case said:

"The evidence shows that the deceased lived something like an hour, I believe, after he had been moved from contact with the wire. If he had lived for 24 hours, no one would have dreamed of saying the cause of death was continuous, or have compared the injury in question with a death by drowning. I cannot differentiate between an hour and a day."

What testimony there is upon the subject of survival is undisputed. Defendant called no witnesses to that issue. The only medical testimony offered was that of Dr. Dick, called by plaintiff to show the cause of death. He examined the boy's body after it was taken to the morgue and held an autopsy. He merely testified that in his opinion the boy died of an electrical shock, which operated to cause death by "overstimulating." No one saw deceased when he first came in contact with the live wire, which carried 110 volts, or knew how long it operated directly upon him. The three witnesses who saw him in contact with it testify that he was then alive, making efforts to escape; that he remained alive after he was released and the admitted cause of his death had ceased to operate directly upon him, and was yet alive after he had been carried to the lumber pile and medical aid arrived. Their testimony is positive that he was not dead when released from the wire, that he sat up, endeavored to get upon his feet, looked at them and tried to talk in a manner indicating he wanted to say something, though unable to do so; the boy sent for his parents testified he was yet alive and breathing, after he returned. The testimony of the two boys while positive is perhaps least satisfactory, owing to their youth, inexperience and friendship for deceased, but Sackett had never seen the boy before, was apparently a disinterested witness, an intelligent man 43 years of age who

had actual experience and training in dealing with and observing the physical manifestation of injured persons, acquired when a non-commissioned officer in the regular army. He frankly stated that he could not say the boy ever regained consciousness, or just when he died, but was positive as to his being alive for some time after he was released from the wire, and described the various manifestations of it; said he knew he was alive after he placed him on the lumber pile because he breathed and "moved his eyes and his tongue, and moved his legs" and moved after the doctor who pronounced him yet alive got there. Asked how many times the boy tried to get on his feet or get up, he replied:

"I could not say how many times he did try. I know he was in distress and struggled as a person would in that case.

"*Q.* And that went on how long?

"*A.* It was fully an hour. It began to get dark when they pronounced him dead."

While there is some evidence from which it might be contended the boy was conscious after his release from the wires, yet conceding to the contrary, the fact that he did not regain consciousness is not a test of instantaneous death.

"There is no occasion for saying that one dies instantly because such survival is accompanied by a comatose condition, or unconsciousness, or insanity, or idiocy." *Olivier* v. *Railway Co.*, 134 Mich. 367 (3 Ann. Cas. 53).

The recognized test in this State distinguishing between the two causes of action, survival and instantaneous death, is whether the active cause of death continued to operate directly upon the injured person until life was extinct. *Ely* v. *Railway*, 162 Mich. 287. Concededly death from an electric shock is not necessarily instantaneous. Persons may and do suffer in-

juries from that source in all degrees from a temporary nervous disturbance or slight burn to permanent injury or sudden death, contingent on many conditions and particularly on the voltage or electromotive force of the current received, as reckoned in volts. In this case those service wires are stated to have carried 110 volts. In *Brabon* v. *Power Co.*, 201 Mich. 697, cited by defendant, deceased was found dead on a rainy morning yet standing in contact with the metal siding of an elevator building claimed to have become charged through faulty wiring from a primary line carrying 2,300 volts. It was evident that the cause of death continued to operate upon him until life was extinct, and until he was found dead. It was under such a state of facts this court said:

"The man was killed by a current of electricity received when he leaned against or touched the metal wall, and whether one or more minutes elapsed before life was extinct is not material."

In the more recent case of *Paperno* v. *Engineering Co.*, 202 Mich. 257, where deceased was killed while working on the track of an interurban electric line by the high tension current from a "third rail" carrying 2,400 volts and there was some evidence of his continuing to breathe for 17 or 18 minutes after being released from the current, this court held there was sufficient testimony to carry the question of survival to the jury. To a greater degree the undisputed facts disclosed by this record make a case for the jury under the survival act.

It is further contended for defendant that it was guilty of no negligence because it left the wires when the meter was removed in a safe condition and their subsequent unsafe condition with the resulting accident is attributable solely to the conduct of Keyes in moving the wagon and slacking the wires, of which defendant had no knowledge or notice and for which it

is not responsible. As the court left the case to the jury the questions involved in that proposition are in effect eliminated by the charge, which confined the issue of defendant's negligence to the one question of proper care and inspection of the wires after Keyes moved the wagon, telling the jury that there was no evidence the service wires were left by defendant in an unsafe condition, and that defendant was not bound to remove its electrical service wires from the lunch wagon when the service was discontinued to Mrs. Parsons, saying further:

"The defendant was not bound to anticipate that a third party might so move the lunch wagon as to make the service wires leading to it dangerous to the public, nor was it bound to anticipate that the lunch wagon might be moved without notice to it. * * * What the defendant was required to do in this case was, after the removal of the meter, to exercise a reasonable inspection with reference to the condition of the wires. * * * If the current is left upon them they must exercise a certain care—reasonable care in the inspection of their property to see that by the action of the elements or otherwise those wires are not broken or removed from the building, and so become a danger to the public in general. * * * The question for your determination, gentlemen of the jury, is whether these wires which had been removed by the contractor and wound in loops around the bracket had come down to the ground and remained upon the ground such a length of time that the defendant company, considering the dangerous character of such wires, ought by a reasonable degree of care to have known of its condition and remedied it. * * * If anybody is furnishing electricity as furnished by the defendant company in this case, a very high degree of care is enjoined, and I may say, gentlemen of the jury, it is perhaps the highest degree of care which is reasonably practical; not if by the expenditure of a sum which perhaps would be prohibitive a higher degree of care might be maintained, but it is perhaps as high a degree of care as is reasonably practicable under the circumstances of the case."

To the portions of the charge quoted defendant assigns error on the ground that failure to inspect is not charged in plaintiff's declaration, and a too high degree of care is imposed upon defendant by the language used. Although in alleging and arguing the duties and failures of defendant in connection with this accident, plaintiff's declaration makes a heavy draught on the vocabulary of negligence, it must be admitted that the words "inspect," or "inspection" escaped the pleader, and in the particulars pointed out the declaration is technically defective. But under the assumption that the greater includes the less we see no reason to disturb the conclusion of the trial court in denying defendant's motion for a new trial that:

"There is enough in the declaration to warrant the submission to the jury on that issue. Certainly the counsel could in no wise have been surprised by the submission to the jury on this phase of the case."

Plaintiff alleged and claimed other grounds of negligence, including leaving the electrically charged wires attached to the wagon after service was discontinued, which the court rejected, confining the inquiry to failure of defendant to properly look after and care for its wires between the time they became in an unsafe and dangerous condition and the accident. To inspect simply meant, as applied to the issue here, to look after, pay attention to and reasonably care for these live wires running to an unused wagon on a vacant lot and see that they remained in as safe condition as when left. In *Sumner* v. *Edison Co.*, 187 Mich. 169, where failure to inspect was not technically charged, defendant assigned error on the charge of the court that "defendant would be liable, unless the defendant had duly inspected the rope and found it sound," of which this court said:

"In other words, that a recent inspection of the rope and finding it sound, if shown by defendant,

would relieve it from liability in this case. The court was not in error in so charging the jury as to inspection."

Under the declaration and facts in this case we find no reversible error in the court's charge as to inspection, which in substance narrowed the issue for the jury to the question of whether such time had elapsed since these wires fell upon the ground and became a public menace that defendant should have observed their dangerous condition and remedied it in the exercise of reasonable care and vigilance, in the conduct of its business under the circumstances shown and in view of the dangers connected with the business in which it was engaged.

Neither do we think the language of the charge imposed too high a degree of care as to the public upon those engaged in the business of handling electric currents. Counsel for defendant contends that it imposed a greater duty than the settled rule in this State by which every one in the conduct of his business, whether hazardous or otherwise, is only bound to the exercise of reasonable care under all the circumstances. Reasonable care is to be determined by, and must be commensurate with, the risk involved, within the limits of reasonable practicability under the circumstances, which is the substance of the test stated by the trial court. In *Warren* v. *Railway Co.*, 141 Mich. 298, numerous cases are cited from other States showing the trend of decisions upon this subject, and it was there said in that connection:

"We find it unnecessary to say, as some courts have said, that the use of electricity imposes the duty of the greatest possible care."

Several of the cases cited in the *Warren Case,* and others which may be found, appear to put no limit on the superlative but impose without qualification "ut-

most care," "greatest care," "constant oversight," "utmost degree of care," "highest degree of care," etc. Such is not the unlimited requirement in the language complained of, which expressly excludes an impractical, or prohibitive "utmost," or "highest degree" of care. The court said that of those engaged in the business of furnishing electricity to the public was demanded only "as high a degree of care as is reasonably practicable," or, in other words, as is consistent with the practical conduct of their business according to best known methods and usage. This court has twice said that a "very high degree of care for the protection of life" is imposed upon those engaged in that business. *Huber* v. *Electric Co.*, 168 Mich. 531; *Paperno* v. *Engineering Co., supra.*

It is further urged that the case should be reversed because the verdict was against the great weight of evidence and excessive. That the case is by the evidence put on the border line between the survival act and the death act is true, and what the verdict would have been had both been submitted to the jury is highly problematical, but we cannot conclude as a matter of law that the verdict was so against the overwhelming weight of evidence as to demand invasion by this court of the province of the jury in that particular. Had recovery, however, been restricted to the death act the verdict would have been clearly excessive. In its practical aspect it may be conceded the distinction is largely technical. Conscious pain and lingering suffering of the survivor, with attendant mental and physical distress, perhaps for many years, or the balance of a probably protracted life, for which large verdicts to the actually surviving injured party have sometimes been sustained, are not involved here, and that class of cases is not applicable. There is force in the contention that under the facts and circumstances here shown the verdict is beyond the com-

monly recognized fair measure of damages and to an extent excessive.

If plaintiff concedes by remission a reduction of the verdict to $5,000 the judgment will stand affirmed with costs to defendant, otherwise the same will be reversed with costs to defendant and a new trial awarded.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

OCTOBER TERM, 1919.

SIMMONS *v.* PETERSEN.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PERSONAL INJURIES—QUESTION FOR JURY.
   In an action for personal injuries caused by a collision between defendant's automobile and plaintiff's buggy, where there were controverted questions of fact, the questions of defendant's negligence and plaintiff's contributory negligence were properly for the jury.

2. APPEAL AND ERROR—EVIDENCE—WEIGHT OF EVIDENCE.
   This court will only reverse a case upon the question of the weight of the evidence when the verdict is against the overwhelming weight of the evidence.

3. EVIDENCE—EXCLAMATIONS OF PAIN AND SUFFERING—HEARSAY.
   In an action for personal injuries, testimony by plaintiff's daughter as to exclamations of pain and suffering by plaintiff in her presence, *held*, admissible.

   PER STONE, MOORE, STEERE, and BROOKE, JJ.

4. TRIAL—INSTRUCTIONS—NEGLIGENCE—DEGREE OF CARE REQUIRED.
   In an action for personal injuries, caused by defendant's automobile colliding with plaintiff's buggy at a street intersection, an instruction by the trial court that the jury were to determine whether, under all of the circumstances, the driver of the automobile did "everything possible after he had discovered the danger to prevent an accident," *held*, erroneous, as it held him to a higher degree of care than the law demands, and may have misled the jury.

5. WITNESSES—CREDIBILITY—DRIVING AWAY FROM PLACE OF ACCIDENT—TRIAL—INSTRUCTIONS.
   In an action for personal injuries caused by defendant's automobile, driven by his son, colliding with plaintiff's buggy, where it appeared that the conduct of the son at the time of the collision, and immediately thereafter, was not in violation of 1 Comp. Laws 1915, § 4816, it was error for the court to instruct the jury that his driving away from the place of the accident might be considered as bearing on his credibility as a witness, he having testified to very material matters. Per STONE, MOORE, STEERE, and BROOKE, JJ.

Error to Montcalm; Snow, J., presiding. Submitted June 4, 1919. (Docket No. 39.) Decided November 5, 1919.

Case by Sanford Simmons against Frank Petersen for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Rarden & Rarden (*S. H. Person* and *Dean W. Kelley,* of counsel), for appellant.

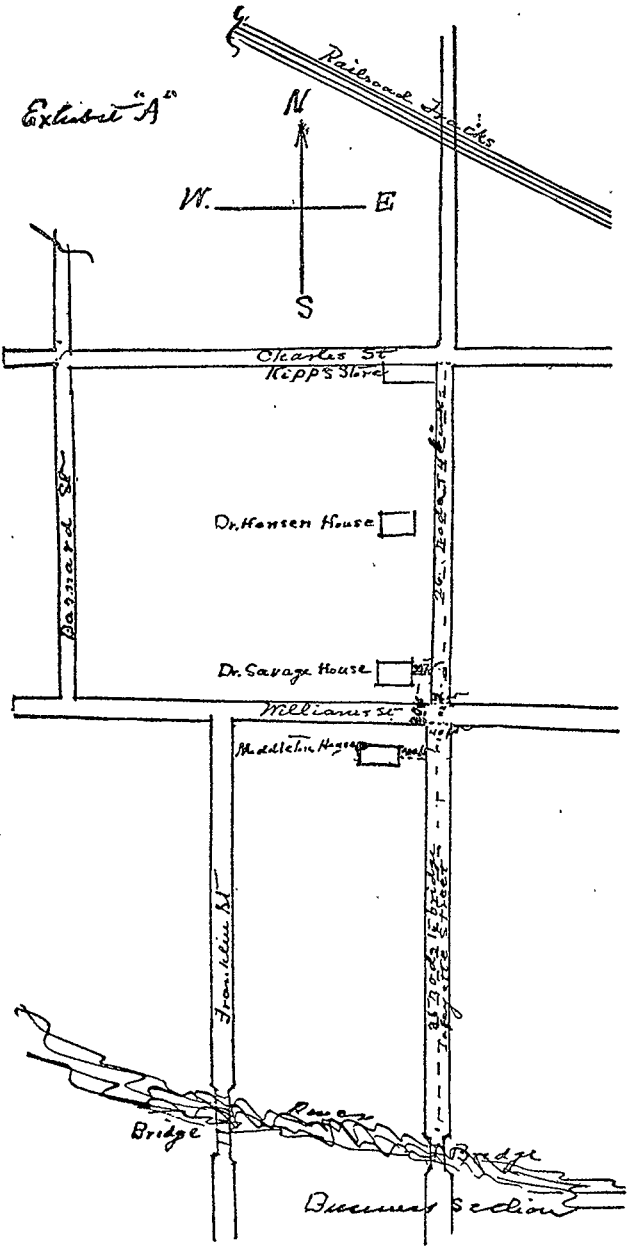
Nichols & Nichols (*A. R. Locke,* of counsel), for appellee.

STONE, J. This case was brought here by the defendant to review a judgment for the plaintiff obtained in the circuit court for the county of Montcalm. This suit was begun on October 6, 1917. The declaration alleged that on September 6, 1917, the defendant was the owner of a Dodge touring automobile, which, at the time of the injury complained of, was being driven and operated by one Ralph Petersen, a son of defendant, who was at the time driving the same with the express knowledge and consent of the defendant; that on the evening of said day, while in the exercise of due care and caution, the plaintiff was lawfully proceeding with a team of horses and buggy up Williams street, a public street in the city of Greenville, and had reached a point directly past the center of Lafayette street, a public street in said city, which the said Williams street intersected at right angles; that the plaintiff was, at the time of the injury complained of, turning his horses at said intersection of said streets, for the purpose of proceeding northward on Lafayette street; that the plaintiff was, at the time of the injury, at the extreme right of Williams street and his buggy was located directly south of the center of said Lafayette street at the intersection of said streets, and the horses on said buggy were facing, or had started to face in a northerly direction upon Lafayette street, upon the intersection, when the said automobile of said defendant was so carelessly managed and driven that it ran upon and crashed into said buggy of the plaintiff, throwing him to the

ground, and causing him great injury, pain, and suffering, and greatly damaging said buggy; that there was at the time of said injury six to eight feet or upwards between the rear of said buggy and the westerly curb of Lafayette street, and sufficient room between the said curb and buggy for said automobile to have been driven safely between said rear end of said buggy and the said westerly curb of Lafayette street, had any degree of care been used in the operation of the same.

It is alleged that the negligence complained of consisted in said automobile striking the plaintiff's buggy; in running said automobile at an excessive and unlawful rate of speed, and in failing to sound a warning as said Ralph Petersen was approaching said intersection; and failing to go through the space between the rear end of plaintiff's buggy and the westerly curb of Lafayette street; in failing to slow down and come to a stop before striking said plaintiff's buggy; and in failing to take heed or notice that plaintiff's buggy was in the process of crossing, and making the turn to proceed in a northerly direction up Lafayette street. The plaintiff's bodily injuries consisted of a broken right hip, and shock to his nervous system by being thrown to the pavement, mental and physical suffering, and claimed permanent injury to said limb. A map of the place where the collision occurred, and of the vicinity, found on page 14 of the record, is appended here for convenience of reference. Some points testified to, and not in dispute, are as follows:

The pavement on Williams street only extends a short distance west of Lafayette street; Lafayette street is 40 feet wide from curb to curb; at Williams street the pavement begins to narrow, and north of there it is 36 feet wide. The house of Dr. Savage is 40 feet from the north curb of Williams street. A person on the curb on Williams street, directly south


Railroad Tracks
Exhibit "A"
N
W.
E
S
Charles St
Kipp's Store
Dr. Hansen House
Barnard St
Dr. Savage House
Milliam St
Madelein House
Franklin St
Bridge
Bridge
Draw Section

of the southeast corner of the Dr. Savage house, can see up Lafayette street to the railroad track. Charles street is 26 rods and 4 feet north of the north curb of Williams street.

Upon the night of the injury, an exhibition of fireworks had taken place at the fair grounds in the western part of the city, and a large crowd had gathered there with teams and automobiles. The plaintiff attended the fireworks with his wife and daughter and another woman. After the fireworks, and about 10 o'clock p. m., they started to go to their home north of the city in a two-seated buggy drawn by a span of old horses. He turned onto Franklin street and drove north across the river to Williams street, where Franklin street ends; and then east on Williams street to Lafayette street, and while attempting to turn north into said street, his buggy and defendant's automobile came in collision. On the same night the defendant's son, Ralph, 18 years old, accompanied by Mary Frantzen, of the same age, was also at the fireworks. Ralph was driving the defendant's automobile, with his permission, and had started to go to his home north of the city, going out Lafayette street. When these young people had got out of the city, they "discovered that they were hungry, and turned around and started back down town to get something to eat." After turning around there is no dispute that Ralph was driving south on the west side of Lafayette street. The automobile and plaintiff's buggy came in collision at the intersection of Lafayette and Williams streets, the left fender of the car coming in contact with the left hind wheel and the left step of the buggy, and the step was bent inward and backward, and one spoke of the buggy wheel was broken, and the print or impression of the outer face of the buggy tire was made on the front end of the left fender of the car. There were some other slight marks on the end of the fender, and a slight bruise on the grease cup on the end

of the left front spring of the car. There was evidence that at the collision the horses sprang forward, breaking the evener and thus becoming detached from the buggy, ran up Lafayette street, dragging the plaintiff out over the dashboard by the lines to which he was holding, and breaking down the dashboard. He fell upon the pavement and was bruised and shocked by the fall, and the femur bone of his right leg was obliquely fractured. He was confined to his bed for about three months and suffered much pain from the injury. He testified that after he got out of bed he was not able to do hard manual labor and that he had done nothing but chores around up to the time of the trial, which took place in March, 1918, and that by reason of the injury he had been compelled to expend in doctor's bills, help on his farm, etc., the sum of about $350.

When the collision occurred Ralph got out of the car and went in front of it and examined it. He testified that he was excited and frightened, and soon a lot of people gathered there; that he saw the plaintiff go out of the buggy, but saw nothing of him after that; that he got back into his car, and turned west on Williams street, north to Charles street, then east to Lafayette street, and then home. The next morning he told his father of the accident, and the latter went to Greenville and saw the plaintiff. Lafayette street was, at the time in question, well lighted with arc lights, one of which was directly over the center of the intersection of said streets.

The questions in controversy at the trial related to the manner in which the automobile was driven, its speed, and what, if anything, the driver did to avoid the collision; the conduct of the plaintiff, and what care, if any, he exercised in going upon Lafayette street at the time; and the condition of the street as to traffic, when he went upon it. There is upon these vital questions an irreconcilable conflict in the testi-

mony. F. R. Hicklin, a witness for the plaintiff, testified that he was walking south on the west side of Lafayette street at the time, and north of Williams street. He testified:

"Later I noticed a rig, looked to me like a two-seated carriage with a team of horses hitched to it. I thought there were three people in it at the time. I found out afterwards that there were four. The team was on a light jog, I should say. They were going east on Williams street. The automobile was coming from the north going south. I noticed the automobile as it was approaching the corner. At the time the rig reached a point parallel with the curb on the west side of Lafayette street, the automobile was about 25 or 30 feet away, I would think. I mean 25 or 30 feet to the north. It was on a line with me. I figured I was about that far from the crossing.

"*Q.* How far had the team proceeded out into Lafayette street when the automobile hit it?

"*A.* They were about 10 feet from the curb. The automobile hit them right amidship, right between the two wheels.

"*Q.* Would you say the team had reached a point parallel with the center of the intersection of Lafayette and Williams streets at the time it was struck?

"*A.* Yes, sir.

"*Q.* Had it reached a point the other side of that towards the east?

"*A.* No, I wouldn't think so. They were just about in the middle of the street, I judge. The driver had started to turn his horses towards the north, at the time of the accident. The collision made a loud crash. The driver of the rig was thrown from the rig on the pavement, I should judge about 12 feet in a sort of northeast direction."

On cross-examination he was asked and answered as follows:

"*Q.* Just before dinner you testified that when you —just after seeing the team, you looked towards the automobile, and it was 10 or 12 feet from the buggy. Now I want to know in what shape the buggy was at that time?

"*A.* The buggy was about 8 feet I should judge

from the curb, the curb on the west side of Lafayette street. The buggy was going in a semicircle going northeast, he was making the regular turn you would naturally do with a team of horses.

"*Q.* Turning at that point on the west side of Williams (Lafayette) street?

"*A.* Yes, sir.

"*Q.* To go north?

"*A.* Yes, sir. * * * I should judge it was about 25 or 30 feet south of the north curb of Williams street that these vehicles came together. I should say the Petersen car stopped pretty near in the middle of Williams street, the hind end of it was past the curb on Williams street."

This witness also testified that when the car reached the intersection line of Williams street and Lafayette street, it was going about 18 miles an hour, between that and 20, and was going 18 miles an hour when the collision occurred. And that the driver of the car was driving with one hand, and had one arm around the girl.

Asked on cross-examination:

"*Q.* Do you state as a matter of fact he did have his arm around the girl?

"*A.* I would say yes; that he had his arm around the girl, yes.

"*Q.* That he was driving the car with one hand?

"*A.* I think so, yes."

Mabel Simmons, the daughter of the plaintiff, testified that she was riding on the front seat with her father at the time of the collision. Asked how he was driving, she said:

"Well, just as we got to the corner he took out the whip, and tried to drive them faster around the corner. * * * They were old horses.

"*Q.* When you drove on Lafayette street did you see any cars?

"*A.* Yes, sir. I saw one coming from the north just before we drove on. I looked to the south and saw one coming from the south.

"*Q.* How far was the one coming from the north from you when you drove on Lafayette street?

"*A.* About two-thirds of a block, I should think it was—going south.

"*Q.* I wish you would tell me how far you drove on Lafayette street before the accident occurred?

"*A.* Well, we got about the center, I should think, of the street, when we were hit, back of the buggy."

Asked to tell just what occurred, she said:

"Well, when we came to Lafayette street I looked up one way and saw Mr. Petersen's car first coming, then they were two-thirds of a block down north; I looked the other way, and saw the other car coming just off from the bridge. I thought we would have just time to make it before he came up that way; then we started out to the corner to turn a square corner, and just as we got started to turn, horses started to turn, Petersen he came up there quite close. I looked to see how far he was coming; I saw he was going to hit; I thought he would not then, we would have plenty of time to turn and go in the other direction, and go down Lafayette street; the first thing I knew he hit us, and I went over the front of the buggy, and went down, kind of my head under the car."

After testifying that plaintiff was eight weeks in bed with a weight on his leg, she was asked if she was able to discover whether plaintiff suffered pain or not. She said she was from the way he screamed and took on about it. This, being objected to, was at first stricken out. Later in her examination the following occurred:

"*The Court: Q.* What was it you said your father said to indicate to you he was in pain?

"*A.* Screamed, exclamations, pained him awful.

"*The Court:* Screamed, you said?

"*A.* Yes, sir.

"*The Court:* I think I will allow it to come in.

"*Mr. Barden:* When was that?

"*The Court:* After the accident, I understand.

"*Q.* During the time he was in bed?

"*A.* Yes, sir.

"*The Court:* Was the physician there?

"*A.* He did it all the time, whether the physician was there or not.

"*Mr. Rarden:* Move to strike it out.

"*The Court:* I think the rule is, statements of parties as to pain and suffering would be hearsay, but present exclamations of pain—

"*Mr. Rarden:* Take an exception."

On cross-examination this witness testified that the defendant's automobile was about two-thirds of the way up the block, when plaintiff commenced to go on the street. She said:

"I first saw the automobile just about as the horses' heads started to come on the road, a couple of feet or so before the horses started to go on the road, I looked. I don't know whether Dr. Savage's house is about 35 feet back from the street. After you get by Dr. Savage's house you can see up Lafayette street, clear up to Kipp's store, and beyond. * * *

"*Q.* So that he whipped up his horses and tried to beat the automobile out, but it was going so fast it caught him?

"*A.* Yes, sir, it must have."

Mrs. Rose Simmons, plaintiff's wife, was a witness. She testified that he was 65 years old on May 20, 1917; his business that of a farmer; that Williams street west of Lafayette street is a well lighted street. Asked where the rig was when she first saw the automobile coming from the north, she answered:

"Just turning a square corner.

"*Q.* How far away when you first noticed it, when you were turning the square corner?

"*A.* About half a block away. * * * I saw the automobile, but I didn't think that the auto would hit us, I didn't judge it would. I couldn't tell how far we were south of the north curb of Williams street, when the automobile came in contact with the buggy, but we were just turning north, the horses were just turning. We came down on the south side of Williams street. We were on the south side of the road; we have to make a good big turn with that old buggy, it is almost a lumber wagon." * * *

On cross-examination she testified:

"We drove from Williams street on Lafayette street

and drove from the south side of the street, just the same as anyone would, and turned a square corner on the east side of Lafayette street.

"*Q.* Do you know whether you had got by the center before you started to turn north?

"*A.* I think so, because the horses' heads were that way, they sure must have been.

"*Q.* Do you know?

"*A.* Yes, sir. I think the horses were east of the center of the street. The buggy was in the center of the street."

The plaintiff testified that when he got to the intersection of the streets he looked to the south and saw an automobile coming over the bridge, and from the north he saw a car coming about 4 rods south of the other side of the block.

"*Q.* What, if anything, did you do to get out of the way of the approaching car?

"*A.* I picked up my whip and hit the horses to hustle them, and get across the street, and get on to the right hand side of Lafayette street. I was finally hit by the car. I got to the center of the street, and was making the turn north, when I was hit by the car. * * * I should think my wagon was about 12 feet from the west curb of Lafayette street when it was struck."

On cross-examination:

"*Q.* Where were you with reference to the center of the street, where was your buggy standing at the time the automobile struck your buggy?

"*A.* My buggy, horses and front wheels were across the center of the street.

"*Q.* On the east side of the center?

"*A.* The east side.

"*Q.* Of the center of the street?

"*A.* Of the center of the street. The whole buggy was not across, the horses were. The hind wheels of the buggy were west of the center, just west; it was turning, the buggy was cramped then. * * *

"*The Court:* Why did you try to get ahead of this automobile, why didn't you stop?

"*A.* I didn't want to stop there on the street and

let the automobile run right into me, did I, when I saw it coming?

"*Q.* I understand you whipped up your horses just as you were entering into Lafayette street?

"*A.* I whipped up my horses just as I was entering Lafayette street, so as to make that turn ahead, get ahead of the automobile coming from the south. I wanted to be on the east side of that automobile, and miss the automobile coming from the north."

Question by plaintiff's counsel:

"At the time you were struck by the automobile, how far was the rear end of your wagon from the west curb of Lafayette street?

"*A.* I should think it was 10 or 12 feet. * * *

"*The Court:* Understand me, when you saw the car coming from the north, you had already whipped up your horses to avoid the car coming from the south, is that correct?

"*A.* Yes, sir.

"*Q.* Where were your horses when you first saw this car from the north?

"*A.* Just coming out on the street, was just coming out.

"*Q.* Were they going faster than they had before?

"*A.* Yes, sir, I just touched them up.

"*Q.* Then you saw the car coming from the north?

"*A.* Then I saw the car coming from the north. Went right on making the turn, to get ahead of the one coming from the south."

By defendant's counsel:

"*Q.* You hadn't got out on Lafayette street at the time you saw this car coming from the north; why didn't you stop your buggy and let the car go by?

"*A.* I thought I had time to get across the street on my own side of the road, before it got there."

At the close of the plaintiff's evidence, defendant's counsel moved for a directed verdict in his favor, for the reasons that the plaintiff was negligent in whipping his team and trying to get across ahead of the automobile he saw coming; also in not stopping and keeping out of danger when he saw the automobile

six rods away; and in driving rapidly down to, and upon this street, knowing it was congested with traffic. The court reserved its opinion until defendant put in his testimony.

On behalf of defendant, Sephas Hansen testified that he was present, and that he should judge that the automobile was going between 8 and 10 miles per hour, and the team just about as fast.

"The buggy was headed east at the time it was struck, and the horses northeast. The horses were on the east side of the center of the street, and a little bit to the north. The buggy when it came out there did not go around the center of the street intersection, before it was struck."

Earl Despelder, a witness for defendant, testified that he was present at the collision, and being asked how far the rig was from the west curb of Lafayette street when hit, he answered:

"I should judge about 3 or 4 feet.

"*Q.* Where were the horses at that time?

"*A.* They were further near the center of the street. They were turning northeast. They were north past the center post. They were just coming out of Williams street and past the corner inside of the post and curb corner, going northeast, just making that swing. (Consulting map.) They were just swinging right in here, inside of the stake. Northwest of the stake. When the automobile struck the buggy, it was pushed to the south about 5 or 6 feet."

On cross-examination witness repeated that the plaintiff turned inside of the post.

Ralph Petersen, son of defendant and the driver of the car, testified that when traveling south on Lafayette street he was close to the west curb, going about 10 miles an hour, that there was much traffic going north and the lights were bright and bothered him some, that he kept a sharp lookout and that he was right on the buggy, within 6 feet of it, before he saw it, going north "at an angle towards the northeast."

He described how he tried to stop the car. He denied that he had his arm around the girl and said he had both hands on the steering wheel. That he could stop the car, running at the rate of 10 miles an hour in about 8 feet. And that the reason why he did not turn to the west behind the buggy was that there wasn't room. Miss Frantzen, the young woman who accompanied Ralph, corroborated his testimony in every respect. At the close of the testimony, the motion to direct a verdict for the defendant was renewed, but the court reserved its decision, and directed that the case be submitted to the jury.

The court, among other things, charged the jury as follows:

(12) "It has been suggested and claimed on the part of the plaintiff that he (Ralph Petersen) should have turned to the right and gone west on Williams street. This is a question of fact for you to determine under all of the circumstances, gentlemen of the jury, having in mind the situation as it appeared to him at the time, take into consideration the traffic upon the road, and all other things being considered, as to whether or not the defendant did do, or the defendant's son did do, everything *possible*, after he had discovered the danger, to prevent an accident."

Also as follows:

(14) "You have heard the testimony in this case, as to what defendant's son did after the accident; that he got out of his automobile and looked at the front of it, and later got in the car and drove away, drove west on Williams street, then north to Charles street, and over to Lafayette street. That was admitted simply to prove the transaction that existed there. There is no negligence attributable to the defendant in this case, because he didn't stay there, or because he didn't render aid. You may take that into consideration, however, as bearing upon the testimony of the defendant in this case, and if it has any weight with you at all, you may make application of it and consider it in determining what weight you will give his testimony in the case; in other words, you may

consider it, if you think it worthy of consideration, as affecting the credibility of the witness in the case, but the act itself is not relied upon or claimed in the case to be an act of negligence; the mere fact he ran away is not an act of negligence of itself."

The jury returned a verdict for the plaintiff in the sum of $1,500 damages. Later a motion for a judgment for the defendant, notwithstanding the verdict, was duly entered and submitted upon the ground of contributory negligence for the reasons stated in the motions for a directed verdict, the reasons being elaborated. The learned circuit judge denied this application, and upon the question reserved held that there was a question of fact for the jury as to the contributory negligence of the plaintiff, and that the court was unable to say from all the evidence in the case that the plaintiff was guilty of such contributory negligence as would preclude recovery, and judgment upon the verdict was entered accordingly. Thereupon a motion for a new trial was duly entered and submitted, the main grounds of the motion being that by the overwhelming weight of the evidence the defendant, or the driver of his car, was not guilty of negligence; that by such weight of evidence the plaintiff was guilty of contributory negligence; and that the verdict was against the weight of all the evidence in the case. This motion was denied and exceptions duly entered.

In this court defendant's assignments of error raise the questions above indicated, and others, some of which will not be specifically referred to, but all of which have been considered. Both upon the oral argument and in their briefs counsel for appellant were so persistent in their claim that, as matter of law, the plaintiff was guilty of contributory negligence; that the defendant was not guilty of any negligence; and that the verdict was against the weight of all the evidence, that we have examined the record with great

care. While we have set forth so much of the evidence as leads to tediousness, yet in fact we have inserted only a small part thereof. Enough appears, we think, to show that controverted questions of fact are involved. Upon the oral argument we were of the impression that the case was a proper one for the consideration of a jury, upon the main features involved. That impression has been strengthened by an examination of the record. If some of the defendant's witnesses were to be believed, the plaintiff was guilty of contributory negligence; but the questions were such, in view of the plaintiff's evidence, that it was proper to submit them to the jury.

We are unable to say that the plaintiff should be held to be guilty of contributory negligence, as matter of law. As we said in *Beach* v. *City of St. Joseph,* 192 Mich., at p. 301:

"Before such a conclusion can be arrived at, all reasonable minds must reach the same decision, that under the undisputed testimony, there was such contributory negligence as would bar recovery." See cases cited.

Whether the plaintiff "cut the corner," or whether he observed the ordinance and law, depends upon the facts, which were in dispute. Upon the subject of the weight of evidence we do not think that it can be justly said that the verdict was against the overwhelming weight of the evidence. What we said in *Druck* v. *Antrim Lime Co.,* 177 Mich. 364, is applicable here:

"The rule is well settled that this court will only reverse a case upon the question of the weight of the evidence when the verdict is against the overwhelming weight of the evidence. The verdict must be clearly against the great weight of the evidence to require this court to overrule the decision of the circuit judge in refusing a new trial."

See *Walsh* v. *Railway Co.,* 185 Mich. 177, 184.

Did the court err in receiving the testimony of Mabel Simmons as to exclamations of pain by the plaintiff? It is to be noted that this case was commenced one month after the injury. Whether pending or not at the time of the exclamations does not appear. After an examination of the following cases, we conclude that the court did not err in its ruling. *Hyatt* v. *Adams,* 16 Mich. 200; *Johnson* v. *McKee,* 27 Mich. 473; *Grand Rapids, etc., R. Co.* v. *Huntley,* 38 Mich. 543 (31 Am. Rep. 321); *Strudgeon* v. *Village of Sand Beach,* 107 Mich. 496; *Will* v. *Village of Mendon,* 108 Mich. 251; *Marshall* v. *Railroad Co.,* 171 Mich. 180; *Loose* v. *Township of Deerfield,* 187 Mich. 206.

In *Marshall* v. *Railroad Co., supra,* stress was laid upon the point that it was one of the principal contentions of the defendant that plaintiff suffered no such injury as he alleged. Here there is no such claim. The evidence received only tended to enhance the damages, and there is no claim here that the verdict was excessive.

We are constrained to hold, however, that the court erred in that part of the charge covered by the 12th assignment of error, as to whether the son of defendant did "everything *possible* after he had discovered the danger to prevent an accident."

As this court said in *Pearl* v. *Railway,* 188 Mich. 84, 88, in dealing with a similar question:

"We think it held him to a higher degree of care than the law demands, and may have misled the jury."

The part of the charge referred to practically said to the jury that under the law the driver of the car was required to do everything *possible* to avoid the accident. He was only required to use such care, and take such course as an ordinarily prudent person would under like circumstances. There should also be taken into consideration the conditions as they appeared to the driver of the car in the emergency of the moment.

We are also of the opinion that there was prejudicial error in that part of the charge set forth in the 14th assignment of error. It appearing by the undisputed evidence that the conduct of Ralph Petersen, the driver of the automobile, at the time of the collision, and immediately thereafter, was not in violation of the provisions of section 4816, 1 Comp. Laws 1915, it is difficult to understand from this record how the fact of his driving away, after the collision, should affect the weight of his testimony, or his credibility as a witness.

He had testified to matters very material in the case—upon questions vital to the issue. The jury were told that bearing on his credibility as a witness, they might consider that he drove away from the place of the accident. In our opinion this was prejudicial error. We are impressed with the view that the case was a close one, and that possibly these two errors in the charge may have led to a miscarriage of justice in the verdict.

For the errors pointed out the judgment is reversed and a new trial granted, with costs to appellant. We find no other error in the record.

MOORE, STEERE, and BROOKE, JJ., concurred with STONE, J.

FELLOWS, J. I concur in reversal on the first ground stated in the opinion.

BIRD, C. J., and KUHN, J., concurred with FELLOWS, J.

The late Justice OSTRANDER took no part in this decision.

PEOPLE *v.* MATHEWS.

1. CRIMINAL LAW—RETURN OF EXAMINING MAGISTRATE—"JUDICIAL DETERMINATION"—TWO OFFENSES.

   Where defendant was charged in the complaint and warrant with felonious assault "with intent to ravish and carnally know," followed by a statutory charge of assault, at the same time and place, with a dangerous weapon, without a specified intent, an offense springing out of the same transaction and covered by the same testimony, and the examining magistrate, after an examination of the whole matter, including taking testimony, came to the opinion that an offense not triable by a justice had been committed, and there was probable cause to believe the accused guilty thereof as charged, and so certified to the circuit court, he made a "judicial determination" adequate to confer jurisdiction and afford the basis for filing an information in said court, although his said return did not specify the offense committed.

2. SAME—INFORMATION—JOINDER OF COUNTS — DUPLICITY — ELECTION OF COUNTS.

   An information containing two counts, charging two distinct crimes, where they were committed by the same acts, at the same time, and the same testimony must be relied on for conviction, *held*, not defective for duplicity, and election could not be required.

3. SAME.

   The trial court was not in error in allowing the prosecutor to dismiss the second count and proceed upon the first.

4. SAME—EVIDENCE OF GOOD CHARACTER—INSTRUCTIONS.

   Refusal by the trial court to give a requested instruction to the jury that defendant was "entitled to the benefit of good character even if they should find positive evidence tending to show commission of the crime," that it was "admissible not only in case where doubt exists, but may be offered for the purpose of creating a doubt," *held*, not error, where the charge as given was favorable to defendant, and in essentials fairly complied with the general rule upon good character testimony.

5. SAME.

Held, that the charge as a whole properly submitted to the jury the principles of law applicable to the questions of fact submitted for their determination.

Exceptions before judgment from Muskegon; Vanderwerp, J. Submitted June 12, 1919. (Docket No. 94.) Decided November 5, 1919.

Clifford Mathews was convicted of an assault with intent to commit rape. Affirmed.

Willard G. Turner, Jr., for appellant.

Alex. J. Groesbeck, Attorney General, *Christian A. Broek*, Prosecuting Attorney, and *Harry W. Jackson*, Assistant Prosecuting Attorney, for the people.

STEERE, J. Respondent was arrested upon a complaint and warrant which charged him with the commission, on April 13, 1918, at the city of Muskegon, Michigan, of the crime of feloniously assaulting one Lena Christian, a female of the age of 31 years, with intent to ravish and carnally know her, and also with the crime of feloniously assaulting one Lena Christian on the day and year aforesaid, being armed with a dangerous weapon, to wit, a revolver, but without intending to inflict great bodily harm less than the crime of murder. An examination was demanded and certain witnesses were sworn and examined, when further examination was waived by the respondent. The foregoing is shown by the return of the justice, which contains also the following:

"And, whereas, it was made to appear to me, the said justice of the peace, that said offense was committed as charged in said complaint and warrant, and that there was probable cause to believe said accused person to have been guilty thereof," etc.

Respondent was ordered to recognize and, failing to

do so, was committed to the county jail to answer such information as might be filed against him for said offense. The information charges both offenses as in the complaint and warrant. The cause came on for trial at the April, 1918, term of the circuit court, whereupon counsel for respondent asked that he be permitted to withdraw his plea and stand mute and, this having been granted, moved to quash the information on two grounds, *first*, that it lacked "the required basis in the return of the justice," and, *second*, that the information is faulty because of duplicity. In reply the prosecuting attorney moved to dismiss the second count—the one charging an assault with a dangerous weapon — and elected to try the respondent upon the first count. The motion of respondent was overruled and the motion of the prosecuting attorney granted, and the cause proceeded to trial upon the first count of the information—the one charging assault with intent to commit the crime of rape. Respondent was convicted by the verdict of the jury, and a motion in arrest of judgment, based upon the ground that the information was void and was faulty because of duplicity, was denied. Respondent reviews the conviction on exceptions before sentence, and discusses errors assigned under the heads:

"*First.* Errors in refusing to quash the information on the ground that it was void for two reasons, lacking the required basis in the return of the justice, and being faulty because of duplicity.

"*Second.* Error in allowing the prosecution to elect upon which one of two separate and distinct charges respondent should be tried, after respondent had been bound over upon his examination for trial upon both crimes, without any specification as to what particular offense he was held for.

"*Third.* Errors in the instructions of the court to the jury, both in the charge made and in refusing to give requests to charge made by counsel for respondent, and

"*Fourth.* Error in overruling the motion of respondent's counsel in arrest of judgment."

The testimony of Lena Christian tends to prove that, after having been at her home in the evening of April 13th, respondent, in company with her husband, left the house and went away, returning again alone between 11 and 12 o'clock, when he assaulted her while she was in bed in her night clothing and had been asleep. The door was not locked and there was a light in the house. He said nothing to her and she got out of bed, but he pushed her back on the bed. He threw down the bed clothes and tried to get into bed with her. "He acted as though he was trying to have intercourse with me." During the assault he secured her husband's revolver, which was in a cupboard near the bed, and when she "fought back" he struck her on the head with it several times, inflicting wounds and cuts which bled freely. Of the assault she testified in part:

"He didn't say anything. He just came right over to me. And I rolled out of bed. And then he hit me. He reached for the revolver before he hit me on the side of the head. And I fell over onto the bed. He got into bed after me. It bled all over the pillows, as I showed you. And he hit me again with the revolver on the other side of my head. He didn't have any intercourse with me. He did not get on top of me. He did get into the bed with me. He hit me again. He did not put the revolver back. He went away."

This is a part of the cross-examination of Mrs. Christian. She further testified he did not stagger, but did seem to be drunk. After he left, the witness went with a towel around her head and blood running over her face to the club managed by her husband and made complaint. He took her home and at once sent for a physician, Dr. Foss, who testified that when called to attend her he found she had received

serious cuts and bruises on her head, a scalp wound just above the forehead over two inches long penetrating to the skull and another upon the side of the head almost penetrating her ear, and there were also other bruises upon her hands and limbs.

Ought the motion to quash to have been granted because the return of the justice did not specify the offense committed, there being two charged in the warrant? In *People* v. *Evans,* 72 Mich. 367, cited in respondent's brief, it appeared that the examining magistrate had not, at the time respondent pleaded in abatement to the information, made and certified a determination that any offense had been committed or that there was probable cause to believe the respondent guilty, but on the contrary had returned he did not believe the offense charged had been committed, or that the respondent was guilty, and he had bound him over for trial because of the intense public feeling against him on the subject. It was there said (p. 387):

"The statute requires the justice, after 'an examination of the whole matter,' to come to an opinion as to whether or not an offense has been committed; and, if of opinion there has been, then as to whether there is probable cause to believe the accused guilty thereof, and thereupon to discharge or hold him to answer according to the conclusion reached; and it is only when the conclusion reached by the justice, after an examination of the whole matter, is that an offense has been committed, and that there is probable cause to believe the accused guilty thereof, and so certified to the circuit court, that an information may be filed. This conclusion or opinion of the justice is a judicial determination, and the basis of the right to proceed in the circuit court by filing information. *People* v. *Annis,* 13 Mich. 511; *People* v. *Turner,* 33 Mich. 363; *People* v. *Yaner,* 34 Mich. 286.

"In the present case, it appears at the time the information was filed in the circuit court, upon which the respondent was put upon his trial, no determina-

tion had been made by the justice, either that any offense had been committed, or that there was probable cause to believe the respondent guilty, and the prosecuting attorney had no authority to proceed in the circuit court by filing such information. * * * The information was filed upon the return of the justice, as it then appeared. We are not called upon to determine whether a new information might have been filed after the justice's further return was filed in the circuit court. The court refused to quash the information then filed, and the case proceeded to trial thereunder. The circuit court having no jurisdiction at the time of filing the information, it follows that a conviction thereunder cannot be sustained."

Neither is the case of *People* v. *Yaner,* 34 Mich. 286, cited and quoted in defendant's brief, of controlling application to the situation presented here. In that case the respondent was arrested, examined and held for trial upon a complaint charging him with the crime of murder. A motion was made to quash the information because the committing magistrate on application therefor refused to determine whether the facts proven on the examination "amounted to murder or manslaughter," the latter being a bailable offense of which respondent was subsequently convicted, holding that was "a question for a petit jury, and not one for the examining magistrate." This court held such a return deprived respondent of a substantial right defined as follows:

"The magistrate in his special return affirmatively shows that he refused to determine 'whether the proof would amount to murder or manslaughter.' Clearly, then, he did not determine from the evidence adduced upon the examination that the offense was murder, or that there was probable cause to believe the accused guilty of such an offense. It thereupon became his duty to fix the amount of bail, as the offense, if any, was a bailable one, and admit the accused to bail, if sufficient bail was offered, and if no sufficient bail was offered, to specify upon the mittimus the amount for which bail should be required."

The scope of this decision is indicated in *People* v. *Brownell,* 38 Mich. 732, where it was held in a murder case that "there seems to be no defect in a commitment which describes the offense as it is charged," adding, however, that upon a question of bail "the real character of the charge and the degree must in some way appear, inasmuch as murder in the second degree is bailable by a justice." No such question of bail arose in the instant case. The charge did not involve a non-bailable offense. The magistrate found that it appeared to him "said offense was committed as charged in said complaint and warrant, and that there was probable cause to believe" respondent was guilty thereof, required him to enter into a recognizance to appear at the ensuing term of the circuit court to which he bound him over for trial, specified the amount of bail required, and made full return of said proceedings to the court in which he was held for trial in compliance with statutory requirements. The only claimed irregularity is use of the singular in finding "said offense was committed as charged." The major and first stated charge in the complaint and warrant is that of felonious assault "with intent to ravish and carnally know," followed by a statutory charge of assault, at the same time and place, with a dangerous weapon, without a specified intent—an assault minor in degree springing out of the same transaction and covered by the same testimony. When the magistrate, after "an examination of the whole matter," including taking of testimony, came to the opinion an offense not triable by a justice had been committed, and there was probable cause to believe the accused guilty thereof as charged in the complaint and warrant, with determination of bail required, and so certified to the circuit court, with the testimony taken before him, he had made and certified an opinion or "judicial determination" adequate to confer jurisdic-

tion and afford a basis for filing an information in that court.

Respondent certainly was not put upon trial for another or different offense than the one upon which he was arrested and examined before the committing magistrate. It was competent for the prosecuting attorney to put his information in such form as he thought might best enable him to try the offense charged on its merits, provided he did not proceed against respondent for a different transaction than that to which the preliminary examination related. *People* v. *Annis*, 13 Mich. 511. Of the testimony taken at such an examination this court said, by Justice GRAVES, in *People* v. *Turner*, 33 Mich. 363:

"It is to such evidence the prosecuting attorney is plainly referred in order to shape his information, and the same evidence which is to govern the court when directing a 'proper' information to be filed. All the regulations point to it as the evidence to discriminate the criminal act to be laid, and to disclose its class and character. Indeed, on this subject the law appears clear when the various provisions are examined and compared."

In *People* v. *Burwell*, 106 Mich. 28, respondent was charged in the complaint and warrant with both rape and incest. The magistrate in his return stated that it appeared the offense as charged had been committed and he found probable cause to believe respondent guilty thereof, without specifying either offense. The evidence taken upon the examination contained sufficient to warrant binding respondent over for trial upon a charge of rape. The information filed against him contained two counts separately charging each offense laid in the complaint and warrant. Respondent when arraigned in the circuit court refused to plead and by his counsel moved to quash the information because it contained inconsistent counts, which was overruled and the prosecutor required to elect, which

he did and the trial proceeded under the count for rape. In sustaining the ruling this court said:

"The transaction for which respondent was tried is identical with the transaction for which he was examined. The offense for which he was tried and convicted was set forth in the complaint and warrant. We think the case is ruled by *People* v. *Annis*, 13 Mich. 515, and *People* v. *Aikin*, 66 Mich. 460, and that no error was committed in refusing to quash the information."

In *People* v. *Warner*, 201 Mich. 547, where error was assigned on denial of defendant's motion to compel the prosecutor to elect between counts in his information, the reasons of the trial court on denial of a motion for retrial with cited authorities is quoted with approval and the following excerpt from *People* v. *Sweeney*, 55 Mich. 586, stated to have "been the rule in this State for many years":

"Election between counts cannot be required on the ground that distinct offenses are charged, where they are committed by the same acts, at the same time, and the same testimony must be relied on for conviction."

In the early case of *People* v. *McKinney*, 10 Mich. 54, it is stated there is "nothing technical" in the rule of election, and in its application the controlling consideration is not necessarily whether several different offenses in point of law are charged, but—

"whether the trial of these several offenses would involve the proof of substantially different transactions, and thereby tend to confuse the defendant in his defense, or deprive him of any substantial right. And therefore where the several offenses charged, though distinct in point of law, yet spring out of substantially the same transaction, or are so connected in their facts as to make substantially parts of the same transaction, or connected series of facts, the defendant cannot be prejudiced in his defense by the joinder, and the court will neither quash nor compel an election. Such would seem to be the principle of the general

rule to be deduced from the cases. See cases cited; 1 Chitty Crim. Law, pp. 253 and 254, and notes; Roscoe's Crim. Ev. pp. 231, 232, 233."

In the instant case the court did not quash the information and had no occasion to compel election, but permitted the prosecutor to elect, which in any event answered the rule so far as duplicity is concerned.

Prejudicial error is also urged upon refusal of the court to give defendant's following request:

"You are further instructed, as a matter of law, that the respondent is entitled to the benefit of proof of good character, even if the jury should find positive evidence tending to show commission of the crime. Evidence of good character is admissible not only in case where doubt exists, but may be offered for the purpose of creating a doubt."

In support of this contention counsel cite *People* v. *Jassino,* 100 Mich. 536, from which the last sentence in the above request is taken. The language was used in discussing the concluding and restricting statement upon the subject in a charge that "when there is positive proof of the commission of an offense, then good character cannot avail to overthrow that proof." Illustrative or argumentative language by the appellate court in discussing a question is not necessarily the language which should be adopted by the trial court in its charge to the jury. No such restriction as that criticized in the *Jassino Case* is found in the court's charge as to character in the instant case, which in its details was favorable to the accused and in essentials fairly complied with the general rule upon that subject. Not only was the charge replete with instructions that the jury should carefully and impartially take into consideration all circumstances and conditions shown by the evidence to have surrounded the occurrence and the parties themselves, but, more directly, the court said in part:

"There have been witnesses placed upon the stand here in behalf of the respondent to prove his good character. It is your duty, gentlemen, carefully to consider that testimony. A good character, a good reputation is one of the more valuable possessions that any person can have, and testimony concerning a good character may, in itself, be sufficient to raise a reasonable doubt in the minds of jurors as to guilt of the respondent of the specific act and offense which is charged against him and for which he is upon trial, so that you will give this testimony concerning his character careful consideration; you will weigh it and you will give it such weight and credit as you think it is entitled to and as you believe it ought to receive, and consider it in connection with the other testimony and the other evidence in the case."

The charge as a whole is noticeably full upon the duties of the jury and principles of law applicable to the questions of fact submitted for their determination. Plain and impartial instruction is given upon the presumption of innocence, burden of proof, reasonable doubt, the essential elements of the offense charged, and intent as applied to that offense, the minor offenses of assault and assault and battery as included in the greater charge, also submitted to the jury, etc.

We have examined the questions raised by various other assignments of error and are of opinion they do not demand discussion or serious consideration.

Finding no reversible error in the record, the conviction will stand affirmed and the case remanded for judgment.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

BISHOP *v.* JUDGE OF RECORDER'S COURT OF DETROIT.

1. APPEAL AND ERROR—STATUTORY RIGHT OF APPEAL—JURISDICTION.
   The right of appeal is a statutory one, and unless the mandatory provisions of the statute are complied with, the court has no jurisdiction to entertain the appeal.

2. SAME—POLICE COURT OF DETROIT—JUSTICES OF THE PEACE.
   Under Act No. 118, § 23, Pub. Acts 1891, appeals from the police court of the city of Detroit are controlled by the general laws of this State applicable to appeals from convictions by justices of the peace to the circuit court in criminal cases.

3. SAME—RECORDER'S COURT OF DETROIT—SPECIAL APPEAL—EXTENSION OF TIME.
   In the absence of any provision in the general laws of the State or in the charter of the city of Detroit authorizing the recorder's court of said city to extend the time for appeal from the police court to said recorder's court beyond the limit of 10 days fixed in the statute (3 Comp. Laws 1915, § 15786), said court has no authority to grant leave for a special appeal after the expiration of said 10 days.

4. SAME—DISMISSAL—MANDAMUS.
   Mandamus will lie to compel the judge of the recorder's court of the city of Detroit to vacate an order granting special leave to appeal from a conviction in the police court of said city to said recorder's court after the expiration of the 10 days fixed in the statute; there being no showing that said appeal was prevented by any action or nonaction on the part of the court or its officers beyond the control of appellant.

Mandamus by Matthew H. Bishop, prosecuting attorney of Wayne county, to compel Charles T. Wilkins, recorder of the city of Detroit, to vacate an order granting a motion for an appeal. Submitted

October 7, 1919. (Calendar No. 28,858.) Writ granted November 5, 1919.

Matthew H. Bishop, in pro. per., and *Joseph A. Popiel*, Assistant Prosecuting Attorney, for plaintiff.

Stewart Hanley, for defendant.

STEERE, J. This proceeding was instituted by the prosecuting attorney of Wayne county, to test the jurisdiction of the recorder's court of the city of Detroit to entertain and grant a motion for special leave to appeal from a judgment in the police court of that city after the statutory limit for appeal had expired.

On May 3, 1919, one Robert West was complained against in the police court of the city of Detroit for a misdemeanor, arrested on a warrant duly issued, convicted and sentenced to the Detroit house of correction for a period of 90 days. After the expiration of the statutory period for appeal he made application by his attorney to the recorder's court of Detroit for special leave to appeal his case to that court, which was granted on May 17, 1919, and he set at liberty under a recognizance in the sum of $200 for his appearance at the ensuing term of said court. A motion by the prosecuting attorney requesting that court to vacate the order was denied, and on application to this court for a writ of mandamus an order was issued to show cause why the same should not be granted.

Defendant's answer to such order admits the proceedings as alleged in plaintiff's petition, and further returns that defendant found said Robert West was "prevented by reasons and circumstances not under his control from consulting with an attorney and from taking steps to appeal within the 10 days allowed by statute," for which reason the discretion of the court was exercised in his favor. So far as the record discloses the showing made before the recorder's court for

leave to appeal after the expiration of the statutory period consisted of two affidavits, one by West himself stating that he had only been in Detroit a few days when arrested, that the charge preferred against him was not true, that he was tried, convicted and sentenced to the Detroit house of correction, without opportunity to consult an attorney and make arrangements to appeal his case until May 14, 1919. The other affidavit is made by his attorney who states that he has investigated the case, believes "that the conviction aforesaid is a travesty and unjust," and that the respondent is able to prove he is not guilty of the charges made against him.

Plaintiff contends that the recorder's court of Detroit is given no authority by public act or charter to entertain a motion for special leave to appeal, and is therefore without jurisdiction to enlarge the time therefor beyond that fixed by statute. Counsel for defendant, appointed by an order of the recorder's court as *amicus curiæ,* urged that the right of appeal, having been given by statute a liberal but permissible construction to effect its just administration, implies a degree of discretionary jurisdiction vested in the appellate court to extend the specified time therefor in exceptional cases, on a proper showing of circumstances which rendered it impossible for the applicant to act within the statutory time given.

Of the police and recorder's courts in the city of Detroit it is sufficient to state that they are relatively analogous to the justice and circuit courts of the State. With reference to appeals from the Detroit police court, Act No. 118, Pub. Acts 1891 (amending section 23 of Act No. 161, Pub. Acts 1885 establishing said police court), provides:

"SEC. 23. In all cases determined in said police court an appeal may be taken to the recorder's court of the city of Detroit in the same time and manner and with

same effect as prescribed by the general laws of this State for appeals from convictions by justices of the peace within this State to the circuit court in criminal cases."

So far as material to the question involved, the general laws of the State relative to appeals from convictions by justices of the peace in criminal cases provide:

"SEC. 18. The person so charged with, and convicted by any such justice of the peace of any such offense may appeal from the judgment of such justice of the peace to the circuit court: *Provided,* Said person shall enter into a recognizance to the people of the State of Michigan in a sum not less than fifty nor more than five hundred dollars, within ten days after the rendition of the judgment, with one or more sufficient sureties, conditioned," etc. 3 Comp. Laws 1915, § 15786.

No provision is found either in the general laws of this State or the charter of the city which authorizes the recorder's court of Detroit to extend the time for appeal beyond the limit of 10 days definitely fixed by this statute, or to at any time entertain a motion for special leave for appeal. Nor is there in the first instance any constitutional or inherent right of appeal from a judgment in an inferior to an appellate court for review, or to a court of superior jurisdiction for the purpose of securing a retrial on the merits of a case; neither has the judicial department of government any power to grant that right, or privilege, except as authorized by the legislative department. The legislature may delegate discretionary control of appeals to the courts and can take it from them when previously granted, an unquestioned power recently demonstrated in this State. The right to appeal is and always has been purely statutory and does not exist at common law. Acting upon its own views of expediency the legislature can decide and dictate by

statute to what extent and under what restrictions the right to appeal shall exist. It may deny that right, or grant it with limitations and conditions as to amount involved, time for taking, bonds required, and such other statutory regulations as it deems desirable. That it is a jurisdictional necessity for the courts to comply with the procedure and time limit prescribed by statute is generally recognized:

"The procedure necessary to perfect an appeal is usually the subject of statutory regulation, and there must be at least a substantial compliance with the requirements, otherwise no jurisdiction is secured by the appellate court, and the court cannot dispense with any of the prescribed requirements." 2 R. C. L. p. 100.

"The legislature has general power to prescribe the time within which writs of error may be sued out or appeals taken, and it is essential to the jurisdiction of the appellate court that the proceeding be taken within the time limited, and the trial court has no inherent power to extend the time, either directly or indirectly. Thus, where an appeal has not been taken within the required time, the court has no power indirectly to extend the time for appealing by vacating, for such purpose, the judgment, order or decree, and entering it as of later date. The power to extend the time to appeal may, of course, be given by statute." 2 R. C. L. p. 104.

Along the same line it was said in *Sullivan* v. *Haug*, 82 Mich. 548 (10 L. R. A. 263):

"Acting upon its own views of expediency, the legislature organized and established the police court of the city of Detroit, and gave it jurisdiction over certain offenses, including the one for which relator was convicted. The legislature deemed it expedient to provide for an appeal to the recorder's court in certain cases, and not in certain others when the punishment inflicted was small. * * * The right to an appeal is and always has been statutory, and does not exist at common law. It is a remedy which the legislature may in its discretion grant or take away, and it may

prescribe in what cases, and under what circumstances, and from what courts, appeals may be taken; and unless the statute expressly or by plain implication provides for an appeal from a judgment of a court of inferior jurisdiction, none can be taken. (Citing numerous decisions.)

"The decisions of this court with reference to appeals in chancery and other cases are in point."

It is urged for defendant that the *Sullivan Case, Renaud* v. *State Court of Mediation,* 124 Mich. 648 (51 L. R. A. 458), *Van Leuven* v. *Ingham Circuit Judge,* 166 Mich. 115, and other cases of similar import are not applicable here as in those cases no right of appeal had been conferred, and they merely decide that, in the absence of express statutory authority, no constitutional right to appeal exists; while in the instant case a statutory right of appeal had been conferred, which decisions of this court have in effect construed as giving to the appellate court a discretion to permit appeal after expiration of the statutory limitation of time, in cases similar to the present where the applicant has been precluded by circumstances beyond his control from acting within the prescribed time. In support of this contention counsel cite *Dickinson* v. *Simondson,* 25 Mich. 113; *Cameron* v. *Calkins,* 43 Mich. 191; *Gram* v. *Wasey,* 45 Mich. 223; *Lake Shore, etc., R. Co.* v. *Chambers,* 89 Mich. 5; *City of Kalamazoo* v. *Power Co.,* 122 Mich. 489, and *Duell* v. *Oakland Circuit Judge,* 206 Mich. 680.

That the scope of *Sullivan* v. *Haug, supra,* is not limited to those cases where no right of appeal exists is manifest from preceding cases cited in it and subsequent decisions in which it is cited. Of the numerous authorities cited in the *Sullivan Case* to sustain what is there stated as a rule of general application, the earliest Michigan case is *Weed* v. *Lyon,* Walk. Ch. 77, in which there was a statutory right of appeal, and it was held that where a party failed to

comply with the statutory requirements within the prescribed time the court could not reinstate his lost right by a re-entry of the decree to enable him to appeal.

In *Waterman* v. *Bailey,* 111 Mich. 571, which cites the *Sullivan Case* with approval, it is held that this court has no jurisdiction to entertain an appeal where settlement of the case has been delayed until expiration of the statutory limitations therefor, including discretionary extensions permitted by the statute, when the delay is not the fault of the circuit court or any of its officers, and that jurisdiction to take cognizance could not even be conferred by waiver or express consent of the parties. The following quotation from 2 Enc. Pl. & Prac. p. 16, is there said to be "the doctrine of this court":

"It follows, therefore, that all the requirements of the statute for taking and perfecting an appeal are deemed jurisdictional, and must be strictly complied with."

The case is illuminating, not only in its generally concise and distinct discussion of this question with citation of authorities but from the fact counsel there urged, as here, that *Cameron* v. *Calkins, Gram* v. *Wasey, Lake Shore, etc., R. Co.* v. *Chambers, supra,* were inconsistent with the proposition that statutory requisites are necessary to confer jurisdiction, and it is said of them:

"These were cases in which the court refused to dismiss proceedings, where, owing to some default of the court or its officers, parties were prevented from taking appeals seasonably; and the opinions seem to make such cases exceptional."

In *Perkins* v. *Perkins,* 173 Mich. 690, is again noted as an exception to the general rule a class of cases in which this court has refused to dismiss appeals because the parties without fault on their part were

prevented from perfecting the same by some action or nonaction of the court or its officers; but the general rule is reiterated and it is held that even though the delays were by consent of both parties and for mutual benefit, neither the trial court nor the consenting parties can confer jurisdiction on the appellate court after expiration of the maximum statutory time limit, it being said in part:

"Having the power to permit or refuse appeals to be taken, the legislature has the power to prescribe the conditions which shall attend and control the taking of such appeals. The legislature has not qualified or limited an existing right, but has created a right, to be exercised within a prescribed period of time, in a prescribed manner. Whether an appeal should be allowed in this cause is not a question of discretion of the court, but one of compliance with the conditions which the legislature has prescribed for taking such appeals. * * * We hold, in conformity with repeated decisions of the court, that the statute fixes a time within which appeals in chancery must be perfected, and that a party desiring to appeal must within that time perfect his appeal; for the failure to do which, the right to appeal is lost and cannot be restored by the court."

In *Munroe, Boyce & Co.* v. *Ward, ante,* 378, it is again said, with citation of recent decisions:

"The right of appeal is a statutory one, and unless the mandatory provisions of the statute are complied with the court has no jurisdiction to entertain the appeal."

The cases cited for defendant in support of the contention that the appellate court may, and this court does, in its discretion assume jurisdiction on a meritorious application to appeal after expiration of the statutory time therefor, do not imply or purport to be authorized by any inherent discretionary power to that end. Those decisions are based upon the not unusual nor unreasonable legal proposition that the pre-

scribed time in which a litigant is authorized to act does not in contemplation of law run against the party without fault or want of diligence on his part during such time as his power to act is suspended, or his efforts to do that which the law authorizes and requires him to do are blocked, by some act or non-action of the court itself or its officers entirely beyond his control.

It is not shown by this record or claimed that West made known to the court in which he was convicted a desire to appeal, asked for or was refused permission to consult counsel, or was denied any right to which a party in custody accused of a criminal offense is entitled. In proposing and arguing from a suppositious case counsel for respondent frankly states, "We do not, of course, mean that in this record there is any showing that either the police department of the city of Detroit or the officials of the house of correction deliberately planned to deprive defendant of his right to appeal," and the record is barren of any showing that he was prevented from so doing through any default of the court or its officers.

Under the authorities cited and others to which they lead, we are of opinion that the recorder's court was without jurisdiction to entertain or grant the motion for special leave to take a belated appeal.

The writ asked by plaintiff may issue.

BIRD, C. J., and SHARPE, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

KNEELAND-BIGELOW CO. *v.* MICHIGAN CENTRAL RAILROAD CO.

1. EVIDENCE — JUDICIAL NOTICE — STATE OF WAR — OPERATION OF RAILROADS BY GOVERNMENT.

   Judicial notice may be taken by the courts that a state of war exists, and that congress has placed in the hands of the government the direction and operation of the railroads of the country during such emergency.

2. WAR—GOVERNMENTAL DETERMINATION—BINDING UPON COURTS.

   The existence of war and restoration of peace are determined by action of the legislative, supplemented by the executive, department of government, and such determination is binding upon the courts.

3. SAME—DURATION OF WARFARE.

   War having been declared, that condition must be recognized by the courts as existent until the duly constituted national power of the country officially declares to the contrary, even though actual warfare has long since ceased.

4. SAME—OPERATION OF RAILROADS BY GOVERNMENT—POWERS.

   The government, in exercising its war-time power, *vis major*, or the greatest power of all, in taking over the railroads of the country and directing and operating them, has the power to initiate and change rates, fares, charges, etc., when the public interest requires, beyond any resistance by those against whom it is directed (39 U. S. Stat. chap. 418, p. 645; 40 U. S. Stat. chap. 25, p. 456).

5. SAME—RAILROADS—GOVERNMENTAL AGENCY.

   A railroad company, whose property has been so taken over by the government as a war measure, is but a subordinate governmental agency, serving under direction and at the will of the government.

6. SAME—CONTRACTS AS AFFECTED BY WAR.

   The existence of a state of war affects different contracts in different ways: Some are avoided or dissolved, others are rendered unenforceable for the time being, others, again, remain unaffected; the particular condition of each contract materially affecting the consideration of each case.

7. RAILROADS—CONTRACTS—SPECIFIC PERFORMANCE—OPERATION BY GOVERNMENT AS WAR MEASURE—STATE COURTS—JURISDICTION.

The State courts will not entertain jurisdiction to compel the specific performance of a pre-war contract between plaintiff, a logging company, and defendant, a railroad company, for hauling logs at a specified rate, during the time said railroad is operated by the government under its war time powers; said defendant having been ousted and incapable of performing.

8. SAME—BREACH OF CONTRACT—REMEDIES.

The validity of the contract, defendant's liability for damages by reason of its breach, or duty to continue performance should changed conditions render such course possible, and plaintiffs' rights in an action at law or in some other appropriate proceeding, are passed without prejudice and not determined.

Appeal from Bay; Houghton, J. Submitted June 6, 1919. (Docket No. 78.) Decided November 11, 1919.

Bill by the Kneeland-Bigelow Company and another against the Michigan Central Railroad Company and another for a temporary injunction and the specific performance of a contract. From a decree dismissing the bill for want of jurisdiction, plaintiffs appeal. Affirmed.

Beaumont, Smith & Harris, for plaintiffs.

Frank E. Robson, for defendant railroad company.

STEERE, J. This matter was heard in the circuit court of Bay county, in chancery, on a motion of plaintiffs for preliminary injunction to restrain a claimed excessive rate charge for transportation of logs, together with a motion of the Michigan railroad commission to dismiss plaintiffs' bill as to it and a motion of the Michigan Central Railroad Company for dismissal of said bill on grounds set forth in its answer then on file. The motions were argued and submitted

together. Plaintiffs appeal from a decree dismissing their bill of complaint on the ground that the court was without jurisdiction to grant the relief asked.

The original bill of complaint was filed May 15, 1918. On May 22, 1918, motion for a preliminary injunction and an amended bill were served, the latter being practically the same in form and matter as the original and accompanied by certain exhibits referred to therein. The motion by defendant Michigan railroad commission to dismiss was served May 22, 1918. The defendant railroad company filed its answer on July 15, 1918, with motion to dismiss. The grounds stated in its answer and pressed in the motion to dismiss which present the controlling issues involved, as we view them, are that plaintiffs have an adequate remedy at law, if any, and—

"all jurisdiction by this court over the property of this defendant and all equipment thereof, appurtenances thereto and the operation thereof, and charges for the transportation of freight thereon, so far as pertains to the complaints alleged in said bill of complaint, and the relief therein prayed for, has been ousted by said act of congress of August 29, 1916, the proclamation of the President of the United States pursuant thereto, and the act of congress entitled 'An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' approved March 21, 1918, and the action of the President and director general thereunder, as set forth in director general's Order No. 28, and supplement thereto."

The relief sought by plaintiffs' bill is specific performance by the Michigan Central Railroad Company of a pre-war contract according to its terms, their immediate grievance being the imposition of a haulage rate in excess of that provided in said contract which the court is asked to eliminate by injunction.

While previous contract relations between the parties are detailed at length as a basis for plaintiffs' various contentions in support of the validity and present enforceability of the contract immediately involved, as more directly in point and contemporaneous with the matter complained of, it appears that for several years prior and up to the time when the Federal government took over possession and control of the Michigan Central Railroad as a war measure said railroad company and plaintiffs were in mutual performance of a written contract entered into September 15, 1911, which, with numerous recitals, descriptions and conditions not necessary to detail, provided that plaintiffs would deliver from their lumbering operations on lands in northern Michigan 12,500,000 feet of logs per annum to said railroad company for transportation to Bay City during the ensuing period of 20 years, and the latter would receive, furnish cars therefor and transport the same over its line to said destination during said period, charging therefor a basic rate, with immaterial variations, of $2.25 per thousand feet. Before the time answer was filed herein and the motions, noticed for July 1, 1918, had been heard this rate had been increased 40% by two advances, the first of 15% becoming operative April 15th and the second of 25% effective June 25, 1918.

Section 1 of an act of congress of August 29, 1916, making appropriation for the support of the United States army, and for other purposes (39 U. S. Stat. chap. 418, p. 645, 9 Fed. Stat. Ann. [2d Ed.] p. 1095), provides in part as follows:

"The President, in time of war, is empowered, through the secretary of war, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion so far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other

purposes connected with the emergency as may be needful or desirable."

On December 26, 1917, the President of the United States issued a proclamation that by joint resolutions of congress a state of war existed between the United States of America and Germany and Austria, that it had become necessary in the national defense to take possession and assume control of certain transportation systems under the act above quoted from, proclaiming that—

"under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, secretary of war, take possession and assume control at 12 o'clock noon on the twenty-eighth day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads," etc.

—and directed that possession, control, operation and utilization of such transportation systems be exercised through and by William G. McAdoo, appointed director general of railroads. (Official Bulletin December 27, 1917.) Said proclamation at some length declared the duties imposed and authority given to said director general, provided that until and except so far as from time to time otherwise by general or special orders directed and determined by him such systems should remain subject to existing laws, statutes and orders of the interstate commerce commission and to statutes and orders of regulating commissions of the various States in which said railroad systems or any part thereof should be situated, but that "any orders, general or special, hereafter made by said director general shall have paramount authority and be obeyed as such."

Following this an act of congress was passed, on March 21, 1918, entitled: "An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes" (40 U. S. Stat. chap. 25, p. 456, Supp. Fed. Stat. Ann. [2d Ed.] p. 757), which provided in section 10, among other things:

"That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, * * * That when the President shall find and certify to the interstate commerce commission that in order to defray the expenses of Federal control, and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the interstate commerce commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendation as he may make."

Under the terms of this act and for its efficient execution the President issued a further proclamation on March 29, 1918, continuing Mr. McAdoo in authority as director general and authorizing him—

"to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads, and inland waterways, as fully in all respects as the President is authorized to do, and generally to do and perform all and singular all acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform."

The 15% increase in rates was made while the railroads were in possession of the government and under

Federal control, pursuant to acts of congress and proclamations of the President above referred to. No direct order of the director general is shown as to it, but rate tariffs were then published and filed with the Michigan railroad commission in compliance with the State law upon that subject (2 Comp. Laws 1915, § 8109 *et seq.*), providing, amongst other things, for a 15% advance in the rate on logs effective April 15, 1918. Plaintiffs, and others, then applied unsuccessfully to the State railroad commission under the State law for an order suspending or changing such tariff.

On May 25, 1918, Director General McAdoo issued General Order No. 28 by which the then existing rate was advanced 25%, expressly finding therein and certifying to the interstate commerce commission, in part:

"That in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, and, * * * the public interest required that a general advance in all freight rates, passenger fares, and baggage charges on all traffic carried by railroad and steamboat lines taken under Federal control under an act of congress approved August 29, 1916, entitled 'An act for making appropriations for the support of the army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' shall be made by initiating the necessary rates, fares, charges, classifications, regulations, and practices by filing the same with the interstate commerce commission under authority of an act of congress approved March 21, 1918." * * *

The basic rate upon which this 25% increase was authorized by Order No. 28 was the filed and published tariff rate then in effect and applicable to the public generally. The rates established and put in force by

General Order No. 28 were initiated and authorized by proclamation of the President under and by authority of congressional legislation enacted as a war measure, in the exercise of a recognized paramount governmental power when a state of war exists. That the governmental power is ample in such emergency and Federal authority plenary under the exigencies shown by the presidential findings and proclamations, is not open to controversy. *United States* v. *Russell,* 13 Wall. (U. S.) 623. Judicial notice may be taken by the courts of such extraordinary conditions. *The Kaiser Wilhelm II,* 246 Fed. 786, 159 C. C. A. 88; *Marshall* v. *Bush,* 102 Neb. 279 (167 N. W. 59).

In the legislative branch of the government congress passed resolutions declaratory of war and laws for the efficient conduct of the same, while the President as chief executive of the nation issued authorized proclamations and orders deemed by him essential to the execution of such laws. Within the scope of those two sovereign departments of our government, the action of congress in passing laws and of the executive in their administration are not to be questioned by the judicial department, Federal or State. The existence of war and restoration of peace are determined by action of the legislative, supplemented by the executive, department of government. Such determination is conclusive and binding upon the courts. War having been declared, that condition must be recognized by the courts as existent until the duly constituted national power of the country officially declares to the contrary, even though actual warfare has long since ceased. *Perkins* v. *Rogers,* 35 Ind. 124, 167.

"The existence of a state of war affects different contracts in different ways. Some contracts are avoided or dissolved; others are rendered unenforceable for the time being; others, again, remain unaffected. The particular condition of each contract materially affects

the consideration of each case." Trotter on Contract During and After War (3d Ed.), p. 7.

This is a pre-war contract partially executed and in course of performance by both parties at the beginning of and during the war until government interference by requisition intervened to deprive the defendant company of the independent power to perform on its part.

This case presents a peculiar if not exceptional situation in the particular that the contract was at the time of hearing in undisturbed physical performance with every indication of continuance, as to the manner and conduct of which plaintiffs offer no complaint. Their sole grievance is that as a condition of its continued performance they are compelled to pay a haulage price 40% in excess of that contracted for, not to the defendant company or its agent, as is clearly shown, but to the Federal government which has taken over the railroad as such in its physical entirety, and has been since December 28, 1917, through the President and his subordinates acting under authority of Federal legislation, in possession and control of defendant's entire system of transportation with all its property and appliances therefor or relating thereto, and is operating said system of transportation under direction and control of the President, who is authorized to initiate and change rates, fares, charges, etc., when in his opinion the public interest requires, while defendant company's connection therewith is but as a subordinate governmental agency serving under direction and at the will of the government. The defendant company has been ousted from possession and control of its entire transportation system by governmental interference, in the exercise of that war time, paramount and irresistible power of government sometimes termed *vis major*, or the greatest power of all, beyond any resistance by those against whom it is

directed. *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1918), L. R. App. Cas. 119.

Since this contract was entered into in 1911 a grave change of conditions for which neither contracting party is responsible and neither anticipated has imposed upon the defendant company impossibility of further performance on its part, whether temporarily or permanently we need not inquire; while on plaintiffs' part the existence of a state of war with resultant governmental interference in taking possession and control of defendant's transportation system has only affected them by advanced traffic rates. This they seek relief from in a court of chancery under a bill for specific performance against a defendant deprived of power to perform by the Federal government, which is in absolute control of the transportation system essential to performance and with it fulfilling the contract, except as to the matter of rates, while none of its officials in control and imposing the conditions complained of are parties to the suit. Under such conditions a decree of specific performance against the party ousted and incapable of performing would seem to be a vain thing.

For disposition of the issue directly involved we deem it sufficient to find and hold that, by a war measure interposition of the sovereign governmental power, this contract was rendered unenforceable, for the time being at least, and so long as such interposition is maintained by *vis major*.

Back of this proposition counsel present and ably argue in their briefs numerous interesting questions, both new and old, bearing upon the validity of the contract, which we do not find it necessary to discuss or pass upon. Whether this contract is valid or invalid is immaterial here in our view of the case, which turns on the duty and power of the court to enforce the specific performance, or injunctive relief asked

against defendants under the conditions shown by this record. The validity of the contract, defendant's liability for damages by reason of its breach, or duty to continue performance should changed conditions render such course possible, and plaintiffs' present rights in an action at law or in some other appropriate proceeding, are passed without prejudice and not determined. For the reasons stated plaintiffs' bill cannot be entertained at this time under the conditions shown.

The decree dismissing plaintiffs' bill is affirmed, with costs to defendants.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

WOODS *v.* CHALMERS MOTOR CO.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INFERENCES FROM TESTIMONY TO BE DRAWN BY JURY.

   In an action for the destruction of plaintiff's houseboat by fire caused by an explosion on defendant's premises, any inference that plaintiff's husband appreciated the danger and was guilty of contributory negligence that could be drawn from his testimony that he had been aware for a few days that gasoline was escaping from defendant's premises onto the ground and a scum was forming on the surface of the water around his houseboat, and that he was looking for another location, *held*, for the jury rather than the court.[1]

[1]The question of liability of one for injury caused by escape of dangerous substance stored on his premises, is discussed in a note in 15 L. R. A. (N. S.) 535.

2. SAME—EXPLOSIVES—DEGREE OF CARE REQUIRED.
In storing upon its premises and handling for its purposes large quantities of gasoline, defendant was bound to exercise such reasonable care to avoid accident as was commensurate with the apparent dangers attending such use.

3. SAME—PROOF—INFERENCES—QUESTION FOR JURY.
While the burden was upon plaintiff to prove facts from which it might be fairly inferred that defendant's negligence was the proximate cause of the explosion, the evidence need not be direct and positive; proof sufficient to give room for a reasonable inference, or permissible presumption, of negligence on the part of defendant being sufficient to carry the case to the jury.

4. SAME—EVIDENCE—QUESTION FOR JURY.
Contradictory testimony as to whether defendant permitted gasoline to overflow and run at large, and to what extent, rendered the question of its negligence one for the jury.

5. SAME—INFERENCES—QUESTION FOR JURY.
Even if there were no conflict in the testimony, if different inferences might reasonably be drawn as to its import, the question as to whether there was negligence would still be for the jury.

Error to Wayne; Tappan, J., presiding. Submitted June 13, 1919. (Docket No. 66.) Decided December 22, 1919.

Case by Anna Woods against the Chalmers Motor Company for the negligent burning of plaintiff's houseboat. Judgment for plaintiff. Defendant brings error. Affirmed.

Clark, Emmons, Bryant, Klein & Brown, for appellant.

Charles A. Lorenzo (*Clifton G. Dyer,* of counsel), for appellee.

STEERE, J. On October 16, 1916, plaintiff was living with her husband in a houseboat moored in Connor's creek near its mouth adjacent to land belonging

to the city of Detroit, through the easterly part of which said creek flows. On that date the houseboat was destroyed by a fire resulting from an explosion in defendant's nearby factory. Plaintiff's husband assigned to her all his right, title and interest in the houseboat and its contents together with all demands for damages by reason of its destruction and she thereafter brought this action against defendant in the circuit court of Wayne county. From a verdict and judgment in her favor for $1,644, found by a jury to be the value of the property so destroyed, defendant has brought the case to this court for review upon various assignments of error all directed, as stated in its counsel's brief, to these two questions:

"1. Was the defendant entitled to a directed verdict on the ground that the plaintiff had failed to show that the defendant was guilty of such negligence as would permit recovery? And

"2. Was the plaintiff guilty of such contributory negligence as bars recovery in this case?"

Defendant's claimed right to a directed verdict was presented and preserved for review by motion, requests and motion for a new trial, with exceptions to the trial court's rulings thereon, it being urged and argued that the record contains no testimony showing the cause of the explosion nor any negligent act or omission on defendant's part; and that plaintiff's husband negligently kept their houseboat moored where oil and greasy scum floated around it and they well knew whatever dangerous conditions existed.

Connor's creek curves in its southerly course through Detroit at a point near where it crosses Clairpointe avenue south of Jefferson, running thence in a southwesterly direction to the Detroit river. Along its shores in that locality are located a number of manufacturing establishments. Defendant's factory property extends southerly from Jefferson avenue to Connor's

creek with a number of large buildings upon it. Near its easterly limits is a long four-story factory building containing the heat treating department, to which is connected a one-story building used by the block testing department, located next to and abutting on Connor's creek. Close to the latter building on the northeast lies land owned by the city of Detroit known as the garbage plant property. Plaintiff's houseboat was moored to the shore in front of the city property, about 50 feet from defendant's one-story building of the block testing department in which motors manufactured and assembled elsewhere were tested. The two buildings were adjacent, and "connected by an opening in the steel aperture or door," as defendant's manager described their proximity.

Connor's creek is a sluggish stream at its mouth practically on the level of Detroit river into which it empties. On the day in question there was no perceptible current near its mouth, and a considerable quantity of oil and oily scum was floating upon its surface in that locality, held back by the wind which was then blowing up stream. That portion of the creek was quite commonly used as a place for mooring houseboats, especially in the fall, and on the day in question three were anchored not far from plaintiff's.

Gasoline was used by defendant in its block testing department to run the motors, which were placed on blocks or iron cradles for examination and testing, oil being also used to lubricate and function them. A supply of gasoline was stored in the yard on the west side of the building in a sunken tank having a capacity of about 12,000 gallons. For use it was first drawn from the large sunken storage tank by a vacuum pump system into a smaller gravity tank with a capacity of three or four barrels, located close to the side of the building. The overflow from this tank ran, as claimed by defendant, back into the submerged

tank. Plaintiff claimed this overflow did not all return to the larger tank but quantities escaped into a small depression in the ground, or ditch, extending from the building to Connor's creek. The gasoline was piped from the small tank to the motor stand and released to the motors by pet-cocks. There was testimony that almost daily escaping gasoline, oil and water drained into Connor's creek along the small open ditch, and in places it could be seen standing in pools. There was also a sewer running from under the southeast corner of the test building to the creek. At about 5 p. m. of the day in question, just when the motor testing work had shut down and the quitting employees of that department were punching the clock preparatory to going home, there was a heavy explosion under that end of the building which blew off the covers of man-holes of a trench or sewer system, including one just outside the building. Simultaneously with this explosion flames burst out of the building and the oily surface of Connor's creek was set aflame. At the same time plaintiff's houseboat was listed over by the explosion, caught fire, and burned so rapidly that plaintiff, who was thrown off her feet by the shock, had difficulty in escaping. Her husband was away from home at his daily employment when this took place and some men who ran down to the shore rescued her. She testified of this:

"Between the time of the explosion and the time I discovered the house was on fire I didn't have time only to run for my life on the front deck, and when I got on the front deck of the boat the escape was cut off. Mr. Thompson and this other man had risked their lives to take me off, * * * I had two cats burned, they couldn't get off."

The negligence imputed by plaintiff to defendant is that it carelessly failed to keep its oils, gasoline and other dangerous combustibles safely stored upon its

own premises and negligently permitted the same to escape upon its own premises, and into Connor's creek; that it employed unskilled persons to handle and use the same, and—

"did negligently and wilfully cause a large quantity of oils, gasoline and other highly dangerous combustible substances to become ignited and to explode which escaped from its premises to plaintiff's said boathouse setting fire thereto and destroying the same together with all its contents," and "did also communicate to the oils, gasoline and other inflammable matters then accumulated on the surface of said Connor's creek near and about said boathouse, which also exploded and set fire to said boathouse, destroying same together with its contents," etc.

Defendant's contention that plaintiff was as a matter of law guilty of such contributory negligence as precludes recovery is directed to the claim that she and her husband with knowledge of conditions kept their houseboat moored in a manifestly unsafe location where oils, greasy scum, etc., had accumulated upon the surface of the water around it, the danger being, it is asserted, "appreciated by plaintiff's husband, who testified that he was so concerned over the situation that he was looking for a place to move, and that he had known this for some time at least before the fire and explosion."

The record scarcely sustains this version of his testimony. Thomas Woods, plaintiff's husband, had known and been around that portion of Connor's creek "off and on" for 17 or 18 years. It was navigable, sheltered water for some distance above its mouth and much used by rowboats, launches, and houseboats. He built their houseboat in 1914. It contained several rooms, was comfortably furnished and fitted up as a home for himself and wife. They had there the usual household goods, comforts and conveniences of

a modest home, including customary furniture, culinary utensils, a sewing machine, rugs, draperies, silverware, etc., with various other articles of use and modest luxury, including a phonograph and two cats. Plaintiff testified to having been married 33 years and that they had lived on board their houseboat for over three years. It had been moored abreast the city property where it burned for some time, just how long is not shown. Her husband worked nights at the Michigan Central station, going on duty at 4 p. m., and was called home by telephone shortly after the fire. He had recently noticed and apparently been annoyed by fumes of gasoline, and planned to find a more agreeable location. His testimony on the subject is as follows:

"*Q.* Did you have occasion to observe the condition of the surface of the water when you left? (On the day of the fire.)

"*A.* Yes, sir, I was trying to find a location to get out from the fumes of gasoline.

"*Q.* Because—

"*A.* On account of the fumes of gasoline.

"*Q.* You were doing what?

"*A.* Looking for a location to move.

"*Q.* When did you first notice those fumes?

"*A.* Sunday morning when I came home, which would be Sunday about 3 o'clock in the morning."

Other houseboats were moored close by. He does not testify that in his purpose to move he was actuated by any thought or appreciation of danger from explosion or fire. If his testimony permits that inference, it was for the jury rather than the court.

This is not a case where a plaintiff is shown or claimed to have been at default in some defined duty in regard to a danger of which he had knowledge. It is said in 29 Cyc. p. 640:

"The fact that the person injured was aware of the danger is not sufficient to render him guilty of con-

tributory negligence as matter of law, but the question should be submitted to the jury."

Amongst the authorities cited in support of this text is *Brezee* v. *Powers*, 80 Mich. 172, in which it is said:

"Where the essential fact in a case is whether contributory negligence did or did not exist, and this depends upon inferences to be drawn from facts and circumstances about which honest, intelligent and impartial men might differ, such a case should be submitted to the jury."

The trial court did not err in submitting the question of plaintiff's contributory negligence to the jury nor in the charge upon that subject.

Not denying that there was an explosion in defendant's building with an outburst of flames, in the air and on the water, which set fire to and destroyed plaintiff's houseboat, defendant's further contention is that a directed verdict should have been granted in its behalf for the reason that no presumption of negligence arises from the bare fact of an explosion, and the record is destitute of testimony showing any negligent act or omission on its part causing or contributing to the explosion.

The court charged the jury that no presumption of defendant's negligence arose from the bare proof of an accident or explosion on its premises, that the burden of proving freedom from contributory negligence on her and her husband's part, and negligence on defendant's part causing the injury complained of rested upon plaintiff. If right in the assumption that the testimony viewed in its most favorable light for plaintiff, which is the recognized test, raised an issue of fact for the jury, the charge is not otherwise complained of, as we understand the position of counsel, nor open to criticism.

Counsel for defendant cite as analogous in facts and particularly in point here, *Cosulich* v. *Standard*

Oil Co., 122 N. Y. 118 (25 N. E. 259). In that case plaintiff's vessel was lying at a wharf in Newton creek, King's county, N. Y., next adjacent to defendant's wharf and premises on which it conducted a petroleum refinery, where some oil caught fire from an explosion and while burning a quantity of it ran down a pipe leading to a lighter lying at its wharf loaded with petroleum. The lighter exploded and set fire to plaintiff's vessel at the adjoining dock some 20 feet away. Although quite analogous in its general outlines, that case does not impress us as particularly helpful to the present inquiry, for the principles of law applied to the undisputed facts in that case are conceded here. The opinion is a long one, dealing with many negligence cases involving explosions and similar accidents. It is somewhat peculiarly commented on by Judge Thompson in his work on negligence with the concluding reflection:

—"but a great many judges forget the limitations of their own power and perform the functions of jurors in actions at law for damages, in this way." 1 Thompson on Negligence, note to section 763.

Be that as it may, the essence of the long decision in facts and law as disposed of appears in the following excerpts:

"The plaintiffs proved simply an explosion. The inference is perhaps permissible that the subject of the explosion was the receptacle described as a boiler, tank, still or agitator, although no witness pretends to assert that it was destroyed or torn down. If it may be inferred that it was the tank the evidence is silent as to the cause. * * * he who alleges injury sustained through the negligence of his neighbor, with whom he has no contract relation and who owes him no other duty than that he shall observe reasonable care to prevent injury, must prove the facts from which an inference of the particular act of negligence charged can be drawn."

Here facts were proved beyond simply an explo-

sion, from which plaintiff claims and defendant denies the inference of negligence can be drawn. The facts upon which plaintiff relies are scattered through the testimony in a more or less fragmentary way, of claimed varying significance, full understanding of which an examination of the entire record might best subserve, but we can only note certain significant items of testimony which at least distinguish this from the *Cosulich Case.*

Defendant used large quantities of gasoline in its testing department taken from a storage tank of 12,000 gallons capacity sunken in the yard near by. It was elevated from there by a vacuum pump into a gravity tank just outside the building with a capacity of three or four barrels, from which the gasoline passed by gravity through piping to the motors. The gravity tank was elevated so as to keep a 10 or 12 foot head on the motors. On that side was an open ditch about 16 inches wide leading along the building from the creek for about 60 feet to where, as a witness states, "it got out of the building to an outlet." From 55 to as high as 100 motors a day were tested in the building, supplied with gasoline from the small gravity tank by the wall outside. Carl C. Hinkley, defendant's work manager and engineer, testified the vacuum pump supplying gasoline from the sunken storage tank pumped continually—"all the time," the overflow running back into the big tank, and "in taking out gasoline for motors there was a third pipe." Plaintiff contended and introduced testimony to show that the overflow was not properly cared for and safely returned to the big storage tank but quantities of gasoline were negligently permitted to overflow from the small elevated gravity tank to the ground, spreading into the open ditch and standing in pools, creating a condition which was in effect a dangerous nuisance. This was an issue of fact for the jury, of which Hinkley said when making denial of the fact:

—"it would be highly dangerous to have a surplus, so many motors you know. For instance, if there was considerable gasoline permitted to accumulate around the premises, it would be highly dangerous, so many motors, you know. If gasoline was allowed to accumulate around the premises, it would be dangerous. I know where the ditch was on the outside of the premises that day. If that ditch was filled with gasoline or partly filled or if it had any gas in it at all, there would be a certain amount of vapor always present. There would be a certain amount present if used with lubricating oil. * * * If gasoline was present there would be also gasoline action in the ditch. It is obvious that the greater the quantity, the greater the gasoline action. I should imagine if there was sufficient gasoline saturating the air it would ignite if it came in contact with flame."

An apparently disinterested witness named Thompson, who worked for the city at the garbage grounds adjoining defendant's property and was near by at the time of the explosion, testified:

"I have seen this tank overflow for hours at a time. Gasoline came out of it. The gasoline would flow on the ground, lay there in a pool and run off into the creek. Some of it remained in that pool. This was not protected in any way. * * * I saw the can run over day after day. * * * There is a little ditch running all the way through where this stuff comes out of the tank in this ditch, * * * I have seen gasoline and oils in this ditch; I saw this on the 16th of October, 1916. There was oil and gasoline in it. * * * There was quite a little bit in it, water and gasoline and oil together. The bottom of the ditch was covered with it. The ditch was probably 16 inches wide, just a narrow little gutter down to drain it. There was a flat hole, little trap running from the edge of the hole to the ditch and the flat hole was full. * * * I was down near where the sewer empties into the stream on the day in question. I saw oil and water coming out of it, right at the corner of the Chalmers building. * * * It was quite a little stream running there."

Of the explosion Thompson said in part:

"I was standing in the barn door and was looking in that direction. The explosion took place about the middle of the building. About the time of the explosion the air was on fire, gasoline oil or something going out of all the windows over there. The flames came from the Chalmers plant. I saw the burning flames in the air. The burning flames lit on the houseboat of the Woods. Prior to the explosion I did not see any flames around the houseboat. I was looking in that direction. After the explosion I saw flames light on the houseboat and saw the houseboat afire."

Another witness near by who ran out on hearing the explosion to see what had happened said in part:

"I jumped up quick and ran outside and when I got outside everything was afire. The houseboat was afire. It was all over the houseboat, right around where the boat lay and kept working up further because Mr. Benowski had all he could do to get his boat out of the way. * * * There was fire inside the Chalmers plant. I saw fire coming out of the manhole at the foundation of the one-story building. I saw flames coming from the inside of the building. * * * The point where the fire came out of the manhole there was about in the center of the one-story building."

Outsiders testified to two apparent drainages from the test block building, a sewer from the southeast corner and an open ditch on the side of the building towards the garbage plant. It also appeared from Hinkley's testimony there was some kind of a tunnel system under the building. He said he would "judge the tunnels are about 20 inches wide and 3 feet deep"; that they were "just a trench system from the block test" and not a part of the sewer system; that the only water which ran out of the sewer at the southeast corner was waste water from cooling the engines, and the only oil which could pass out with it "would be the lubricating oil that was backed up by the water

in flushing out the circulating system of the engines." He stated "the tunnel had an outlet to the outside." Asked where the tunnels, or trench system, emptied he replied, "as near as I can recall, it emptied into the ditch that you referred to and ran down to the creek." He also said that there were manholes in the tunnel system under the floor, and at the time of the explosion "the motors that were over the manholes were elevated and tipped over, causing the damage." In explanation of his failure to remember to whom he reported the accident, and whether his report was in writing, he offered the reflection that "the management was changing quite rapidly at that time."

Without further prolonging reference to other items of testimony of similar import which might be noted, we conclude it can be fairly maintained from the record that there is much more shown in this case from which it is possible to infer negligence than the bare fact of an explosion. Negligence is absence or want of ordinary care. In storing upon its premises and handling for its purposes large quantities of gasoline, defendant was in duty bound to exercise such reasonable care to avoid accident as was commensurate with the apparent dangers attending such use. While the burden was upon plaintiff to prove facts from which it might be fairly inferred defendant's negligence was the proximate cause of the explosion and her injury, the evidence need not be direct and positive. Negligence in a given cause may be susceptible of proof only by circumstances pointing more or less directly to the ultimate fact charged. To carry the case to the jury plaintiff was only bound to prove sufficient to give room for a reasonable inference, or permissible presumption, of negligence on the part of defendant to her damage.

It is urged for defendant there is practically no conflict in the evidence and therefore "the decision

of the case becomes a question of law, and not of fact for the jury." We are impressed the testimony cannot be counted harmonious upon whether, or the extent, gasoline was permitted to overflow and run at large from the gravity tank upon and over the ground to gather in pools, or in the ditch connected with tunnels under the testing building; but were the testimony not in conflict, if different inferences might reasonably be drawn as to its import, it does not follow the case should be disposed of as a matter of law.

"It is also the general rule that the mere fact that an injury has resulted from certain conduct does not establish the further fact that the conduct was negligent, and we may add a third rule, stated by counsel, which is that although the facts concerning the conduct complained about are not in dispute, if different minds may honestly draw different conclusions respecting them, the question whether there was negligence is still a question for the jury." *Brown* v. *Bryant*, 166 Mich. 180.

We regard as well in point and applicable here the principles applied in *Schoepper* v. *Chemical Co.*, 113 Mich. 582, involving an explosion of nitro-glycerine, the cause of which defendant contended rested entirely in conjecture. As was said there in conclusion:

"Negligence, like any other fact, may be inferred from circumstances. (Citing cases.) And, though the proof of plaintiff depended upon inference to establish the main fact, the question of whether the inference suggested by the plaintiff's theory is the correct one, or whether it was sufficiently rebutted, was for the jury." (Citing cases.)

The judgment will stand affirmed.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

HIGGINS *v.* McGILL.

1. VENDOR AND PURCHASER — LAND CONTRACTS—EXECUTION—CONSIDERATION OPEN TO INQUIRY.

In a suit to restrain summary proceedings, to set aside a certain land contract, and for an accounting, where the vendee denied the execution of the contract and also denied the correctness of the consideration expressed therein, the latter was still open to inquiry although she failed to prove that she did not execute the contract; the consideration being always open to inquiry, even where execution is not denied.

2. SAME—CONSIDERATION—ACCOUNTING.

Where plaintiff sustained the burden of proof that the consideration for each of two former contracts was $1,200, and that the consideration in the contract in dispute should be the combined balance owing on the two, she is entitled to an accounting on that basis with credit for all payments satisfactorily shown.

Appeal from Cass; Des Voignes, J. Submitted June 3, 1919. (Docket No. 33.) Decided December 22, 1919. Rehearing denied January 28, 1920.

Bill by Irena Higgins against William McGill to enjoin summary proceedings, to set aside a land contract, and for an accounting. From the decree rendered, plaintiff appeals. Reversed.

C. M. Lyle and *John R. Carr*, for plaintiff.

Chester E. Cone, for defendant.

STEERE, J. This bill is filed for an injunction to restrain proceedings at law to dispossess plaintiff of certain premises, to have a certain contract in relation thereto claimed to have been signed by plaintiff declared void, for an accounting and right to redeem.

The immediate moving cause for filing said bill was commencement by defendant, in August, 1917, of summary proceedings to recover from plaintiff possession of 120 acres of land in Calvin township, Cass county, Michigan, to which he held the fee title and claimed ownership, and of which she had been in possession for many years, claiming it as her own. At the time defendant instituted his summary proceedings he held the record title to this farm and amongst other papers an unrecorded contract from himself to plaintiff, purporting to be signed by both parties, dated July 24, 1912, by the terms of which she bought and he sold to her the 120 acres for a stated consideration of $7,-159, payable five years after date with interest at 7% per annum payable annually. He claims this was the renewal of a former land contract, dated June 24, 1898, between the same parties and covering the same property, in which the stated consideration was $3,-707. She admitted having signed the former, but denied the correctness of its stated consideration, and totally repudiated the latter, asserting she never signed it or had any knowledge of its existence until informed of it later by a little 12-year-old girl, named Augusta, who lived with her and had signed it without her knowledge at defendant's instance. The issues of fact upon which the testimony of the parties is in direct conflict were whether plaintiff had signed or consented to the contract of July, 1912, and the amount owing by her to defendant. The trial court found said contract was executed by plaintiff as defendant claimed, that there was due upon it $9,944.43, on May 1, 1918, that defendant's title was in effect a mortgage lien on plaintiff's farm for enforcement of which he must resort to foreclosure proceedings, and granted an injunction permanently restraining summary proceedings at law to obtain possession.

These parties have had business relations for many

years and are now both past the threescore and ten. Defendant testified he was 75 years of age. Plaintiff, who is an illiterate native of North Carolina, born in slavery, gave her age as 74 years, stated that her "nationality is white, Indian and a little colored descent," and of her educational qualifications admitted:

"I can't read nor write. I don't know any figures or any dates of the month or anything like that. I ain't got no learning; never went to school a day in my life."

Defendant has lived many years in the village of Union, Cass county, about four miles from the farm in question which is in the colored settlement of Calvin township and was settled upon by plaintiff with her family between 45 and 50 years ago. He has been and is a money loaner, a dealer in land, horses and cattle; he acquired extensive real estate holdings and does many thousand dollars of business a year. Plaintiff was manifestly a person of energy and industry in her field of activity which was her farm and home. Her husband, from whom she was separated some 25 years ago and has since died, is not shown to have figured in any of her business transactions during the many years she developed and worked this farm. She testified that she had borne nine children, all brought up on the farm. Five of them who appeared as witnesses for her were of mature ages varying so far as stated from 40 to 56 years. The young girl, Augusta, who said she had lived with plaintiff all her life and called her "mother," is referred to by counsel as a daughter and a foster child.

Plaintiff early bought 80 acres of this farm from one George Redfield on contract and obtained a deed for it from him in 1883. In 1890 she borrowed $1,300 secured by mortgage on the 80 acres from a man named Silver who died in 1892, after which those settling his estate asked payment. She had before

that time become acquainted with defendant in a business way and incurred some indebtedness to him secured by chattel mortgage, apparently on some stock, as in 1890 he gave her written permission to let the bearer have a certain cow and he would allow her $30 on it. When making a payment on a chattel mortgage she spoke to him about borrowing money to pay the Silver mortgage, and was also wishing to get a 40 acres of land which he owned, called the "Dungey forty," which joined her place.

Their first real estate transaction was in relation to this 40 acres which she bought from him on a land contract dated February 29, 1892, for $1,200. In it the consideration is stated to be $1,260, $50 payable on that date and the balance in annual payments of $100 with interest at 8% per annum. They both testified to an agreed consideration of $1,200. When first examined he asserted that she paid nothing down "when she bought it for $1,200." Shown the contract stating a consideration of $1,260 and asked if it should have been $1,200 defendant replied, "Well now, I don't know just about what that was, but there was something that there was $60 put with it, I don't remember just exactly how it was." She testified positively that the agreed price was just $1,200 and she paid the $50 first payment then, and thereafter made payments on it of $100 per year or more. He denied that she paid $50 down, or any such amounts subsequently as she claimed, asserted "she paid but mighty little no time," that he gave her a receipt whenever she made payments and each of them had a duplicate contract.

In January, 1894, plaintiff borrowed $1,200 from defendant to pay off the Silver mortgage. His method of transacting this business was to take from her a deed, dated January 22, 1894, of the 80 acres for a stated consideration of $1,500 and give her a land contract of like date for the same, in which the ex-

pressed consideration was $1,501.38 payable in five years with interest at 8% per annum. It bears five indorsements of payments amounting to $96. Of this plaintiff testified she had paid $100 and interest on the Silver mortgage, leaving $1,200 due, which was just the amount borrowed to pay off the mortgage; that she did not then know she was signing a deed to him of her 80 acres, but let him fix up the papers as he claimed they should be and she signed them for she then had confidence in and "trusted to him what to do," as he said he "wouldn't cheat her quicker than he would his mother." He first testified of this that she borrowed money from him to pay off the mortgage, but he did not remember how much it was, nor when or to whom the money was paid because they made papers, which was what he went by. Recalled as a witness, he said that $1,500 was the amount he paid for her. The mortgage was discharged from the public records by Mary Silver, administratrix, on May 3, 1894.

On May 24, 1898, defendant had a new land contract prepared and signed by both of them which on its face provided for the sale to her of the 120 acres covered by the two previous contracts, the stated consideration being $3,707 payable in three years from date with interest at 7% per annum. On this there are seven indorsements of payments amounting to $200.32. She denies the correctness of the amount stated but says he came with the papers proposing that it would be better to have both pieces of land together, "to make it all in one payment," as to which she agreed with him and signed the paper he produced for that purpose. Of this, defendant first testified the contract bore his signature, that he did not remember how much was then due on the two contracts put together, but he thought about $3,000, that he could not tell where the contract was made or who by, and he

did not "know anything about these transactions except as appears on the papers," and when recalled was positive she then owed him $3,707.

July 24, 1912, defendant had a new contract covering the 120-acre farm drawn up between himself and plaintiff by A. H. Field who was accustomed to do clerical work for him. By its terms he sold the farm to her for $7,159, payable within five years from date with interest at 7%. Accompanied by Field he went to plaintiff's home where she was alone with the little girl Augusta and, as defendant claims, secured plaintiff's signature, or mark, to the instrument, which she emphatically denies. It is not acknowledged and bears no indorsements. On its face it appears as signed by defendant and "Irene (X) Higgins, her mark," witnessed by "A. H. Field, Augusta H. Higgins." Plaintiff testified of this that she was then sick in bed with paralysis and did not then know of McGill and Field being there, did not sign by mark or authorize her name to be written on the paper, and knew nothing about it until the next day when the girl informed her and said they had left a new paper; that as soon as she got able to ride she went to see defendant about it and denied owing him the amount he claimed, as he had once told her she had done extra well and only owed him $200 or $300, saying, "He said I owed him $7,000 or $10,000, or something like that. He said he wouldn't bother with it, and was going right up and put me out of doors. I told him to go on." This interview apparently resulted in an awakening loss of confidence in him on her part and a grievance as she viewed it upon which she was easily aroused to warm discussion and intemperate assertion, as typical of which she declared:

"I will just walk up and down the road before I will pay it. * * * When I know I paid anything I ain't going to pay no more; never allow to pay another cent while I live, and I told him so when he

came there and said if I didn't pay him he would throw me in the road. I told him to go ahead and throw me in the road, and I say so today."

It was testified by her and other members of her family that during the summer of 1912 she had suffered a stroke of paralysis affecting mainly one side, which laid her up for some time, during which two named physicians attended her and she slowly recovered, walking first with crutches and at the time of the trial yet remained somewhat crippled on that side so that she walked with a cane. The girl Augusta testified that when McGill and Field came to the farm plaintiff was "sick in bed suffering with a stroke" and she herself was outdoors; that Mr. McGill, whom she knew, called her and said he had some papers to sign, telling her to write plaintiff's name to them with her mark and sign as a witness, which she did as directed; that the papers were not read to her, and plaintiff "did not have anything to do with the contract at all." McGill, who when first examined said he knew nothing about those transactions except as appears by the papers and monotonously punctuated his testimony with "I don't remember," experienced an active renaissance of memory when recalled, stated plaintiff was up and attending to her work when they went there to have a settlement with her, that Field did the figuring, with which she was satisfied and made her mark to the contract, which he thought was read to her. Field testified that he had acted as clerk for McGill off and on since 1897, drawing many papers for him, as he did many thousands of business in a year, and there was nothing more about this transaction to impress it on his mind than any other and he had "no distinct recollection of drafting this paper in 1898," saying further:

"All I recollect about it is what is stated in the contract, Exhibit G. As to what was said and done I

don't pretend to remember, I figured the amount by the former contracts; interest on them, whatever payments were made, * * * I have no recollections of what took place there that day, except what it takes to complete the paper. That applies to any contract that is made. I know nothing in this contract any different from any other contract that I have made for Mr. McGill."

Thus qualifying his indicated inferential testimony as based on "what it takes to complete such papers," he stated that plaintiff was around the house, was told what the amount was, said she could not write, "a very common occurrence," that he wrote her name with her hand on the pen, presumed he made the mark, that Augusta H. Higgins wrote her own name as a witness, and in a general way confirmed McGill's version of the matter.

Plaintiff does not deny having signed by her mark the various instruments defendant prepared relative to this farm prior to the last contract of 1912, although she denies knowing at the time that one of them was a deed to him of her 80-acre farm. Her testimony that she could not read, write or figure, "trusted to him what to do" and none of these papers were read to her is not denied by defendant, beyond his thought that the last was read to her, or by any other witness. These transactions were in her life rare and unusual events, of magnitude and serious import, vitally affecting her home and all she possessed. She knew by first knowledge what was done and said, but only knew what was written in the papers to which she made her mark as, and to the extent, defendant may have told her.

In his examination relative to the Dungey 40 contract of 1892, on which are indorsed payments amounting to $176.42, defendant stated he could not remember when he bought the 40 or what he paid for it,

had little recollection of any important deals with plaintiff, although he "had a little deal with her, more or less. She has bought horses of me and I bought one or two of her." Following this he was asked if she borrowed $1,200 of him after February 29, 1892, and said, "Well, she borrowed money to pay the mortgage off"—then was asked and answered as follows:

"*Q.* How much did she borrow?
"*A.* I don't remember.
"*Q.* Was it $1,200?
"*A.* I don't remember. I didn't try to keep those things in my head because we made papers and that is what I go by. * * *
"*Q.* How much did you pay?
"*A.* I don't remember.
"*Q.* And to whom?
"*A.* I don't remember whom it was paid over to.
"*Q.* You don't remember anything about it, do you?
"*A.* Yes, I remember the deal, but I don't remember just whom it was paid over to.
"*Q.* You don't remember the amount?
"*A.* No, sir.
"*Q.* Do you remember who discharged the Osborn Silver mortgage?
"*A.* I don't remember."

When recalled later and asked what he had to say relative to plaintiff's claim of the amount she borrowed, he replied, "I say I paid the whole thing, $1,500. She gave me a deed of the 80 acres at the time."

It is undisputed the third contract, of 1898, was made to extend and combine her existing indebtedness then represented by the two previous contracts. Plaintiff so understood, but contends it does not correctly represent the amount then owing by her, and that advantage was taken of her inability to read and write by inserting a larger amount. Field identified this contract as in his handwriting. Asked if he remembered when it was made he answered: "Nothing in particular about it. That is my writing, that is all,"

and also said of it later, "I don't remember anything about this contract, nothing particular about it to impress it on my memory."

Fourteen years later defendant took Field with him and went out four miles into the country to plaintiff's home at a time she was there alone with a little girl and obtained, as he claims, a renewal of the former contract by which he agreed to sell her and she agreed to buy this 120-acre farm, then assessed at $2,650 but shown worth $75 per acre at the time of trial, for an expressed consideration of $7,159, claimed to be with its increase her original indebtedness to him, incurred about 25 years before, beginning with $2,400 as claimed by her, and $2,761.53 according to his version. In the meantime his dominant muniments of title to her farm, as party of the first part, provided "that all hay made and crops raised on said land are not to be sold or otherwise disposed of without the written consent of the party of the first part." The evidence is persuasive that he received payment for wheat and other products of the farm which he evasively denies. Plaintiff's denial and repudiation of this instrument was absolute and her refusal to recognize it by further payments positive, whether from honest belief that her indebtedness was fully or mostly paid, or because of surprise at the rate at which money breeds when cultured by a scientific breeder whose business is to "buy and sell horses, and do different kinds of business, and loan money," in connection with which he handles chattel mortgages. Her words and conduct are at least consistent with the theory that if she did make her mark to this paper she did not understand its contents.

Defendant's answer is a denial, asking for no affirmative relief. The trial court held, as was ultimately conceded, that the deed and land contracts defendant held covering plaintiff's farm were but se-

curity for money loaned, in their nature a mortgage lien which could only be enforced by foreclosure, and granted an injunction restraining defendant's summary proceedings, but finding that the last contract, of July 24, 1912, was valid, held that having acquiesced therein by its execution plaintiff's "defense utterly fails because she says the debt had been extinguished at that time, and there would be no occasion to enter into a new renewal contract; what would be her due would be a deed and not a contract." So concluding, the court accepted the consideration nominated in that contract as indisputable and determined her indebtedness to be the amount therein stated with interest from the date of the contract, and as a consequence did not grant an accounting as to the many transactions which preceded it, although the court said of plaintiff's witnesses:

"Counsel for McGill in his brief uses this language: 'None of these witnesses produced on the part of the plaintiff are worthy of credit. They have all except one, possibly, been convicted of crimes. Mr. H. C. Wilson testifies that their reputation for truth and veracity in the neighborhood in which they have long lived is bad and that he would not believe any of them under oath. Mr. Wilson is a colored man himself and very loyal to his people.' * * * An examination of the record discloses the unfortunate history of the family and confirms, I regret to find, what is said in defendant's brief."

From this it is perhaps inferable that the record before us is incomplete. Our scope of inquiry is confined to the authenticated printed record furnished this court for review of the appeal. An examination of it confirms but part of what is said in defendant's brief. The Mr. Wilson there mentioned was the only impeaching witness called by defendant. So far as the record discloses his asserted loyalty to his people cannot be taken seriously. He condemns the char-

acter of all members of the colored race of whom he makes mention, including himself. He testified that he long lived near and knew plaintiff and her family, that he knew the reputation for truth and veracity of six named members of the family who were witnesses, including plaintiff, and it was "bad," adding, "I would not believe Irena Higgins or one of the family under oath." On cross-examination he testified he had been arrested for crime, convicted and sentenced to Ionia, the occasion, as he states, being:

"I throwed some lead at a man kind of careless that time, and he needed it—cost me a thousand dollars, too, but he would have got his bacon if he hadn't went."

The only evidence we discover of loyalty to his people is his account of another criminal experience which cost him $100, based on an event in which he knocked a man, "as far as from here across to that wall there." This he thought was a good investment, as before that the man "wouldn't let a negro eat at his table. After that he was a gentleman." The sweeping statements of defendant's counsel that the witnesses produced on the part of the plaintiff "have all, except one, possibly, been convicted of crime" finds support in this record only as to five of the twelve witnesses called by plaintiff's counsel and sworn. These were her children who testified mainly in confirmation of her claim that she had on certain occasions made specified payments, which defendant denied, when certain of them were present, with details of what products of the farm in crops or stock she sold to get the money and when paid. We find nothing in the record to support this accusation as to the girl Augusta or plaintiff herself, who is not shown to have ever during her long life in that community been arrested for or charged with any criminal offense, to have ever had a lawsuit or employed an attorney before the present litigation;

and Wilson's impeaching evidence as to her reputation for truth and veracity is met to the contrary by that of two apparently disinterested citizens of long acquaintance with no disclosed criminal record—color not shown—one of them being a U. S. mail carrier whose route passed her home and who had known her for 40 years.

We cannot agree with the conclusion of the trial court that having failed to show she did not execute the contract plaintiff's defense utterly fails. The testimony of the four witnesses present is equally divided as to her participating in the transaction. Assuming that she did, the undisputed circumstances under which defendant secured her mark to an instrument of its character and importance shade its verity and are persuasive that if her hand was on the pen when Field made the mark, as he finally concluded and stated after testifying that he did not pretend to remember what was done and said or "anything about this contract," she did not hear it read, nor as the matter was presented to her, execute the instrument with full knowledge of its contents and import, or clearly understand that it mortgaged her farm and obligated her to an amount inserted as the consideration. But accepting the conclusion of the trial court that plaintiff has failed to sustain the burden of proof in denial of her mark against the presumptions of the written instrument, the considerations expressed in such instruments where execution is not denied is always open to inquiry, and particularly so under the circumstances of this case.

We are impressed that plaintiff has on this record as it reads convincingly sustained the burden of her claim that the actual consideration for each of the first two contracts, of 1892 and 1894, was $1,200, and that she executed the third understanding and believing the consideration therefor was the combined bal-

ance owing on the two which preceded it. She is entitled to an accounting on that basis with credit for all payments satisfactorily shown.

These parties were by no means on an equality in business experience and ability. Defendant was a money loaner and trafficker of large experience, doing many thousand dollars of business each year in lines of dealing which demanded keen business ability and shrewdness to succeed, as he did to a marked degree. She was an unlettered colored woman, living in the country with her family on new land she had secured which proved to be productive and by her efforts was made to produce. She for years successfully raised upon it both crops and stock. With an eye to business defendant early formed her acquaintance, secured her confidence, sold her horses, took chattel mortgages from her, sold her additional land at a profit, lent her money, took a deed of her farm and secured in writing control of what she raised upon it. Compared with his, her business transactions were few. Unable to read or write she could only record them in her memory. Whether true or false, she relates the more important business events in her life with a distinctness and verifying circumstantial detail often characteristic of the illiterate, in marked contrast with defendant who in venturing beyond his asserted lack of remembrance and dependence on what is in the contracts is quickly adrift in a maze of contradictions. Failure to have written evidence of their various business transactions is more readily explainable and excusable for one in her walk in life than in his. For a business man dealing with many people, in various lines, with clerical help, doing many thousand dollars of business a year, to keep no books of account, or written records beyond the securities he holds is at least peculiar. What the facts are in defendant's case is open to conjecture. First stating he knew nothing

about these transactions except as appears on the papers and had no independent recollection he later inadvertently stated:

"Oh, I think I have records or accounts of payments that Mrs. Higgins made since she has been transacting business with me since February 29, 1892, but I haven't looked it over. I keep account of different things, you know, and when I get through with that book I lay it away."

If that book which he had laid away, containing records of accounts of plaintiff's payments since February, 1892, had been, or could be, produced it would seem a very helpful thing to one or both of these parties; but defendant shortly thereafter denied its existence and hastened to assert,—

"I haven't any record at all outside of what are indorsed on these contracts. * * * I would not pretend to have a record of it. I don't make any records or minutes when I make loans to different people. I simply rely on the papers of that date."

Asserting that plaintiff "didn't make but mighty little payments," that he remembered "her making little payments once or twice" and he didn't think she "ever made a payment to exceed $20," when shown an indorsement of $100 in his handwriting he did not deny it, but later impeached his few indorsements on "those older contracts" with the reflection that there were some of them "all right and some that are not." He was the only witness for the defense in denial of plaintiff's claimed payments, his only other witnesses being Field and Wilson. His testimony was in substance an omnibus denial, behind dependence on the contracts and asserted non-remembrance, with at times conflicting statements when he ventured into details.

Claiming that throughout all these years plaintiff paid but little on her indebtedness to him and never near kept up the interest, admitting he knew the deed

of her farm and contracts he held were only security for money loaned and to be treated as a mortgage, with the nature of which he was not unfamiliar, he attempted after a difference developed as to the amount plaintiff owed him to short-cut past a possible accounting and right of redemption by summary proceedings to put her off the place. She is entitled to an injunction, as held by the lower court, restraining summary proceedings, and to an accounting, either in this suit or on foreclosure by defendant as to her indebtedness to him which is secured by the deeds and contracts which he holds.

Under the theory on which the decree appealed from was rendered, no accounting was gone into as such and directly passed upon by the trial court. The finding and decree of the trial court that between the original parties the consideration set out in defendant's security in the nature of a mortgage may not be inquired into is set aside and the case remanded for such further proceedings as parties may desire and the trial court determine in harmony with this opinion, with costs of this court to plaintiff.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

McMULLEN *v.* GAVETTE CONSTRUCTION CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION—COMMUTATION OF DEFERRED PAYMENTS—DISCRETION OF INDUSTRIAL ACCIDENT BOARD.

   The workmen's compensation act (part 2, § 22) construed, and *held*, to provide (1) for a lump sum agreement between the parties with the approval of the industrial accident board, and (2) for a commutation of deferred payments without the consent of the employer if the discretion of the board is moved by special circumstances attending the case.

2. SAME.

   Said section *held*, not inconsistent and therefore void because by the second provision thereof the employer would be deprived of the right to retain future payments should the injured employee die prior to the expiration of the period within which he would have received weekly payments, leaving no dependents (part 2, § 12), or surviving dependents be deprived of them (part 2, § 7), since it is in furtherance of the central idea which underlies the legislation, viz., to provide for the misfortunes of employees by accident.

3. SAME—EVIDENCE—SUFFICIENCY—INDUSTRIAL ACCIDENT BOARD—DISCRETION.

   A showing by the injured employee that he is permanently incapacitated for work at his trade of carpenter, that he might be able to do some kinds of clerical work where he could sit, that he requires the money to educate himself for such purpose, and that to pay medical and hospital bills his father mortgaged his farm, *held*, sufficient to authorize the board to exercise the discretion provided in said section.

Certiorari to Industrial Accident Board. Submitted October 14, 1919. (Docket No. 32.) Decided December 22, 1919.

Petition by Roy McMullen against the Gavette Con-

For authorities passing on the question of lump sum settlement under workmen's compensation act, see subdivision of a comprehensive note in L. R. A. 1916A, 175.

struction Company and the Globe Indemnity Company, insurer, praying for a lump settlement of a claim for accidental injuries. From an order awarding payment, defendants bring certiorari. Affirmed.

Douglas, Eaman, Barbour & Rogers and *O. G. Wismer,* for appellants.

Herbert W. Smith, for appellee.

BIRD, C. J. Plaintiff is a carpenter by trade. On November 20, 1916, he was employed by defendant construction company. On that date he fell from a scaffold and sustained what is termed by counsel as a "broken back." No question is raised but that the injury arose out of and in the course of his employment. On April 9, 1917, the parties entered into a compensation agreement of $10 a week. This weekly wage was regularly paid by defendants up to January 20, 1919, when plaintiff filed a petition with the industrial accident board praying for a lump sum settlement. A hearing followed in which a showing was made bearing upon plaintiff's physical condition and financial necessities. After considering the same the board made an order, the material part of which is as follows:

"(*a*) That said applicant, Roy McMullen, as a result of the accidental personal injury sustained by him November 20, 1916, while in the employ of said respondents, is totally and permanently incapacitated for work as a carpenter, the occupation in which he was engaged at the time of the accident;

"(*b*) That as a result of respondents' failure to provide for applicant necessary and reasonable medical and hospital services during the first three weeks following his injury, as provided by the workmen's compensation act, said applicant had to himself secure proper medical attention and become liable for the payment of the same ($1,000.00), about one-half of which medical attention should have been furnished

the applicant by the respondents, at their expense, during the first three weeks following the injury;

"(c) That the circumstances in this case are such that it is reasonable and proper that said applicant should receive a sufficient amount of compensation in a lump sum to take care of debts contracted because of the accident, and also to make it possible for said applicant to educate himself so that he will be able to follow some new vocation.

"It is therefore ordered and adjudged, that said petition should be and the same is hereby denied, as to the granting of a lump sum settlement, but respondents are hereby authorized and directed to make an advance payment of one thousand seven hundred fifty dollars ($1,750.00), which commuted on its present worth would amount to the sum of one thousand six hundred seventeen and 6-100 dollars ($1,617.06), which latter amount shall be paid forthwith and receipt therefor filed with the board."

Upon certiorari defendants insist the order is wrong and make the following contentions:

"(1) The power of the board to grant or order lump sum advance payments is confined to those cases in which the consent of the employer is given.

"(2) If the power of the board is not confined to the extent stated in our first contention, it does not extend beyond cases involving specific indemnities.

"(3) Whatever disposition the court may make of contentions one and two, and even if it be held that the statute gives the board power to direct at any time a lump sum advancement to be made, in any case, if special circumstances be found which, in its judgment, require the same, then the present award should be reversed."

1 and 2. The statute under which the board acted in making the order provides that:

"Whenever any weekly payment has been continued for not less than six months, the liability therefor may be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of the industrial accident board, and said board may at any time direct in any case, if special circumstances

be found, which, in its judgment, require the same, that the deferred payments be commuted on the present worth thereof at 5% per annum to one or more lump sum payments, and that such payments shall be made by the employer or the insurance company carrying such risk, or commissioner of insurance, as the case may be." 2 Comp. Laws 1915, § 5452.

There appears to be very little necessity for construing this statute. In plain, unmistakable terms it provides for a lump sum agreement by the parties with the approval of the industrial accident board, and it also provides that the board may, at any time, in any case, provide for a commutation of deferred payments if its discretion is moved by special circumstances attending the case. While the first provision makes it plain that the consent of the employer is to be given, there is no language in the second provision from which any such conclusion could be drawn.

3. It is argued that if this provision of the statute is to be given full effect, in many cases, it will suspend the following provisions of the act:

"The death of the injured employee prior to the expiration of the period within which he would receive such weekly payments shall be deemed to end such disability, and all liability for the remainder of such payments which he would have received in case he had lived shall be terminated, but the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity." * * * 2 Comp. Laws 1915, § 5442.

"* * * In case of the death of one such dependent, his proportion of such compensation shall be payable to the surviving dependents *pro rata*. Upon the death of all such dependents, compensation shall cease." * * * 2 Comp. Laws 1915, § 5437.

"Any weekly payment under this act may be reviewed by the industrial accident board at the request of the employer, or the insurance company carrying such risks, or the commissioner of insurance as the case may be, or the employee; and on such review it may be ended, diminished or increased, subject to the

maximum and minimum amounts above provided, if the board finds that the facts warrant such action." 2 Comp. Laws 1915, § 5467.

The argument is made under the first and third sections that if, after a lump sum advancement is made, the injured party should die, leaving no dependents, the employer would be deprived of the right to retain the future payments, and under the second section that the dependents would be deprived of them. In view of this we are asked to nullify this section of the statute as being inconsistent with the body of the act. It was evidently the intention of the legislature in passing this act to provide for the misfortunes of the employees by accident, and in doing so it was evidently in the mind of the legislature that in most cases the employees' misfortune would be better served by making periodical payments rather than lump sum payments, and that policy was adopted and carried out in the act. But to that rule the legislature created an exception, namely: That lump sum advancements might be made where special circumstances exist, which, in the discretion of the board, made it probable that the interest of the employee would be better served by so doing. We see no inconsistency between these provisions. The exceptions may in many cases be very beneficial to the injured man and his dependents and is, therefore, in furtherance of the central idea which underlies the legislation.

But it is insisted that there have been no circumstances shown here which justify action under this statute. It was shown, on the hearing, by medical testimony, that plaintiff is permanently incapacitated for work at his trade as a carpenter. It was further shown that he might be able to do some kinds of work where he could sit, such as clerical work or telegraphing. It is further shown that his medical and hos-

pital expenses were over $900, and that in order to obtain the same his father mortgaged his farm. We think the showing was ample to authorize the board to invoke the aid of this statute and their order must be sustained, with costs to the plaintiff.

SHARPE, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

POCS *v.* BUICK MOTOR CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DENIAL OF REHEARING BY INDUSTRIAL ACCIDENT BOARD—REVIEW.

There being no provision in either the workmen's compensation act or the rules of the board for a rehearing by the industrial accident board after it has made a final order, the Supreme Court will not, on certiorari, review the action of the board denying such rehearing.

Motion by George Pocs against the Buick Motor Company and another to dismiss a writ of certiorari. Submitted October 7, 1919. (Calendar No. 28,829.) Motion granted December 22, 1919. Rehearing denied April 10, 1920.

Kinnane, Black & Leibrand, for the motion.

Kerr & Lacey, contra.

SHARPE, J. The petitioner filed a claim for compensation against defendants under the Michigan workmen's compensation law with the industrial accident board. An arbitration was had, the award reviewed by the board, and a final order entered in

The question of review and appeal under workmen's compensation acts, generally, see notes in L. R. A. 1916A, pp. 163 and 266; L. R. A. 1917D, 186.

favor of the petitioner and against defendants on January 24, 1919. On February 18, 1919, the respondents filed with the board a petition and motion for a rehearing, alleging therein that the board did not have before it, at the time of making such final order, a true and certified transcript of the testimony which was submitted to the committee on arbitration and that the errors and omissions in the transcript furnished were so flagrant and apparent that the order made should be vacated and the case reopened and a rehearing had. On April 15, 1919, the board made the following order denying said petition:

"In this case a petition having been filed, praying for the reasons therein set forth that the board reopen said case and grant a rehearing and that the order entered by the full board herein on January 24, 1919, reversing the award of the committee of arbitration be set aside, and said petition having come on to be heard before the full board on April 4, 1919, and having been argued on that date by counsel for the respective parties, and the board having carefully considered the entire record of the case and all matters herein involved, the board finds that while differences exist between the two transcripts of testimony made by the two stenographers who reported the arbitration hearing, yet there is no reason apparent to the board for reversing the order of the full board granting compensation in this case, and does not pass upon the question as to which of the two transcripts is the more accurate; and on full consideration of the case:

"It is ordered and adjudged that the said petition of the respondents should be and the same is hereby denied, and respondents shall comply in all things with the final order of the full board entered in this matter on January 24, 1919."

The respondents applied to this court for a writ of certiorari to review such order, and the same was granted on May 14, 1919. Petitioner now moves to dismiss this writ, alleging that "it was improvidently

issued and without authority in law" for the reason that such applications must be *made* and *filed* within 30 days after the determination by the board.

The statute providing for the review by this court of the orders of the board (2 Comp. Laws 1915, § 5465) reads as follows:

"The findings of fact made by said industrial accident board acting within its powers, shall, in the absence of fraud, be conclusive, but the Supreme Court shall have power to review questions of law involved in any final decision or determination of said industrial accident board: *Provided,* That application is made by the aggrieved party within thirty days after such determination by certiorari, mandamus or by any other method permissible under the rules and practice of said court or the laws of this State, and to make such further orders in respect thereto as justice may require."

There is no provision in the law for a rehearing after a final order is made by the board. Neither has our attention been called to any rule relative thereto which has been adopted by the board. While other provisions of the act permit the board to review any weekly payment allowed, at the request of the employee, employer or insurance company carrying the risk, it was held in *Estate of Beckwith* v. *Spooner,* 183 Mich. 329 (Ann. Cas. 1916E, 886), that—

"On the hearing of such petition for review it can be stated as a general rule that the essentials leading up to the award, or its equivalent, are to be taken as *res adjudicata,* except the physical condition of the injured employee, which naturally and legally remains open to inquiry."

The respondents claim that the decision in *Shaffer* v. *D'Arcy Spring Co.,* 199 Mich. 537, supports their contention. In that case it appeared that, while an agreement between the parties had been filed with the board, it had never been acted on by it, and it

was held that "until this is done the agreement is not final."

It follows that the writ of certiorari was improvidently issued and the same will be dismissed, with costs to petitioner.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

BROWN *v.* BOUSCHOR.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF INDUSTRIAL ACCIDENT BOARD—CONCLUSIVENESS.

   The findings of the industrial accident board, in the absence of fraud, are conclusive, if there is evidence to support them.

2. SAME—EVIDENCE—SUFFICIENCY.

   Testimony that plaintiff's decedent, when injured, was an employee rather than an independent contractor, and that he was injured while in the course of his employment, *held*, sufficient to sustain the findings of the board.

3. SAME—INSURANCE—LIABILITY OF INSURER.

   Where the compensation insurer of a lumber company accepted, by an indorsement on the policy, as within its terms, without any restriction, the employees of a subcontractor of said lumber company, and said subcontractor returned his entire pay roll, including employees not employed on said subcontract, and paid premiums thereon, his policy of insurance covered all of his employees, although the lumber company and the insurer were not aware that he had employees other than those employed on said subcontract.

Certiorari to Industrial Accident Board. Submit-

Independent contractors and employees of subcontractors as employees within the meaning of workmen's compensation acts, see notes in L. R. A. 1916A, pp. 118 and 247, L. R. A. 1917D, 148, and L. R. A. 1918F, 206.

ted October 14, 1919. (Docket No. 35.) Decided December 22, 1919. Rehearing denied April 10, 1920.

Caroline Brown presented her claim for compensation against George W. Bouschor and the Consolidated Lumber Company for the accidental death of her husband in defendant Bouschor's employ. From an order awarding compensation, the Lumbermen's Mutual Casualty Company, insurer, brings certiorari. Affirmed.

Nichols & Nichols (*A. R. Locke* and *J. T. Haviland,* of counsel), for appellant.

Gottfrid S. Johnson, for appellee Brown.

Virgil I. Hixson, for appellee Bouschor.

MOORE, J. This is certiorari to review an award made by the industrial accident board, upon the application of Mrs. Brown, growing out of the death of her husband while he was, as she claims, in the employ of the defendant Bouschor. Following the accident to Mr. Brown and his death as the result thereof, a settlement was made under a misapprehension of facts, which proceedings are not important as related to the vital questions in this case, and while we have carefully read all that is said in the record and briefs upon this phase of the case, we shall not refer to it except incidentally.

Caroline Brown, widow of William Brown, on July 10, 1918, filed an application with the industrial accident board asking for compensation as a dependent and made George W. Bouschor, the Consolidated Lumber Company, the London Guarantee & Accident Company, Limited, and the appellant, respondents, and asked for compensation on account of the death of her husband, William Brown, caused by the injury said to have resulted through the accident on the 18th day of December, 1917. The appellant denied liability,

claiming that Mr. Brown, when injured, was working as an independent contractor; that he was not injured while employed by any of the parties to the proceeding; that he was not in the employ of the Consolidated Lumber Company when injured, and did not receive the injury arising out of and in the scope of his employment. An arbitration was had upon such petition and an award made in which it was decided that the London Guarantee & Accident Company and the Consolidated Lumber Company were not liable, but that George W. Bouschor and this appellant were liable to the claimant in the sum of $2,940, which should be paid at the rate of $10 per week, and $33 to Andrew Nelson, the attending physician. The appellant appealed to the industrial accident board for review and urged the same defenses it urged before the arbitration committee, and claimed that the industrial accident board was without jurisdiction in the matter as to the Lumbermen's Mutual Casualty Company, for the reason that the said company had never had its certificate of insurance covering the said George W. Bouschor approved by the industrial accident board, and that unless a certificate was filed in accordance with the rules of the board it had no jurisdiction over the company or the subject-matter; and that the industrial accident board had no jurisdiction to construe the terms and conditions of an insurance contract between the insurance company and employer; and that the finding of the weekly wages of $20 per week was not supported by the evidence, as well as the finding that the appellant was liable for the medical services of Dr. Nelson. The industrial accident board affirmed the award of the arbitration committee.

We quote from the brief of counsel:

"(1) Did the industrial accident board have jurisdiction over the parties and subject-matter?

"The first question to be determined is whether the

industrial accident board had any jurisdiction in this case at all. By rule and statute, three things are necessary to give the board jurisdiction over all parties, viz., the employer and employee and any insurance company of the employer, they are:

"(*a*) The employer's written notice to the board that he has elected to come under the act with the statement of the method of payment of compensation that he desires to adopt or has adopted.

"(*b*) The certificate from the insurance company that it has taken over the risk.

"(*c*) The approval of the industrial accident board.

"These things are essential and jurisdictional, and in no other way can the board know that the employer is complying with the act and until that is done and the approval of the board indorsed and made a part of the record, the employer is not under the act and the board has no jurisdiction over him or his employees. *Bernard* v. *Traction Co.,* 188 Mich. 504; *Shevchenko* v. *Railway,* 189 Mich. 421; *Bendykson* v. *Evangelistic Committee,* 195 Mich. 490."

An examination of these cases will show they are readily distinguishable. In each of them the employers' determination to come under the act had not been approved by the industrial accident board when the injury for which compensation was asked occurred. In this case on the 20th of May, 1916, Mr. Bouschor filed with the industrial accident board his written acceptance as an employer, stating that his method of providing payment was through the London Guarantee & Accident Company. This acceptance was duly approved by the board May 20, 1916, while the accident to Mr. Brown occurred on the 18th day of December, 1917.

It is the further claim that Mr. Brown was not an employee but was an independent contractor. It is also claimed that it is not clearly shown that he was hurt while in the course of his employment. There is testimony tending to sustain the contention of the claimant in both of these respects. We have repeat-

edly held that the findings of fact made by the industrial accident board are, in the absence of fraud, conclusive, if there is evidence to support them: Section 12, part 3, compensation law (2 Comp. Laws 1915, § 5465); *Meyers* v. *Railroad Co.*, 199 Mich. 134; *Homan* v. *Power Co.*, 200 Mich. 206; *Jacobs* v. *Glasser & Hoffman*, 200 Mich. 473; *Nagy* v. *Solvay Process Co.*, 201 Mich. 158; *Perdew* v. *Nufer Cedar Co.*, 201 Mich. 520; *Wilson* v. *Furniture Co.*, 201 Mich. 531; *Malone* v. *Railway*, 202 Mich. 136; *Gabriel* v. *Construction Co.*, 206 Mich. 471; *Shaffer* v. *D'Arcy Spring Co.*, 206 Mich. 483. There was evidence that Mr. Brown was an employee and that he was hurt in the course of his employment.

The meritorious question about which there can be serious controversy is whether the insurance undertaking of the appellant, the Lumbermen's Mutual Casualty Company, covered William Brown at the time he received his injury which later resulted in his death. The defendant Bouschor was a subcontractor under the Consolidated Lumber Company. His contract with that company required him to carry liability insurance so that if any injury occurred to his employees the Consolidated Lumber Company should not suffer any loss because of said injury. Mr. Bouschor was not only a subcontractor as above indicated but he carried on lumbering operations of his own in which he employed men. After entering upon his contract with the Consolidated Lumber Company he obtained liability insurance from various sources, but for reasons which it is not necessary to detail now he found himself without liability insurance. The Consolidated Lumber Company had insurance in the Lumbermen's Mutual Casualty Company.

Mr. Bouschor testified in part:

"*Q.* Now I note this, Mr. Bouschor, that you state 'Method of providing for compensation adopted by the

undersigned, Consolidated Lumber Company and Lumbermen's Mutual Casualty Company.' Did you think that the Consolidated Lumber Company could be your insurer in that case?

"A. Yes.

"Q. You thought they would guarantee your insurance?

"A. Yes, I figured I had to have insurance and when the insurance company withdrew from me, I went to them.

"Q. You went to the Consolidated Lumber Company?

"A. Yes, sir.

"Q. Are they a local lumber company here?

"A. Yes.

"Q. Of some considerable size?

"A. Yes.

"Q. Is it true, Mr. Bouschor, that you have dealt with them, on and off for years, selling your products to them or working for them?

"A. Yes, sir, for years.

"Q. When you wanted insurance, you after having a little trouble about getting it went to the Consolidated Lumber Company?

"A. Why, yes, their contract with me as a jobber states that I shall carry insurance and they claimed that they could carry the insurance you know.

"Q. For you?

"A. Yes, for me.

"Q. And you went to them about it?

"A. Of course I went to them when the other company withdrew and I wanted them to carry my insurance and they said they could and would carry it.

"Q. The Consolidated Lumber Company?

"A. Yes, sir.

"Q. On their policy?

"A. Yes.

"Q. Now, is this correct, Mr. Bouschor, that when you went to them they and you agreed that they would have their policy fixed so that it would insure you, too?

"A. Yes, sir.

"Q. Was it your understanding that they had a policy with some insurance company?

"A. Yes, sir.

"Q. Lumbermen's Mutual Casualty Company?

"*A.* Yes, sir.

"*Q.* And so, from about the 5th of June, 1917, it was your understanding that the Lumbermen's Mutual Casualty Company covered your employees, was it?

"*A.* No, from February 8, 1917.

"*Q.* Well, I notice, Mr. Bouschor, that on this Exhibit I, it is dated the 16th day of April, 1917, was it your understanding that you were covered before that date?

"*A.* Yes, that was when it was.

"*Q.* That was when you signed the papers?

"*A.* Yes, sir."

The result of the conversation between Mr. Bouschor and the manager of the Consolidated Lumber Company was that there was indorsed on the policy which the lumber company had, the following:

"The policy to which this indorsement is attached in so far as said policy applies to the classification of 'Logging operations, including loading and unloading logs on and from cars, river driving, sorting and booming except at sawmill' is hereby extended in all its terms and conditions to include George W. Bouschor as an assured thereunder. * * *

"Subject in all other respects to all the agreements, general conditions, special conditions and warranties of this policy:

"This indorsement when signed by an executive officer of the company and attached to policy No. 214,-444, issued to the Consolidated Lumber Company of Manistique, Michigan, shall be valid and shall form part of said policy.

"Dated at Manistique, Michigan, December 31, 1916.

"LUMBERMEN'S MUTUAL CASUALTY COMPANY,

"JAS. S. KEMPER, Manager."

Following this indorsement a letter was sent reading in part as follows:

"INDUSTRIAL ACCIDENT BOARD,

"Lansing, Michigan.

"*Gentlemen:*

"Consolidated Lumber Company.

"We hand you herewith Employer's Written Acceptance, executed by the following logging contractors

who are subcontractors for the Consolidated Lumber Company of Manistique, Michigan, whose Workmen's Compensation Insurance we are carrying under our policies No. 214443 and No. 214444: Peter Golden, Fred LaBombard, Ray Graves, Paul Knuth, G. W. Bouschor and Frank Jones.

"Yours very truly,
"LUMBERMEN'S MUTUAL CASUALTY COMPANY,
"JAS. S. KEMPER, Manager."

Inclosed with that letter was the following:

"EMPLOYER'S WRITTEN ACCEPTANCE.
"Act No. 10, Public Acts, Extra Session 1912.
"INDUSTRIAL ACCIDENT BOARD,
"Lansing, Mich.
"Take notice that the undersigned employer of labor in Michigan accepts the provisions of Act No. 10 of the Public Acts, Extra Session 1912.
"Number of employees—25.
"Location of place of employment—Manistique and vicinity.
"Nature of employment—logging contractor.
"Method of providing for compensation adopted by the undersigned—Consolidated Lumber Company and Lumbermen's Mutual Casualty Company.
"Dated at Manistique, Michigan, this sixteenth day of April, 1917.

"G. W. BOUSCHOR."

Upon that acceptance appears a stamp "Received June 5th, 1917. Industrial Accident Board, Lansing, Michigan," and that paper is also stamped duplicate, but it bears no approval stamp.

The claim of the insurance company is tersely stated by counsel as follows:

"So we have this situation: The indorsement was made upon the policy of the Consolidated Lumber Company and the Lumbermen's Mutual Casualty Company accepted its provisions because it understood, and had a right to understand, as provided in the contract between the Consolidated Lumber Company and Bouschor, that it was providing a method of compensation for the employees of Bouschor while engaged in any of the employments enumerated 'upon this operation,'

and 'this operation' is found to mean the making into various merchantable products called for by the specifications included in the agreement all of the merchantable timber and other forest products standing, lying and being upon certain described lands, as above stated, and when the pay roll came to the Consolidated Lumber Company with Brown's name thereon, it had a right to believe and did believe that his work had reference to the operations upon the premises so described, and when the report reached the casualty company that Bouschor had paid $2,515.74 to his employees, it understood, and had a right to understand, that it was the employees 'in this operation' or those men who were working on the premises described and not an employee working for Brown ten miles from there as an independent contractor upon an entirely different job.

"In the very outset we must get away from the proposition that there is any attempt to modify, alter, extend or limit the terms of the contract, but that testimony is admissible to show how and why the contract was entered into and what were the facts upon which the consideration as to both parties was based. In other words, the intent of the parties in making it.

"An examination of the authorities warrants us in stating that under these conditions the court may and ought to examine the testimony referred to for the purpose of determining what was the intent of the parties for, as stated in many cases, that intent must govern when not in absolute conflict with the unambiguous, plain and clear terms of the writing." Counsel cite many authorities.

The testimony is persuasive that the manager of the Consolidated Lumber Company and the insurance company did not know that Mr. Bouschor had other employees than those employed by him as subcontractor. They made no inquiries in that respect. If they had they undoubtedly would have learned that a very substantial proportion of his employees were not at work upon the subcontracts he had with the Consolidated Lumber Company, and among them was William Brown when he was hurt.

The evidence is clear that Mr. Bouschor was seeking insurance that would cover all his liability as an employer of labor and that he supposed he had obtained such insurance by the indorsement made upon the policy as before stated. From that time he returned to the lumber company monthly his entire pay roll, including all his employees on all his work, and paid the insurance premium on all of these men to the Consolidated Lumber Company, which in turn forwarded the premiums to the insurance company, which company retained the premiums and it was not until the hearing before the industrial accident board was well under way that an attempt was made to tender back these premiums to Mr. Bouschor, who refused to receive them. There is nothing ambiguous in the language used in the indorsement made by the insurance company upon the policy. Had it desired to limit the insurance so it would cover only such employees of Mr. Bouschor as were engaged in the work he was doing for the Consolidated Lumber Company it would have been easy to have so stated in the writing.

In the employer's liability law is the following:

"Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act, and provisions thereof inconsistent with this act shall be void." * * * 2 Comp. Laws 1915, § 5475.

In *Utter* v. *Insurance Co.*, 65 Mich. 545, Justice MORSE, speaking for the court, said:

"When a stipulation or exception to a policy of insurance, emanating from the insurers, is capable of two meanings, the one is to be adopted which is the most favorable to the insured. 1 May on Insurance, §§ 174, 175; 1 Wood on Insurance (2d Ed.), §§ 60, 62; *Allen* v. *Insurance Co.*, 85 N. Y. 473."

In the case of *Grand Rapids Electric Light & Power Co.* v. *Casualty Co.*, 111 Mich. 148, Chief Justice LONG, speaking for the court, said:

"In *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484, in speaking of the policy in that case, it was said:

"'It ought to be framed with such deliberate care that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it.'

"In *National Bank* v. *Insurance Co.*, 95 U. S. 673, speaking of the policy in that case and the rule here stated, the court said:

"'The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself.'

"We think the court below was correct in its interpretation of the policy, and the judgment must be affirmed."

In *Turner* v. *Casualty Co.*, 112 Mich. 425 (38 L. R. A. 529), Chief Justice LONG, speaking for the court, said:

"If this language in the policy is ambiguous and susceptible of two constructions, then the question must be solved in favor of the insured; for it is well settled in this State that where a stipulation or exception to a policy, emanating from the insurer, is capable of two meanings, the one is to be adopted which is the most favorable to the insured; that it ought to be framed with such deliberate care that no form of expression by which, on the one hand, the party insured can be caught, or by which, on the other, the company can be cheated, should be found on the face of it. *Utter* v. *Insurance Co.*, 65 Mich. 545 (8 Am. St. Rep. 913); *Grand Rapids Electric Light & Power Co.* v. *Casualty Co.*, 111 Mich. 148."

In the instant case Mr. Bouschor made no misrepresentations. He was not asked to disclose anything that he did not disclose. He desired liability insurance that would protect him under the employers' liability law, as to all his employees. He supposed he was getting that kind of insurance and he paid premiums upon that basis. We think it too late now for the insurance company to avail itself of the defense it is urging.

The award is affirmed with costs.

BIRD, C. J., and SHARPE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

BURDICK *v.* GRAND TRUNK RAILWAY SYSTEM.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEPENDENTS—HUSBAND AND WIFE LIVING APART.

Testimony that decedent left his wife about 22 months before his death, and that during that time he did not live with her or contribute to her support, although he occasionally visited her, *held*, to sustain the finding of the industrial accident board that she was not a dependent within the meaning of the workmen's compensation act.

Certiorari to Industrial Accident Board. Submitted October 17, 1919. (Docket No. 66.) Decided December 22, 1919.

Beatrice B. Burdick presented her claim for compensation against the Grand Trunk Railway System for the accidental death of her husband in defendant's

The question as to who are dependents within the meaning of the workmen's compensation acts is discussed in notes in L. R. A. 1916A, pp. 121 and 248, L. R. A. 1917D, 157, and L. R. A. 1918F, 484.

employ. From an order denying compensation, plaintiff brings certiorari. Affirmed.

Edward Daskam (*Philip A. McHugh*, of counsel), for appellant.

W. K. Williams, for appellee.

BROOKE, J. Certiorari to the industrial accident board. Claimant's husband met with an accident on June 5, 1918, in the course of his employment, resulting in his death while on the way to the hospital. A claim for the injury was seasonably made by claimant, after hearing which the committee on arbitration made an award denying compensation upon the ground that applicant was not a dependent upon George W. Burdick, the deceased, at the time of his death. Upon appeal to the full board further testimony was taken, after consideration of which an award was made by the board affirming the award made by the committee on arbitration. Claimant gave evidence tending to show that her husband left her on August 28, 1916, about 22 months prior to his decease; that from that time although he visited her occasionally up to July 4, 1917, he contributed nothing towards her support. She testified:

"When he came to see me he would live at my expense and go away without leaving me any money. I have been making my own living by keeping roomers at 17 Wyandotte street, Walkerville, Ont."

She further testified:

"*Q.* He left you on the 28th of August, 1916?
"*A.* Yes.
"*Q.* Up until that time had he supported you?
"*A.* Yes.
"*Q.* After the 28th day of August, 1916, Mr. Burdick never contributed toward your support?
"*A.* No.
"*Q.* Not a penny?
"*A.* No.

"*Q.* Where did he live, in Windsor or Walkerville, during the time he lived there after he left you?

"*A.* He lived at Windemere road for a month. I do not know the number.

"*Q.* When did you see Mr. Burdick next after he left you in August, 1916?

"*A.* Well, I saw him on the street. He said he didn't see me. I saw him around Christmas. I saw him before that when he was on the police force.

"*Q.* But you didn't see him to speak to him?

"*A.* No.

"*Q.* And he wasn't at your home?

"*A.* No.

"*Q.* When was the first time that Mr. Burdick came to your home after he left you in the spring?

"*A.* In May, 1917.

"*Q.* Are you sure about the month?

"*A.* I think it was in May, I wouldn't say positive.

"*Q.* How long was he there when he came to see you in May?

"*A.* He came Saturday evening and stayed until Sunday evening.

"*Q.* Was he living at Walkerville at that time?

"*A.* No, he was in Detroit, working for the Grand Trunk Railway.

"*Q.* When was he at your home again after in May?

"*A.* He came the next Saturday.

"*Q.* How long did he stay?

"*A.* He stayed until Monday morning.

"*Q.* And when was he there again?

"*A.* I don't know how often he was there. The last time he came was the 4th of July, I think, I know it was a holiday.

"*Q.* You said it was July 4th in your testimony?

"*A.* It was around the 4th that he came or went there.

"*Q.* This time in July, 1917, was the last time that Mr. Burdick was at your home?

"*A.* Yes.

"*Q.* And you did not visit him at his place of residence in Detroit?

"*A.* No.

"*Q.* Where was he living in Detroit, do you know of your own knowledge?

"*A.* At 355 or 357 Chene street.

"*Q.* He sent you no money from July, 1917, up to the time he was killed?

"*A.* No.

"*Q.* Had you had some trouble when he left you in August, 1916?

"*A.* No, only I was sick.

"*Q.* He just picked up and left?

"*A.* Yes, loaded down with liquor.

"*Q.* You mean he was intoxicated?

"*A.* Yes, otherwise he wouldn't have done what he did.

"*Q.* How old a man was Mr. Burdick, do you know?

"*A.* He was—he told me himself he was forty-seven; and his sister said he was a year younger. The way he tells it he would be forty-eight last October.

"*Q.* You never came over here to live with Mr. Burdick?

"*A.* No, I didn't."

No other testimony as to dependency was offered.

It is contended on behalf of the applicant that giving a fair construction to this testimony applicant was living with her husband at the time of his death within the meaning of the act and therefore entitled to the statutory conclusive presumption of dependency. This contention is based upon the assertion that there was a mere suspension of marital relations for an understood period of time, that is until her husband was financially able to establish a home in Detroit. This position is evidently predicated upon the following testimony given by claimant:

"When he wanted me to come over; he couldn't do much yet, if I would come he would get a house on Jefferson avenue. He said he was going to get $75.00 a month, and start paying for it. I told him if he would go and take a pledge for life, I would go—

"*Q.* It is a fact, as this affidavit was sworn to, that he has not contributed to your support or lived with you since July, 1917, up to the time of his death?

"*A.* No. He did not, but I am certainly dependent upon him just the same, thinking every day, when he

told me he would come back, I was expecting he would come. Then I had to sell the furniture, a piece at a time, to pay the rent.

"*Q.* Let's get this right on the record. Since July, 1917, you say he has not contributed to your support or lived with you as man and wife?

"*A.* Since a year ago last summer; that is the last time I seen him.

"*Q.* July, 1917?

"*A.* Until I seen him dead. Still, it was his intention to do so."

So far from indicating an agreement between claimant and her husband that they should live separately for a definite time or until he could establish a home in Detroit for her, we think this testimony shows merely that the husband was dissipated and that the claimant was indigent. Taking the claimant's testimony as a whole and giving it the greatest probative force possible, we are yet constrained, in the light of our own decisions, to agree with the conclusion reached by the board. See *Finn* v. *Railway,* 190 Mich. 112 (L. R. A. 1916C, 1142); *Roberts* v. *Whaley,* 192 Mich. 133; *Ludwig* v. *Foundry Co.,* 194 Mich. 613; *Kalcic* v. *Newport Mining Co.,* 197 Mich. 364.

The award of the industrial accident board will stand affirmed.

BIRD, C. J., and SHARPE, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

ORTNER *v.* ZENITH CARBURETOR CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CANCER—FINDING OF INDUSTRIAL ACCIDENT BOARD—EVIDENCE—SUFFICIENCY.

On certiorari to review an award of compensation by the industrial accident board to plaintiff for disability from a cancer claimed to be caused by an injury to his hand nearly three years before, while in defendant's employ, and for which settlement had been made in full, where there is no testimony amounting to legal evidence that the cancer, which is in another part of his body, is attributable to the injury to plaintiff's hand, the award will be set aside.

Certiorari to Industrial Accident Board. Submitted October 10, 1919. (Docket No. 27.) Decided December 22, 1919.

Paul Ortner presented his claim for compensation against the Zenith Carburetor Company for injuries received in defendant's employ. From an order awarding compensation, defendant and the Standard Accident Insurance Company, insurer, bring certiorari. Reversed, and order set aside.

Keena, Lightner, Oxtoby & Hanley, for appellants.

Henry Wunsch and *Edward F. Wunsch,* for appellee.

STEERE, J. For some time before October 16, 1915, plaintiff was employed by defendant Zenith Carburetor Company in Detroit, his work consisting mostly of grinding carburetors. His compensation was approximately $17.35 per week. On the morning of that date the third finger of his left hand was crushed in a drill at which he was working. It is undisputed that this injury arose out of and in the course of his employment. The carburetor company was operating under

On what constitutes an "accident" or "personal injury" within the meaning of the workmen's compensation acts, see notes in L. R. A. 1916A, 29, 227; L. R. A. 1917D, 103, and L. R. A. 1918F, 867.

the workmen's compensation law, carrying insurance with the defendant Standard Accident Insurance Company. Report was duly made of the accident to the State industrial accident board and proceedings had in accordance with statutory requirements and prescribed regulations of the board. An agreement was entered into between the parties for compensation, which was approved by the board and parties so notified. That adjustment, made with the approval of the board, was carried out by weekly payments, with medical and hospital attendance provided plaintiff until he resumed his employment. Blood poisoning, or infection of the wound, had resulted from the injury and he "complained of general soreness in different joints of his body" for some time. He returned to his former employment in April, 1916, and on the 28th of that month signed a final receipt "in settlement of compensation under the Michigan workmen's compensation law, for all injuries received by me on or about the 16th of October, 1915, while in the employ of the Zenith Carburetor Company." This receipt was filed with the industrial accident board as required by its practice, together with a final report of the accident.

At the time plaintiff returned to work he had, as described by the physician who attended him, "an anchylosed distal joint of the third left finger and a deformity of the distal of the fourth or little finger." This may have affected his skill or ability to perform certain work, but he was given employment by the carburetor company of a character somewhat similar to that in which he was employed before his injury at the same wages and remained in its employ for two years.

So far as shown by any records of the industrial accident board the rights of the parties in relation to that accident had been fully settled and adjudicated, payment made in full and final settlement receipt filed

with the board by May 3, 1916. Nothing further occurred and no further claim was made to the board in regard to the matter until October 14, 1918, when a petition was filed in plaintiff's behalf for the board to reopen his case. In due course of proceedings defendants answered and a hearing on said petition was set for November 19, 1918, at which time no one appeared in behalf of plaintiff and an order was entered by the board dismissing the petition.

On January 22, 1919, plaintiff filed a second petition asking for a rehearing, which defendants also answered. Following the practice in such cases the parties took whatever testimony of witnesses they desired and the same was returned to the board, followed by a hearing thereon. Upon such hearing, and against objection of defendants, the industrial accident board, on May 6, 1919, entered an order granting plaintiff's petition and required that defendants then pay plaintiff compensation at the rate of $6.61 per week, "as provided in the agreement approved December 3, 1915, from May 6, 1918, the date on which he stopped working for said respondent, to May 6, 1919, a period of 52 weeks, there being due and payable on the latter date the sum of three hundred and forty-three and 72-100 dollars ($343.72), and subsequent to May 6, 1919, that he be paid the same weekly compensation during the period of his total disability," etc.

No findings were made by the board beyond the statement in its order "that said applicant has been totally disabled as a result of the accidental personal injury he sustained on October 16, 1915, since May 6, 1918, when he stopped work for respondent, up to the present time."

Plaintiff's witnesses were himself and three physicians, Dr. Stockwell, who attended him during his disability after the accident of October, 1915, until he

resumed work; Dr. Webber, whom plaintiff consulted the latter part of May, 1918, and was treated by for some time, and Dr. Sigel, to whom plaintiff went after Dr. Webber said he could not do anything further for him and advised him to consult another physician.

It was shown by undisputed testimony of the physicians that plaintiff's physical disability after he stopped work in May, 1918, was due to a cancer which had recently developed in his private parts and rapidly progressed until at the time of hearing he was pronounced by them fatally afflicted.

The assignments of error contained in defendants' petition for writ of certiorari involve the following contentions:

"*First.* Under the law there was no jurisdiction in the industrial accident board to reopen this matter (which had been finally determined in May, 1916) upon applicant's petition filed in January, 1919.

"*Second.* Upon this record there is no evidence tending to support the order complained of in finding that the applicant's disability in 1918 was the result of accidental injuries received by him in the course of his employment by the Zenith Carburetor Company."

Of the second it is to be noted that all three of the physicians who professionally attended plaintiff and were called by him as witnesses agreed that cancer, with which he was afflicted during and after May, 1918, is a germ disease resulting from "streptococcus infection," which none of them claimed resulted from or had any direct connection with the injury to his hand in 1915. But Dr. Webber in answer to questions of plaintiff's counsel was favorable to the theory that plaintiff's reduced vitality and run down physical condition imputable to his accident in 1915 would, as he expressed it, "prevent him from having a cure to those parts down there and consequently the prolonged irritation would result in a cancerous infection," thereby purporting to trace a causal connection between the

injury to the hand in 1915 and what he describes as a "streptococcus infection underneath the foreskin" (in 1918), the development of which into a cancer "comes from irritation, continued irritation," and "especially where it is connected with the mucous membrane, grows fairly rapidly."

As to when he became afflicted with a cancer, plaintiff testified that the first time he had any trouble in his private parts was when he went to see Dr. Webber in May, 1918, which he subsequently modified by the statement that a sore first manifested itself there in November, 1917, and began to swell in February or March, 1918, paining him more or less since Christmas, and his condition became such that he had to quit work on May 4, 1918; but went back on the 14th or 15th and worked two days more when he could not stand it any longer and went to see Dr. Webber on May 18th, at which time he was in very bad physical condition. He then told the doctor that some one in the boarding house was playing a joke on him by placing something on the sheets in his bed which got upon his private parts, starting an irritation and swelling, and, as Dr. Webber states he understood it, "was not laid up or, that is, he did not have any trouble for any length of time."

Dr. Sigel, who first saw plaintiff January 2, 1919, testified that he was then emaciated and suffering from cancer or "carcinoma of the penis" which had developed very rapidly since that time; that he could not tell how long the disease was in progress for "a cancer cell may lie dormant sometimes for a year. It is simply a misplaced cell, and then some irritation causes it to grow very rapidly all of a sudden, which is very likely the case here."

Dr. Stockwell, who attended plaintiff following the accidental injury in 1915 until he resumed work, testified that he was sent to him for examination in Oc-

tober, 1918, and was at that time suffering with what the doctor diagnosed as a cancer which "showed it had existed for some little time from general appearances." Asked whether the cancer resulted from plaintiff's injury for which he had attended him he replied: "I would testify positively that the cancer was not caused by the injury."

Dr. Webber, from whose testimony alone it is claimed a causal connection is inferable, testified, in direct examination, as follows:

"I thought possibly it was a gonorrheal infection, but I found it was not; it was streptococcus infection. I treated him along for a short time with the usual remedies, the injections and the serum treatments, the vaccine treatments, and he did not seem to progress favorably; he was a little bit emaciated, and I thought he better consult somebody else.

"*Q.* How serious was that infection on the penis?

"*A.* Well, it was quite a serious one. The extension at that time was the full length practically of the penis.

"*Q.* What was the man's general condition of health, was he in a weakened, run-down condition of health?

"*A.* He was very emaciated.

"*Q.* Taking into consideration, Dr. Webber, that this man suffered an injury of the finger and the left hand which resulted in October, 1915, in a serious case of blood poisoning and general infection throughout the hand and the arm, for which he was treated by Dr. Stockwell in the hospital and in his office for a period of six months, and taking also into consideration that the man had had no other illness of any sort other than this blood poisoning between October, 1915, and the time you saw him in May, 1918, would you say that this slight infection of the penis was—or this infection of the penis was sufficient to run down that man's health to the point at which he was when you saw him?

"*A.* I would say that his emaciated condition was the result of possibly that infection that he had at that time. It prevented him from recuperating and

building up his general system, so that he was in a condition unfit for work. I would not say, though, that this infection of the penis was the result of his injury at that time, or that the extension of the inflammation of the penis at that time was the result of his injury; but I would say that his emaciated condition could result from his being run down and not having sufficient recuperative powers to build himself up. Consequently, this infection of the penis, as the result of his being run down, prevented him from possibly getting well.

"*Q.* Would you say that that emaciated condition could very logically follow a serious case of blood poisoning such as this man had?

"*A.* Why, certainly.

"*Q.* Some two years previous?

"*A.* Why, certainly.

"*Q.* Taking into consideration, doctor, that this man had no infection such as you have mentioned of the penis at the time of that blood poisoning, will you state whether or not it is your opinion very likely that this emaciated condition was the direct result of the blood poisoning?

"*A.* Why, certainly." * * *

On cross-examination he was asked and answered:

"*Q.* The first time you saw the applicant, Mr. Ortner, was in May, 1918?

"*A.* Yes, some time the latter part of May.

"*Q.* At that time he had quite a serious infection which extended the full length of the penis?

"*A.* Yes, sir. * * *

"*Q.* Did it occur to you that it was a cancer, doctor?

"*A.* Not at that time, no, sir.

"*Q.* It did not?

"*A.* No, sir; in fact, I don't think it was a cancer at that time.

"*Q.* When you informed him along in July that you could do nothing further for him and were trying to get rid of him, as it were, were you then of the opinion that it was a cancer?

"*A.* Well, I suspected there was something of that nature, I told Paul that the only thing that would help him anyway would be to have an operation. * * *

"*Q.* Assuming that this infection existed for six weeks or two months, was that not sufficient to reduce his vitality to the extent which you found it in May, 1918?

"*A.* No, I don't think so.

"*Q.* You don't think it was?

"*A.* No, sir.

"*Q.* You would not say it was not, though, doctor?

"*A.* Well, I would not swear. Yes, I would. I would say it would not reduce his vitality sufficiently.

* * *

"*Q.* But you are sure of one thing, are you, doctor, that this cancer did not result from that infection that he had some two and a half years ago?

"*A.* Oh, no.

"*Q.* It did not result from that?

"*A.* No, sir. I did not say it had anything to do with it.

"*Q.* But all you want us to understand is that perhaps when he went to see you in May, 1918, he was somewhat emaciated as the result of his injury some two years preceding that time?

"*A.* Yes, sir."

So far as Dr. Webber or the other physicians attempt to explain the nature and cause of cancer, admittedly the disease with which plaintiff was suffering in 1918 and by reason of which he became incapacitated and quit work in May, 1918, they show it to have been of local origin from a streptococcus or bacterial infection under the foreskin, roused to malignant activity and rapid growth by misplacement and "continued irritation," none of which is given any causative relation or imputed to the healed industrial injury to his hand, two and a half years before. Whether such a disease germ so planted and roused to malignant growth by misplacement and constant irritation is in its nature recognized by the medical profession as best developed or best resisted by otherwise healthy condition or superior vitality we are not advised beyond Dr. Webber's pathologic theory that

plaintiff's "little bit" and "very" emaciated condition *could* have resulted from his recuperative powers having been impaired as the result of the former injury to his hand, which *possibly* prevented him from "getting well" of the subsequent cancer; although asserting he "did not say" the infection of his hand two and a half years before "had anything to do with it." There is no evidence, or even theory, that the infecting germ, from which the cancer causing plaintiff's subsequent incapacity resulted, found lodgment where it developed by reason of or in the course of his employment, nor that the irritation which his physicians name as an essential element to its growth was attributable to his former injury or employment.

This record affords no testimony to facts or theory amounting to legal evidence that the cancer by which plaintiff was incapacitated in 1918 is attributable to the accident to his hand in 1915.

The award is therefore set aside.

BIRD, C. J., and SHARPE, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

DIEBEL *v.* SPITZLEY & WIDENMAN CONSTRUCTION CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PARTIES—WAIVER.

Where defendant insurance company took the initiative in regard to the accidental death of an employee of either a construction company or its president (the actual employer being somewhat in confusion) by filing a report of the accident with the industrial accident board, and

thereafter, without protest or explanation, assumed to represent them in arbitration proceedings, and whenever occasion arose, accepting the award of compensation by the arbitration committee against it and the construction company, without appeal, any possible objection which defendant might have had as to parties as affecting its liability, *held*, to have been waived.

2. SAME—REHEARING—JURISDICTION OF INDUSTRIAL ACCIDENT BOARD. Where no appeal was taken from a final order of the industrial accident board, in proceedings under the workmen's compensation act, said board is without jurisdiction to grant a rehearing therein

Certiorari to Industrial Accident Board. Submitted October 30, 1919. (Docket No. 82.) Decided December 22, 1919.

Henry Diebel, personally, and as guardian of Eunice and Clara Diebel, presented his claim for compensation against the Spitzley & Widenman Construction Company for the accidental death of his son in defendant's employ. On petition of the Chicago Bonding & Insurance Company, and another, insurers, to be relieved from further payments under an award. From an order denying the petition, defendants bring certiorari. Affirmed.

Frederick J. Ward, for appellants.

Kerr & Lacey, for defendant construction company.

Vincent M. Brennan, for appellee.

STEERE, J. This case comes here by certiorari to the industrial accident board for review of an order made by it on January 29, 1919, denying a petition by defendant Chicago Bonding & Insurance Company to be relieved from making further payments of compensation in the case, ordering accrued compensation paid to the amount of $184.50, and continuance of payment of $4.50 a week in accordance with an award

made by a committee of arbitration on September 20, 1916. The case is somewhat peculiar in an indicated confusion of parties and misunderstanding of facts which seems to run even to the names of the parties and manner of spelling the same. One T. W. Widenman (variously spelled) is not personally a party to the proceeding but figures conspicuously in it.

On February 29, 1916, Leon (or Leland) Diebel, a young single man about 20 years of age, was killed in the course of his employment by a concededly industrial accident, and left him surviving the plaintiffs, respectively his father Henry, two minor sisters Eunice and Clara, the father being personally a party to this proceeding and as guardian for his minor daughters. The case was first brought to the attention of the industrial accident board by the report of an accidental death to one Leland Diebel received from A. D. Kehoe, adjuster of defendant Prudential Casualty Company. That report named T. W. Widenman as employer, the place and date where the accident occurred as 390 Burlingame avenue, February 29, 1916, with answers to other questions in the form furnished by the industrial accident board not material to detail, and was signed by T. W. Widenman as employer. On March 23, 1916, the industrial accident board received a letter from W. D. Allen, adjuster of the Prudential Casualty Co., referring to a report inclosed "of accident to Leland Diebel, an employee of T. W. Widenman," stating that payment of necessary expenses in connection with the funeral had been refused by the boy's father and there was reason to believe a claim of dependency would be made in behalf of two younger sisters of deceased, which the company was awaiting developments in because unable to obtain necessary information as to the different employers for whom deceased worked during the year and inability of the family to furnish informa-

tion as to contributions made by deceased towards their support. On March 24, 1916, the industrial accident board sent the report to the Prudential Casualty Company in Detroit for completion, as to the daily wages of deceased. On April 6, 1916, the board received a letter from V. M. Brennan, attorney, of Detroit, stating he had been retained by Henry Diebel for himself and as guardian of his two minor daughters, that deceased was when killed in the employ of the "Spitzley & Widenman Construction Company," and in a letter dated April 15th the board had named "T. W. Widenman Construction Company" as the employer, while Mr. Allen in his letter to the board referred to deceased as employed by "T. W. Widenman"; that there was a concern located in the Farwell building in Detroit under the name of "Spitzley & Widenman Construction Company" and the writer was anxious to learn whether the concern under that name had filed acceptance of the compensation act with the board. This was followed by other correspondence, and on May 2, 1916, a notice to T. W. Widenman as employer was filed by Henry Diebel, "per V. M. B."; in accordance with the prescribed form, naming as respondents "the Spitzley & Widenman Construction Company, a Michigan corporation, and Prudential Casualty Company, a corporation," and stating "the postoffice address of respondents is as follows: Spitzley Company, Farwell building, Detroit, Michigan, Prudential Casualty Company, Majestic building, Detroit, Michigan."

No agreement as to compensation having been reached the matter was set for arbitration on September 20, 1916, at which time Zalic B. Clago was appointed arbitrator for the three applicants and Arthur L. Aiken for the Prudential Casualty Company at the instance of the respective parties, the appointment of Aiken being made pursuant to a written notice, dated

September 13, 1916, to the industrial accident board as follows:

"You are hereby notified that Arthur L. Aiken whose postoffice address is 1442 Majestic building, has been chosen a member of the committee of arbitration in the above entitled matter by the undersigned.

"PRUDENTIAL CASUALTY CO., Respondent,
"Per A. D. KEHOE."

The arbitration resulted in an award in favor of applicants in the sum of $4.50 per week for a period of 300 weeks from February 29, 1916. True copies of this award were sent to Vincent M. Brennan, attorney, Henry Diebel, Spitzley & Widenman Construction Company, at their Detroit address, one being also sent to the Prudential Casualty Company, 1330 Majestic building, Detroit, Michigan, and another to its home address at Indianapolis, Indiana. No appeal was taken from this award, and the payments were regularly made thereafter for over two years by the Prudential Casualty Company, and its successor, the defendant Chicago Bonding & Insurance Company, receipts being given therefor by Henry Diebel and filed with the board, the last covering the 111th week being filed April 2, 1918.

On October 4, 1916, the industrial accident board wrote to the Prudential Casualty Company asking for a final report of the accident, to which reply was made by A. D. Kehoe, its adjuster, inclosing the supplemental report as per request and stating, among other things, "This matter will not be contested further as it has evidently been settled satisfactorily to all parties concerned." This final report, dated October 9, 1916, gave the name of the employer as "Spitzley & Widenman Construction Company" and was signed by "T. W. Widenman, position—general superintendent." He was also president of that company, which, on July 12, 1915, had filed with the board its written accept-

ance of the provisions of the workmen's compensation law, signed by him as its president. He was also a witness at the hearing before the committee of arbitration on September 20, 1916, and produced the time books showing when Leon Diebel started to work, his rate of wages and number of hours employed. His explanation of the fact that about three weeks after the award was made against the Spitzley & Widenman Construction Company and Prudential Casualty Company he signed a final report of the accident as the construction company's superintendent, giving the name of said company as the employer, is that the question of employment seemed to have been settled when he appeared in the room before the arbitration committee and he subsequently signed the typewritten final report in behalf of the company, "not appreciating the significance and as a matter of formality."

The records of the industrial accident board show that the Southern Surety Company was insurer of the Spitzley & Widenman Construction Company, whose acceptance was approved by the board July 17, 1915; that on February 9, 1916, the Prudential Casualty Company filed a certificate, dated February 1, 1916, stating T. W. Widenman was insured by it under the workmen's compensation act; that his personal acceptance of the provisions of the law, also dated February 1, 1916, first reached the office of the board March 6, 1916, and was approved by the board March 20, 1916.

The petitioner, defendant Chicago Bonding & Insurance Company, which some time later took over and became the successor of the Prudential Casualty Company, continued payment of compensation pursuant to the award until after, as alleged in the petition, claimant Henry Diebel as administrator of Leon Diebel's estate brought a common-law action in the circuit court of Wayne county against T. W. Widenman to recover

damages for the death of said Leon, charging that he was then in the employ of Widenman who had not at that time filed his election to come under the compensation law, which led to discovery on investigation that the Prudential Casualty Company never was insurer of the Spitzley & Widenman Construction Company. Payments thereafter were discontinued and in September, 1918, a judgment was taken in the circuit court of Wayne county under applicable provisions of the compensation law for installments in default, followed by this petition to the board for relief; which is in effect an application for a rehearing, as no claim for review of the award was filed within the prescribed time therefor and the decision of the committee which was filed stood as the decision of the industrial accident board, under section 8, part 3, of the act (2 Comp. Laws 1915, § 5461).

The major key of defendants' reason for relief seems to sound in equity, asserting "that the entire proceedings from the very outset, that is from the hearing before the arbitration committee down to the time of stopping of compensation, was in error and a mistake on the part of all parties concerned," which it is urged the court can and in justice should correct. It is also urged as a legal proposition that the committee of arbitration which made the award had no jurisdiction over the Prudential Casualty Company, because, as we gather from the argument, it was not in fact surety for the defendant construction company and, therefore, as to it, not under the jurisdiction of the workmen's compensation law or its administrative board; which it was the duty of the board or its committee to ascertain before proceeding to determine the rights of the parties; while it is submitted as—

"very evident that this committee did not make the proper inquiry or investigation; if they did the very first thing they would have discovered would have been

that the proper insurance company was not named in that award. This arbitration committee is presumed to determine these matters on a fair and impartial basis and if they find the claim is not made against the proper employer or proper insurance company it is their duty to so report it, and any other action on their part would not be in accordance with their duty and powers and would therefore be illegal."

If anyone knew who was young Diebel's employer at the time of his death, and whether the Prudential Casualty Company was insurer for the Spitzley & Widenman Construction Company, it would seem Widenman and those two companies, or their proper officials, had that knowledge. We are not cited to any provision of the statute or rule of law imposing upon the arbitration committee or accident board the duty of investigating under the presumption those before them as respondents did not know, and must be advised by them in that particular. The Prudential Casualty Company took upon itself the initiative in regard to this accident under the compensation law, by filing report of it with the board as required in such cases. It thereafter without notice to the contrary, protest or explanation, assumed to represent either Widenman or the construction company as an insurer, whenever occasion arose in the matter. It filed two inconsistent reports, the first naming Widenman and the second the Spitzley & Widenman Company as employer. It at first negotiated unsuccessfully to adjust the matter of compensation with plaintiffs. When it, as insurer, and the construction company were together proceeded against for compensation under the law it raised no question as to form of the proceeding or proper parties and joined actively in the arbitration, selecting one of the three arbitrators to represent it, as the law permits a respondent to do. It thereafter advised the accident board there would be no farther contest

as the matter was evidently settled satisfactorily to all concerned and filed no claim for review.

Whatever mistake or misunderstanding there may have been on the part of defendants cannot be imputed to plaintiffs or urged as mutual, for on first participation plaintiffs' counsel wrote the board that his client's son was killed "while in the employ of the Spitzley & Widenman Construction Company," and having decided to proceed against the construction and Prudential companies, so proceeded from the beginning and entitled the papers he filed and served as a claim against them, which was consistently pressed and maintained to final award.

For disposition of this writ it is not deemed necessary to pursue suggested theories or conjectures in explanation or imputation of the causes or motives which may have resulted in the situation from which relief is now asked. We do not disagree with the conclusion and finding of the industrial accident board that the Prudential Casualty Company could and did waive possible objections as to parties, and conceded plaintiffs' claim that it was jointly liable with the construction company.

Aside from that aspect of the case we conclude that, the injured party being dead, the award was clearly a final order and, as before suggested, this petition is in its legal import but an application for a rehearing which when filed the accident board lacked jurisdiction to entertain under the recent holding of this court upon that subject in *Pocs* v. *Buick Motor Co.*, *ante*, 591.

The order of the industrial accident board herein will stand affirmed.

BIRD, C. J., and SHARPE, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

COLLINS *v.* THE ALBERT A. ALBRECHT CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DISCRETION OF BOARD TO EXTEND TIME FOR APPEAL ON PROPER SHOWING.

   A showing that, through some oversight, no copy of the award of the committee on arbitration, in proceedings under the workmen's compensation act, was sent to defendants' attorneys, although it is a well-known and established custom of the board promptly to send one to the parties, to the insurance company carrying the risk, and to the attorneys for the parties, that as soon as defendants' attorneys learned of the award they promptly applied for an extension of time in which to perfect an appeal, *held*, sufficient to invoke the discretion of the board, under part 3, § 8, of said act, upon sufficient cause shown, to grant such extension, and the board was in error in holding that it was without discretion in the matter.

2. SAME—CUSTOM OF BOARD—RIGHT TO RELY ON—QUESTION FOR BOARD.

   As to whether defendants had the right to rely upon said custom of the board and assume that when they received notice of the award their attorneys also received the same notice, and would properly protect their rights, *held*, primarily a question for the board.

Certiorari to Industrial Accident Board. Submitted October 17, 1919. (Docket No. 69.) Decided December 23, 1919.

Alex. Collins presented his claim for compensation against The Albert A. Albrecht Company for injuries received in defendant's employ. From an order denying a petition for an extension of time to perfect an appeal from an order awarding compensation, defendant and the General Accident, Fire & Life As-

surance Corporation, Limited, insurers, bring certiorari. Reversed, and order vacated.

Kerr & Lacey, for appellants.

Douglas, Eaman, Barbour & Rogers, for appellee.

FELLOWS, J. On December 10, 1918, Deputy Commissioner Ora E. Reaves, acting as a committee of arbitration, other arbitrators being waived, heard the testimony offered by the parties upon applicant's claim. He did not at this time announce or make his finding or award or fix a definite date when he would do so. On December 12th he made an award in favor of applicant. It is a well known and established custom of the board, and a commendable one, to promptly send to the parties, to the insurance company carrying the risk, and to the attorneys for the parties, true copies of the award. In this case through some oversight no copy of the award was sent to defendants' attorneys and they did not learn of the award until January 8, 1919. They then promptly filed a petition for an extension of the time in which to appeal the case. The board declined to exercise its discretion in the matter. It is somewhat doubtful from the findings filed whether this result was reached upon the theory that the board had no power or upon the theory that no facts were stated upon which the board could act. In its ultimate findings the board found:

"(*a*) That under the conditions of this case it has no power to grant an extension of time to the respondents during which they might appeal.

"(*b*) That if the industrial accident board had the power in this case it would exercise its discretion to grant an extension of time, and if it believed it had the power to grant an extension of time it would do so."

In its opinion, however, there is some language indicative of the view that no facts had been presented

authorizing it to act. We are, therefore, not confronted with the question of whether, upon the admitted facts, the board has abused its discretion or whether it should or should not grant such application. What we shall here say should not be regarded as any intimation on that subject as it is not before us. We are solely considering the question of the power of the board; and in view of the ambiguity contained in the findings shall consider its power generally and upon the facts in the instant case.

Section 8, part 3, of the act (2 Comp. Laws 1915, § 5461), provides:

"The committee of arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be held at the locality where the injury occurred, and the decision of the committee shall be filed with the industrial accident board. Unless a claim for a review is filed by either party within seven days, the decision shall stand as the decision of the industrial accident board: *Provided,* That said industrial accident board may, for sufficient cause shown, grant further time in which to claim such review."

This court had this provision of the act before it in *Brunette* v. *Mining Co.*, 197 Mich. 301, and *Kalucki* v. *Foundry Co.*, 200 Mich. 604. In both cases this court held that the board had the power, the discretion, to grant an extension of time. In the *Brunette Case,* we held that the discretion of the board had not been abused, while in the *Kalucki Case* we pointed out that the provision did not give the board the arbitrary power to extend the time fixed by the statute.

We think the facts set up in the petition are sufficient to authorize the board to exercise its discretion. What that action should be, we do not intimate. Parties, insurance companies, and attorneys having business before the board are familiar with the practices and customs of the board. The universal custom of

the board was to notify not only the parties, including the insurance companies, but also the attorneys appearing in the case. When the employer and its insurance company received notice of this, or any other award, they knew that, under the custom of the board, their attorneys should also receive the same notice they did. Perfecting the appeal was a matter for the attorneys. It is not an infrequent occurrence that business men turn over to their attorneys all details in the conduct of litigation; and we cannot say, and it is not before us to say, that respondents here did not have the right to rely upon this custom of the board and assume, and have a right to assume, that when they received notice of the award their attorneys also received the same notice and would properly protect their rights. Primarily this question was for the board. Sufficient facts were before the board to authorize it to act upon, to use its discretion; this it declined to do, holding that it had no power, no discretion, in the matter. In this the board was in error. Respondents were entitled to a determination of the question based on the discretion of the board. This they have not had. For this reason the order of the board will be vacated and the case remanded for further proceedings not inconsistent with this opinion.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

KENT COUNTY *v.* KRAKOWSKI.

1. PRINCIPAL AND SURETY—BONDS—RIGHT OF INJURED PARTY TO SUE IN OWN NAME.

   The bond of a public officer to faithfully perform the duties of his office is made for the benefit of any and all to whom he owes an official duty, and it is no longer required that actions upon such bonds be brought in the name of the obligee for the use and benefit of the party claimed to have been injured. 3 Comp. Laws 1915, § 12353.

2. EVIDENCE—ADMISSIONS—CONFESSION—ADMISSIBILITY.

   In an action against a defaulting public official and his surety jointly on his official bond, proof of his oral admissions to the prosecuting attorney of his defalcations and a written confession were admissible so far as he was concerned, where substantial facts beyond mere conclusions of law were included.

3. SAME—ADMISSIBILITY AGAINST SURETY.

   Such admissions, being admissible against the principal, cannot be excluded, and, being admitted as against him, will generally be considered against the surety.

4. PRINCIPAL AND SURETY—BONDS—CLERK OF COURT—LIABILITY—PROOF.

   While no recovery could be had upon the bond of a defaulting court clerk unless it was shown that the money was paid to him pursuant to some mandate of the court, it is not necessary to show that the order was reduced to writing or recorded in the court journal.

5. SAME — COURT RECORDS — NEGLECT OF CLERK — SECONDARY EVIDENCE—ADMISSIBILITY.

   While it is the general rule that an order of a court of record cannot be proved in a collateral proceeding otherwise than by a journal entry, yet the neglect of the clerk of the court to make the proper entries in regard to money passing through his hands would not bar other available evidence upon the subject, in an action against him and his surety on his official bond.

Error to Kent; Brown (William B.), J. Submitted June 5, 1919. (Docket No. 45.) Decided December 22, 1919. Rehearing denied April 10, 1920.

Assumpsit by the county of Kent against Alexander E. Krakowski, principal, and the Southern Surety Company, surety, on a bond. Judgment for plaintiff. Defendant surety company brings error. Affirmed.

Jewell & Smith (*John P. McCammon*, of counsel), for appellant.

Fred P. Geib and *Cornelius Hoffius*, for appellee.

STEERE, J. This is a companion case with *City of Grand Rapids* v. *Krakowski*, *ante*, 483, in the particular that defendants and bond sued upon are the same, and reference may be made to that case for a general statement of the situation so far as relates to Krakowski's official position, duties and delinquencies, the nature of the bond involved and the defendant insurance company's relations with him as his surety. Krakowski held the office of clerk of the superior court of the city of Grand Rapids from January 1, 1912, to December 27, 1917, at which time discovered and admitted defalcations resulted in his removal from office and subsequent litigation to recover from him and his surety for such defalcations.

In connection with his oral confessions to the prosecuting attorney he wrote and signed the following:

"I, Alexander E. Krakowski, do hereby make the following confession:

"As clerk of superior court, about four years ago, I began taking money, consisting of fines and costs paid in to superior court, and converting them to my own personal use. The amount taken to the best of my knowledge is about $8,000.00, in addition to about $1,600.00 taken this year and not turned over to the county treasurer. That I also for the past 2½ years did not turn over fees from civil cases, to the city treasurer.

"The money was used in purchasing a house and lot on land contract and furnishing the house—and spending freely.

(Signed) "ALEX. E. KRAKOWSKI.

"Dated Dec. 27, 1917."

This action was brought by Kent county to recover from Krakowski and the defendant insurance company, which furnished and signed his official bond, the sums of money which in his official capacity as clerk of the superior court came into his hands for fines, costs and estreated bail in criminal cases, and was not by him paid over to the county treasurer as required by law. The case was tried in the Kent county circuit court before a jury, resulting in a verdict in plaintiff's favor for the sum of $8,913.30. The active defense was by the defendant surety company which urged many defenses both against the pleadings and proofs, among which were that the bond, even though good as a common-law obligation, did not comply with the statute and therefore action upon it could only be brought in the name of the obligee, for itself or the use and benefit of a party claimed to be injured; that Krakowski as clerk of the superior court of Grand Rapids was accountable only to the city, and any relations he bore to Kent county were but *ex officio*, not covered by his bond, and his surety therefore not liable for nonperformance of his duties in that relation; that no recovery could be had under the common counts, and there could be no recovery on the single special count because it counted upon several successive bonds and different terms of office. Numerous objections were interposed during the progress of the trial to the proofs offered and admitted to establish the many items of shortage included in the charge. In connection with a motion to strike out all testimony objected to and claimed incompetent defendant moved for a directed verdict both at the close of plaintiff's testimony and at the conclusion of all the testimony, on numerous grounds, and particularly because the record furnished no competent proof of any order or orders by the court directing payment to Krakowski

of any money charged against him in plaintiff's bill of particulars.

A bill of particulars was furnished defendant by plaintiff including a long list of claimed items of defalcations during Krakowski's term of office with case, numbers, etc., to proving which much of the time of the protracted trial was devoted. A motion for a new trial was subsequently made in which the various items of defalcation submitted to the jury were classified into groups, and the sufficiency of proof in relation to each group was argued before the court, under objections made and preserved, briefly as follows: Those sought to be proved by admission of the docket Krakowski kept as clerk, showing fines and costs paid to him without proof of any record of an order of court in relation thereto; certain items which should have been stricken out because they were withdrawn on the trial or no proof of payment to the clerk was made; those in relation to which the court record contained nothing to prove an order of the court beyond a payment to the clerk, and where no attempt or offer was made to prove an order, probation cards, docket or journal entries or anything of like nature. The motion was lengthy, and contained some 30 claimed grounds why it should be granted.

The court filed a written opinion reviewing the motion, in which it found that amongst the many items submitted to the jury and apparently included in the verdict there were certain specified items aggregating $408.35, not supported by competent proof sufficient to justify their submission, and the verdict was excessive to that amount. Overruling defendant's other contentions, the court denied its motion for a new trial on condition that plaintiff remit from the judgment the excess so found, which was done. Defendant duly filed abundant exceptions to the order of the court denying said motion, and brings the case

to this court for review on bill of exceptions containing 124 assignments of error, many of which we regard as either disposed of in the previous case involving the same bond, or not of a nature demanding discussion.

The superior court of Grand Rapids is a court of record with a seal, having within territorial limits of the city like general powers and concurrent jurisdiction with the circuit court of Kent county, with original and exclusive jurisdiction of all prosecutions in behalf of the State for crimes and offenses arising under State laws committed within the corporate limits of the city, except those cognizable by the police and justice's courts. While other litigation arises and is entertained in that court, its exclusive jurisdiction within the city of criminal cases triable in a court of record results in much of its time being occupied in entertaining and disposing of criminal cases under the State law by trial or otherwise, as to which the powers and duties of the court and its officers are the same as in the circuit courts of the State generally and controlled by the same State laws. Without further detail, it is sufficient upon that subject to cite the act creating said court, found in 3 Comp. Laws 1915, § 14682 *et seq.*, and *Attorney General* v. *Renihan,* 184 Mich. 273.

Neither is it necessary to now quote from, or discuss the form of and conditions in the bond involved, which is the same passed upon in *City of Grand Rapids* v. *Krakowski, supra,* where it is reviewed and construed. Its conditions for the faithful performance of the duties of his office embraced the duty imposed upon him as clerk of the court which he served, as it would the clerk of any circuit court, to pay over to the county treasurer within 20 days after its receipt any money received by him in his official capacity under order of the court, or pursuant to statute, on ac-

count of any recognizance, fine, penalty or forfeiture in criminal cases brought under the State law in that court. Sections 13431-13433, 3 Comp. Laws 1915.

Such bond of a public officer to faithfully perform the duties of his office is made for the benefit of any and all to whom he owes an official duty, and it is no longer required that actions upon such bonds be brought in the name of the obligee for the use and benefit of the party claimed to have been injured. Section 12353, 3 Comp. Laws 1915, with certain qualifications not relevant here, requires that:

"Every action shall be prosecuted in the name of the real party in interest, * * * *Provided*, That any person to whom a cause of action shall accrue upon the bond of any public officer, required to give bond to the people of this State, may prosecute a suit for recovery on said bond in his own name: *Provided, further*, That actions upon any bond, contract or undertaking lawfully made with any officer of this State, or of any county, township, school district, city or village, or to enforce any liability or any duty enjoined by law to said officer, shall be brought in the corporate name of the body for whose benefit such contract was made, or such liability or duty enjoined."

Error is urged upon the court allowing proof of Krakowski's oral admissions to the prosecuting attorney of his defalcations and written confession above quoted, which it is said were "directed to a conclusion of law," evidential of no facts upon which liability could be based, and necessarily prejudicial to the defense. Krakowski was a joint defendant in the case represented on the record by the same counsel as the surety company. His admissions included substantial incriminating facts beyond mere conclusions of law and were certainly admissible so far as he was concerned.

"Where the principal and surety are sued jointly, the admission of the principal being competent against

himself cannot be excluded, and being admitted as against him, will generally be considered against the sureties." Stearns on Suretyship (2d Ed.), p. 300; citing *Magner* v. *Knowles*, 67 Ill. 325; *Amherst Bank* v. *Root*, 2 Metc. (Mass.) 522.

On the trial it appeared that Judge William J. Stuart, judge of the superior court during the period under consideration, was deceased. The records of the court were found incomplete in the great majority of cases in the particular that no direct orders had been entered in the journal and signed by the judge pronouncing sentence and directing respondent to pay fines, etc. Defendant's counsel made seasonable objections in various forms to substantially the entire line of evidence pursued by plaintiff, under the general propositions that no liability could arise for any money which came into Krakowski's hands except it was received under order of the court, and that an order of a court of record cannot be proved in a collateral proceeding otherwise than by a journal entry, of which they say:

"No attempt was made on the part of plaintiff to show that the judgments which formed the foundation of its claim were ever in existence and destroyed so that secondary evidence was admissible to prove them,"

—to which statement plaintiff's counsel reply that it produced and offered in evidence all available court records and a written order signed by the judge requiring the defendant to pay fine and costs was produced in many cases, but where such could not be found secondary evidence was produced.

Early in the trial of the case counsel for plaintiff broadly made the claim that under his statutory duties any money received by Krakowski as a public official was public money as to him, and the law obligated him in the performance of an official duty to care for and pay it over to those lawfully entitled to it, in default

of which he and his bondsmen were liable; but on intimation from the court of an impression that the bare fact the clerk received the money without any evidence it came into his hands by some order of the court would not be adequate for recovery against the surety, plaintiff's counsel stated their position to be that there was a court order in each case but because entered on certain cards by the judge some of them appeared to be lost, and:

—"we are entitled at least to go to the jury on the question of whether there was a court order originally. We have introduced the docket showing that there was a criminal case against the respondent and that some action was had in court concerning it and that money was paid in to the clerk for some purpose. We claim it would not have been paid to the clerk unless there was a court order. That the fact that there was such a case pending and money paid in makes a *prima facie* case, and the surety company must show as a defense that it was a mere private matter."

It was shown that Krakowski kept some of the court records in loose leaf form, or by a card system. In explanation of the orders entered upon cards, it was shown to have been a practice followed by Judge Stuart in State criminal cases disposed of under the probation law, and by his successor, to use what are called "probation cards," containing the original order as pronounced to the respondent placed on probation, or a copy thereof, imposing costs and a weekly payment to a certain amount to be paid to the court through its probation officer, who paid it in as received to the judge or clerk of the court, taking receipt therefor and keeping an account in that connection. Of this Mr. Hyde, the court's probation officer, testified:

"All the money that he (Krakowski) signed for here was paid over to him by me, and was money

that I had collected from men on probation under order of Judge Stuart. Exhibit 5 which you show me contains copies of the original cards that the probationer is given at the time he is placed on probation. The cards contain an order, signed by Judge Stuart, with reference to the probationer, and that card is the basis for the account that I keep and for the moneys that I collect. * * * The judge signs the card that the probationer gets. The probationer carries it with him. * * * I have some cards on which I copied off the original cards, but they differ from the cards kept by the superior court. Both my record and the court's record are taken from the original which is signed by the judge and which the probationer has."

Preparatory to this case the Kent county board of auditors engaged a public accountant to go over all available records bearing upon Krakowski's shortage to the county, and plaintiff's bill of particulars was prepared from the results of his research, which started by listing the State criminal cases on the court docket and following each case out in detail through all available books and records of the court, and its officers, in quest of any written evidence of money received or paid out by the clerk in connection with the case. The various books and documents used by the accountant and relied upon by plaintiff were produced in evidence.

The scope of the detailed inquiry, purpose and nature of the available evidence produced is well summarized by the trial court as follows:

"Plaintiff caused to be produced in court and offered in evidence various books of record kept by the officers of the court, most of them having been kept by defendant Krakowski or under his direction. These books included the docket and journal of the court, the clerk's blotter, the clerk's cash book, the clerk's ledger, the clerk's receipt stubs, books of account kept by the probation officer of the court, Mr. J. E. Hyde, a large number of probation cards, so-called, containing

the original order, or a copy of the original order, made with reference to persons put on probation, and a large number of canceled checks showing payment by William J. Stuart, former judge of said court, to said clerk of various amounts designated upon said checks as costs, or fines, in certain cases named upon said check. These books and documents were offered, and were received by the court, for the purpose of establishing the total amount of moneys received by defendant Krakowski as clerk during his said term of office, which he was required, under the laws of the State, to turn over to the county of Kent. No items were claimed by the plaintiff to be recoverable by it except fines, costs and estreated bail which the jury should find from the evidence had been paid to the clerk of the court in cases handled during said clerk's term of office in which the people of the State of Michigan were proceeding against a respondent under the criminal laws of the State. Testimony was also offered by plaintiff showing the total amount paid by defendant Krakowski to the county treasurer during Krakowski's several terms of office on account of such items and such sums were credited to him."

The trial court in submitting the case plainly instructed the jury that no recovery could be had upon any item of plaintiff's claim unless it was shown that the money was paid to the clerk pursuant to some mandate of the court, but held that under the circumstances of the case it was not imperative for recovery that it be proven the order was reduced to writing, or recorded in the court journal, saying in explanation that while it was for the jury to determine from the admitted testimony whether or not each item claimed was paid to the clerk under an order of the court, yet:

"If a respondent were before this court at the present time and the court should, upon a plea of guilty of that respondent, say to him, 'You are fined $100 fine and $10 costs, and upon your failure to pay that sum immediately, you will be confined in the Kent county jail for ninety days,' and if the respondent

should step up immediately to the clerk and pay him $110, the full amount of the fine and costs imposed, he would be discharged. * * * Under the verbal, spoken order of the court, if the money was paid to the clerk, it would be paid officially and it would be as essentially and finally the money of the county as though the respondent were required to wait until the next day and have a written order duly placed upon the journal and signed by the court." Also,—

"If there are any items in this case which are supported by no testimony as to an order of the court or the payment of the money other than the mere bare or naked fact that a credit or charge is made upon the cash book of the clerk, then that is not sufficient to charge the bonding company with liability for such item. There must be other and additional testimony tending to show and establish the order of the court that the money should be paid, in addition to the mere fact that certain money was paid, before you can find the bonding company liable for such amount or item."

On the theory that the admitted evidence was competent to raise an issue of fact for the jury upon whether the items in question were received pursuant to an order of the court, it may be said that the charge of the court in explaining the nature of the case, the principles of law involved, and the duty of the jury, was fair, clear and ample.

Only such items received by Krakowski were permitted, or claimed by plaintiff, as were in some manner shown connected with or based on an actual criminal case under the State law found entered upon the court docket, at some time entertained and acted upon by the court while he was clerk and in charge of its records; and each item was sustained by some written proof, mostly in his handwriting, indicating that it had been received by him as clerk of the court and the official character of the transaction, sufficient for a fair inference or presumption that it was paid and received as public money pursuant to some order of

the court, which it was the duty of the clerk under the statute to pay to the county treasurer.

In 10 Enc. of Evidence, p. 730, it is stated as a general proposition: "The official records of the clerk of a court are competent evidence of his acts," and at page 780, "when the record has not been extended or made up, the minutes and docket entries and files of the case are admissible to prove the proceedings of the court." To like effect, in the early case of *Lowry* v. *Cady*, 4 Vt. 504, recognizing that docket minutes, etc., were not the best or proper evidence where a judgment or order was of record, and should not be received unless there was special and good reason for "dispensing with the usual and appropriate evidence," the court said: "In this case, as the judgment was not recorded, the court was justified in receiving other evidence of the same than an exemplified copy." In *Cooper* v. *People*, 28 Colo. 87 (63 Pac. 314), it was held that books kept by the clerk, though not expressly authorized by statute, are *prima facie* evidence of moneys officially received by him as thereby indicated, binding both upon him and his sureties.

While the general rule of evidence contended for by defendant is not to be questioned in its proper application, the manifest, impelling reason for dispensing with a technical demand for "the usual and most appropriate evidence" in the instant case is that defendant Krakowski, whose duty it was to make the proper record which would furnish such evidence, failed to do so. It would be a strange rule of evidence which under such circumstances protected a defaulting clerk of a court of record and his surety, and rewarded his neglect to properly enter the proceedings of the court upon its records, by blocking all other available evidence upon the subject because the records he should have made but did not, and which would have been the best evidence, are not in existence.

Any want of certainty in the proofs is manifestly attributable to his neglect of duty, which ought not to operate to protect him and his surety where other evidence, direct or inferential, is available. The rulings upon admission of testimony complained of are not inimical to a fair interpretation and application of recognized rules of evidence.

The following reflections by Justice CAMPBELL in the early case of *People* v. *Treadway*, 17 Mich. 480 (involving an action against a defaulting county clerk and his surety), are not inappropriate here:

"If such an officer is to be regarded as acting unofficially whenever he violates his duty, it is not easy to see what object there can be in requiring official bonds. They are not meant to be mere formalities, and they can only be made to secure against the consequences of some sort of misdoings. Their object is to obtain indemnity against the use of an official position for wrong purposes, and that which is done under color of office, and which would obtain no credit except from its appearing to be a regular official act, is within the protection of the bond, and must be made good by those who signed it."

The judgment will stand affirmed.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

FILLINGHAM *v.* DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

1. RAILROADS—NEGLIGENCE—SPEED OF TRAIN—WITNESSES—COMPETENCY.

Witnesses who had sufficient opportunity to see a train when it was running, and to observe where it stopped, after striking an automobile on a highway crossing, *held*, competent to testify as to its speed in an action for personal injuries alleging negligence of defendant for running at an excessive rate of speed.

2. SAME—NEGLIGENCE—QUESTION FOR JURY.

Conflict in the testimony as to whether a box car on the siding obstructed plaintiff's view of the approaching train, as to the speed of the train, and as to whether the crossing signals were given, *held*, to render them peculiarly questions for the jury.

3. SAME—NEW TRIAL—WEIGHT OF EVIDENCE.

Held, that the verdict in favor of plaintiff was not against the great weight of the evidence.

4. SAME—CONTRIBUTORY NEGLIGENCE—CROSSING ACCIDENT.

Where plaintiff stopped, looked, and listened, but saw and heard nothing, when about 50 or 60 feet from the track, if the view of the main track was so obstructed by a box car on the siding that after passing the obstruction there was no safety zone in which to stop, look and listen, the court below was not in error in not applying the rule requiring the driver of an automobile to do so before proceeding to cross the track.

STEERE, BROOKE, and FELLOWS, JJ., dissenting.

Error to Oakland; Rockwell, J. Submitted June 11, 1919; reargued November 5, 1919. (Docket No. 42.) Decided December 22, 1919.

Case by Charles Fillingham against the Detroit, Grand Haven & Milwaukee Railway Company for per-

sonal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Harrison Geer (*H. R. Martin,* of counsel), for appellant.

Pelton & McGee, for appellee.

MOORE, J. This suit is brought to recover for personal injuries received at the crossing of defendant's railroad and Saginaw street at Holly. From a judgment in favor of the plaintiff the case is brought here by writ of error.

Saginaw street runs north and south and the railroad northwest and southeast, the street intersecting the railroad at an angle of 60 degrees, 37 minutes. The automobile was being driven south. The train came from the west on the main line. Saginaw street is 85 feet wide on the north side of the railroad. There is a sidewalk north of the main track, crossing Saginaw street and running alongside Seeley's coal shed, which is west of the street. The distance between the north rail of the main track and the south side of the coal shed is 18 feet and a fraction. From the north rail of the main track to the south rail of the sidetrack is 8.3 feet. The sidetrack is 4 feet 8 inches wide. From the north rail of the sidetrack to the south side of the coal shed is 5.8 feet. Besides the coal shed and office there are two telegraph poles, one 12 and the other 8 inches in diameter, and a safety gate, on the west side of Saginaw street.

The plaintiff's version of what occurred is as follows:

"There was a coal office on my right side as I went south, as shown on this exhibit. There were freight cars there and a coal shed. My son drove the car from my home to Holly. It was around ten when we started to go home. My son backed, cranked up the car and got in, and I got in, and we backed off into

the street. It is a left hand drive car. I was sitting on the right hand side of him. There was no one else in the car. When we backed out into the street we stopped. The car was headed towards the south then. We looked and listened before going across the track, and then went ahead. We started south towards the crossing and stopped and looked and listened, and I told my boy to go ahead, didn't hear any sign of any train or anything, and he drove the car in low, had the car in low and going very slowly and when we approached the track, the crash came and that is all I remember. There were gates at that crossing, but they were up. When we got up to the track there were freight cars to the right of us. I know where the coal shed is. With reference to the freight car, it was on the north side of the track, close to the sidewalk. I have reference to this sidewalk that runs along the west side of Saginaw street. There were cars on the east side, on the north track. The first thing I remember after I was struck I was in Mr. Clyde Hadley's house, a gentleman living there in Holly. They had started to take me to the doctor, but he was sick so they carried me over to Mr. Hadley's."

On the cross-examination he testified:

"My son had to crank the automobile and as soon as that was done we got right into the car and backed out into the street to the middle of it. As soon as we had backed out a sufficient distance, we turned the car and headed to the south. * * * I didn't discover this engine which collided with my car before it did collide. I saw no headlight and didn't hear the car coming down from the west. I was very familiar with that crossing and had been for a good many years. I know that trains coming from the west have to cross over Saginaw street in order to get to the depot. I didn't hear or see anything until I was struck by the engine. My car was nearly across the track. I know something struck my car in the rear. My car was thrown to the south and was struck right over the right rear wheel. If I had been a few feet further south the car would not have been touched. I don't remember when I was picked up; I was not conscious, didn't know anything for a long time."

On the redirect-examination he testified:

"I said we were about fifty or sixty feet from the track when my son stopped the car and we listened and then proceeded toward the crossing, going south. As we approached the north side of the track my son was driving the car in low. I sat right side of him and was listening and watching to see if there was a train anywhere near. I heard and saw none. There was nothing to have prevented me from hearing the whistle if it had been given."

The son's version is as follows:

"I got in the car first and started it, and then my father got in. Then I backed out into the street. I recall the sewer grate there; my car was parked south of that, towards the crossing. Then after I had backed out, we headed south. We stopped, looked each way, and listened, and proceeded very slowly and cautiously toward the tracks. I was driving the car and was on the left hand side of the seat. My father was on the right side. The top was up, but there were no side curtains on. From that point on we proceeded very cautiously towards the tracks, by running very slowly, and as we approached very near the tracks we nearly came to a complete stop, not quite, and still were looking in both directions, and then we went on and were struck. When we got up to the track, I observed a box car south and east of the coal sheds, on the north sidetrack, I believe. That obstructed the view to the west. From the front seat of a Ford car to the end of the radiator it is about six feet, I believe. We didn't hear any bell ringing; we were listening all the time. We heard no signal, no whistle. The first knowledge I had of the train was when a bright light seemed to appear and the next second it hit us. After we were struck the first thing I realized was that I was on the ground there, trying to get up. I was somewhere south and east of that crossing. How far, I don't know. It would be south of the gates, on the east side. Afterwards, when I saw the automobile, it was near the sidewalk somewhere by the gates. I should think it was probably sixty feet or so. I did not see my father just then, but did before he was taken to Mr. Hadley's. He was somewhere in the

garden, and some men were picking him up. I went along with him over to Mr. Hadley's. * * * Dr. Keller looked after him.

"I saw the car after the accident. It was struck over the right hand wheels, towards the rear end. From the time I started to crank my car and start it home, I did not hear any signal from a train, whistle, bell, or anything else. There was nothing I know of to prevent my hearing it. As we proceeded south down Saginaw street, I think we were about in the middle of the highway."

On the cross-examination he testified:

"The south end of my car at the time I started to go south across the track was about 45 or 50 feet north of the track.

"*Q.* And at that time and before you started, did you see this box car standing there at your right?

"*A.* No, sir.

"*Q.* How near the track did you get when you discovered that box car standing at your right?

"*A.* Pretty close to the track.

"*Q.* Is that right, the east end of the box car would be east of the east side of Seeley's coal shed?

"*A.* I believe it was. I didn't take any particular notice to see how far the box car projected east of the coal shed. I saw the box car; I knew it was there when I was about ready to cross the tracks. We drove up very slowly for about forty feet. My engine was running all the time after I cranked it up, up to the time of the collision. It made some noise. As we came up there just north of the box car, we went along very slowly, came almost to a stop. When we got by the box car we looked to the west.

"*Q.* When you got by the box car the box car hid the view, the bright light of the train was there; did you know that the box car would hide your view from an approaching train?

"*A.* I didn't notice it at the time. We were just about on the sidetrack when I discovered the box car standing there west of Saginaw street. The east end of the box car was perhaps thirty feet or so west from us. It was just as we came up there, right on the track, that we discovered that flashlight from the head of the engine.

"*Q.* Well, how long do you think you had discovered that flashlight from the headlight of the engine before you attempted to cross over?

"*A.* Probably instantaneous. * * * I think that you can look west and see a train approaching from the west if there is nothing on the sidetracks, at least a mile and a half. On this occasion there were the coal sheds and box car to hide my view. You couldn't look west for at least a mile and a half across that bend when you were on the south side of the coal sheds, if no box cars were standing there, unless you were in the middle of the track. Within eighteen feet of this track you cannot look west if there isn't anything on the tracks, and see for at least a mile and a half. I have made tests several times recently. You would have to be within six or seven feet of the track before you could look west a mile and a half, that is, if there were no box car there. That would be either on foot or in the automobile. I did not observe this box car until we came up there on the track; did not observe it before.

"*Q.* Well, how near did you get to it when you first discovered that it was there on west of Saginaw street?

"*A.* Probably within eight or ten feet.

"*Q.* Then, during the last ten feet, when you were driving, before you got to the box car, you knew it was there and that it would cut off your view from seeing a train approaching from the west, didn't you?

"*A.* I knew it was there but I did not observe that it would cut off the view at the time. I didn't think anything about the view at that time. I think I was between the sidetrack and perhaps the front end of the machine was on the main track when I discovered the light. I didn't remember anything further about the light, it came so suddenly, the next thing was the collision. I didn't have time to try to go faster after I discovered the headlight of the engine. I was going at a slow speed at the time, and had not changed it up to the time of the accident. I understood the use of the brake. It depends on how hard you put on your brake how quickly you can stop a Ford going five or six miles an hour. You can stop it within two or three feet. My car was going at about three or four miles an hour, so that at any time I think I could have stopped it within three feet."

On the redirect-examination he testified:

"My best judgment is that the automobile was on the main track when I saw the light. There was a very short time between when I saw the light and when I was struck; it was practically instantaneous. To put the car into reverse you have to release, if you are driving slow, and put it into neutral and press on the reverse. You would, in driving in low speed have to stop and release your clutch and then back up. I did not have time to take those steps when I discovered that train."

Several witnesses testified the train was running 25 or 30 miles an hour and that they heard neither whistle nor bell though they were listening at the time.

It was the claim of the defendant that the train was running but 15 miles an hour, that a crossing whistle had been blown at the proper place, that the bell was rung continuously, and that there was no car on the siding to obstruct the view to the west.

It is the claim of the appellant:

"1. The defendant was not guilty of any negligence.
"2. The plaintiff was guilty of contributory negligence.
"3. The verdict of the jury was contrary to the great weight of the evidence.
"4. There was error in the refusal to give certain instructions and in the charge as given."

We quote from the brief:

"The only charges of negligence in this case as to which there may be room for argument is with respect to the speed of the train, and whether signals, by whistle and bell, were properly given. It is our contention that there is no testimony which rises to the dignity of evidence that the defendant was negligent in these particulars. * * *

"This court in a number of cases has had occasion to consider the question of the qualification of a witness to testify as to speed, but in this case we raise

no question respecting the qualification of these witnesses. Our point is with respect to their opportunity for observation."

Counsel cite *Mott* v. *Railway Co.*, 120 Mich. 127; *Canerdy* v. *Railway Co.*, 156 Mich. 211, and other cases. In both of these cases the court held the questions of negligence of defendant and the contributory negligence of the plaintiff were for the jury. In the instant case the witnesses had sufficient opportunity to see the train when it was running and to observe where it stopped, to make it competent for them to testify. *Detroit, etc., R. Co.* v. *Van Steinburg*, 17 Mich. 104; *Thomas* v. *Railway Co.*, 86 Mich. 496; *Line* v. *Railway Co.*, 143 Mich. 163, and cases cited therein; *Garran* v. *Railroad Co.*, 144 Mich. 26. We again quote from the brief:

"*Second.* As to the signals, by whistle and bell, given for the purpose of warning.

"On this point the testimony is apparently conflicting, but when it is examined it will be found that the testimony relied upon to show that the signals were not given is negative in character, while that to the effect that the signals were given is of a positive nature. In cases where testimony claimed to show failure to give signals is of a negative character, this court has held that such testimony is to be wholly disregarded as against the positive testimony that they were given. *Stewart* v. *Railroad Co.*, 119 Mich. 91; *Britton* v. *Railroad Co.*, 122 Mich. 359; *Bond* v. *Railway Co.*, 128 Mich. 577."

A number of witnesses testified that they were observing the train and listening for the signals for reasons which they gave in detail, and that they saw and heard no signals for this crossing. We think this made a question for the jury. *Cotton* v. *Railway Co.*, 99 Minn. 366 (109 N. W. 835, 8 L. R. A. [N. S.] 643, 9 Ann. Cas. 935); *Crane* v. *Railroad Co.*, 107 Mich. 511; *Lonis* v. *Railway Co.*, 111 Mich. 458; *Hinkley* v.

Railway Co., 162 Mich. 546; *Tietz* v. *Railway*, 166 Mich. 205; *Nichols* v. *Railway Co.*, 203 Mich. 372.

We again quote from the brief:

"If there was any evidence to take the case to the jury on the question of negligence and contributory negligence—and we strenuously insist there was not —then we must urgently contend that the verdict is contrary to the great weight of the evidence. In arguing the questions of negligence and contributory negligence before the question of the weight of the evidence we do not wish to be understood as indicating in the slightest degree that we regard the strength of our position on the latter question as less than on the former. On the record in this case, if there was an assignment of error only with respect to the weight of the evidence, we should feel confident that the verdict must be reversed." Citing *In re McIntyre's Estate*, 160 Mich. 117, 120, 121; *Brown* v. *Railroad Co.*, 183 Mich. 574, 585, 586; *Barger* v. *Bissell*, 188 Mich. 366; 204 Mich. 416; *Malloy* v. *Railway Co.*, 192 Mich. 344, 352; *Miller* v. *Railway*, 200 Mich. 388.

It must be conceded the testimony is conflicting. As to the car on the siding, nine witnesses, including the plaintiff and his son, testified to the presence of this car west of the sidewalk. On the contrary, defendant produced the baggageman at Holly who testified from the record kept by him that there was no car on this siding at the time of the accident, that the last car which had stood there prior to the accident was taken away three days before. Defendant also produced the conductor of the train which took away, three days before the accident, the car which had stood on this siding. Mr. Seeley, the owner of the coal sheds, testified that there was no car on this siding up to six o'clock on the evening of the accident, and none there Monday morning. Other witnesses testified that there was no box car there. Someone was mistaken or guilty of falsifying. This conflict in the testimony as to the car on the siding, as to the speed of the train, and whether the signals were given, made them peculiarly questions for the jury.

We again quote from the brief:

"Defendant's requests to charge, numbers 3 and 5, cover the point that an automobile driver is held to the same degree of care as a pedestrian; instead of that applying to the driver of an animal-drawn vehicle. This is the doctrine laid down in *Colborne* v. *Railway*, 177 Mich. 139, 149, cited and quoted approvingly in *Sanford* v. *Railway Co.*, 190 Mich. 390, 399. In the former case, STEERE, C. J., said, respecting the duty to look and stop if necessary, just before entering upon the track:

" 'This rule should be as strictly applied to an automobile as to a pedestrian.'

"The trial judge did not cover this point in his general charge, and hence the 7th and 8th assignments of error should be sustained."

If the isolated sentence counsel quote is read in connection with what precedes and follows it will be apparent that the opinion did not justify the giving of the requests which were preferred.

In the instant case plaintiff claimed, and his witnesses testified, that before he entered upon a field where his vision was obstructed he stopped, looked and listened and saw and heard nothing indicating an approaching train; that he proceeded cautiously. It is his further claim that the coal office, the coal sheds and the box car made it impossible to see an approaching train while he was still in the safety zone. The distance from the main track to the siding was less than nine feet, the overhang of the box car was a foot and a half and the overhang of the locomotive was more. From the driver's seat to the front of the automobile was six feet, so that it is apparent that after passing the box car, if one was there, the occupants of the automobile did not have any safety zone in which to stop, look and listen. The testimony was conflicting as to whether there was a box car on the siding, as to the speed of the train, and the giving of

the signals. The testimony offered on behalf of the plaintiffs, if believed, made a case for the jury. On the other hand, if the witnesses offered by the defendant were believed, they made a complete defense. The case was carefully tried by able counsel and was submitted properly to the jury. We find no reversible error.

Judgment is affirmed, with costs to the plaintiff.

BIRD, C. J., and SHARPE, STONE, and KUHN, JJ., concurred with MOORE, J.

BROOKE, J. (*dissenting*). The distance between the sidetrack and the main track was 8.3 feet. The box car standing on the main track, as claimed by plaintiff, was nearly 60 feet distant, so that as plaintiff approached the main track, his view to the west was constantly widening. The evidence to the effect that no box car stood there as claimed by the plaintiff, including as it does the written records of the movement of the car in question, kept by defendant in the regular course of business, is very persuasive.

The weight of the evidence upon the question of the sounding of the statutory signals is upon the side of defendant. Plaintiff's automobile, according to his own testimony, was being propelled at a very low rate of speed and could have been stopped within three feet. A strong headlight was burning upon the engine with which he collided, projecting its rays from 800 to 1,000 feet ahead. Under the facts as disclosed by this record plaintiff was clearly guilty of contributory negligence under the authority of the following cases: *Colborne* v. *Railway*, 177 Mich. 139; *Sanford* v. *Railway Co.*, 190 Mich. 390; *Gillett* v. *Traction Co.*, 205 Mich. 410.

The judgment should be reversed and a new trial ordered.

STEERE and FELLOWS, JJ., concurred with BROOKE, J.

MARX *v.* SCHULTZ.

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—SUFFICIENCY.
An assignment that "the court erred in directing a verdict in favor of the defendants," where defendants offered no testimony, and there could be no possible uncertainty as to what was meant by the assignment, *held*, sufficiently specific.

2. NEGLIGENCE—DEATH—POISONS—INFERENCE—QUESTION FOR JURY.
In an action by plaintiff for the wrongful death of his wife, claimed to have been caused by an overdose of arsenic due to the negligence of defendants, the owners of a drug store, in substituting the word "teaspoonful" in the label on the bottle, for the words "three drops" in the doctor's prescription, the testimony of a reputable physician, in answer to a hypothetical question stating the facts and describing her symptoms thereafter, that such symptoms are caused by an excessive dose of arsenic and probably would result in her death, *held*, sufficient to warrant the drawing of an inference favorable to plaintiff sufficient to warrant presenting the disputed question of fact as to the cause of her death to the jury.

3. APPEAL AND ERROR—WEIGHT OF EVIDENCE—JURY QUESTION.
The weight of the testimony is primarily for the jury.

4. TRIAL—EXAMINATION OF WITNESSES—DISCRETION OF COURT.
Where it was almost obligatory upon plaintiff to put the attending physician upon the stand in order to make his case, the court below should have been more liberal in allowing plaintiff to examine him as to certain incidents between them in order to show that the doctor had become adverse and unfriendly to plaintiff's cause.

Error to Wayne; Gage (William G.), J., presiding. Submitted October 9, 1919. (Docket No. 21.) Decided December 22, 1919.

Case by Richard Marx against George M. Schultz and others, copartners as the Peninsular Drug Com-

pany, for the negligent killing of plaintiff's wife. Judgment for defendants on a directed verdict. Plaintiff brings error. Reversed.

Thomas A. Conlon, for appellant.

Thomas M. Cotter and *William Wisner Taylor* (*E. Dean Alexander,* of counsel), for appellees.

This action was brought by Richard Marx for $25,000 damages alleged to have been suffered by him on account of the death of his wife, Lydia Marx, caused, according to his claim, through the negligence of the above named defendants, or some of them. It appears that on November 30, 1915, Lydia Marx was being treated by Dr. Francis McNamara for a skin rash, his treatments having extended back to about the middle of that month, although he had been conversant with her condition for five years and had been one of several physicians in attendance on her from time to time during that period. It is disputed in the record as to the exact nature of the ailments that she had previously suffered, her husband having testified that her previous condition was "fair" and that with the exception of an operation for a "pus case in the 'abdomen' " and a few minor ailments, her health had been that of an ordinary woman. This assertion is denied by Dr. McNamara, whose testimony is as follows:

"*Q.* How long, then, if that is your answer, had this patient been suffering from Bright's disease?

"*A.* I think she was suffering for about four years. She had an infection about four years ago and had a very severe operation. I think—it is my opinion that the Bright's disease dates from that time because Bright's disease is simply an infection of the kidneys brought about by some bacterial poisoning."

Dr. McNamara was the only one of the doctors who had previously treated Mrs. Marx who was called by

the plaintiff. His diagnosis corresponds to that of Dr. Brandt, the county physician, who stated in his testimony that the *post mortem* examination of the organs of Mrs. Marx which he made soon after her death was the basis for his opinion that she had died of chronic Bright's disease of from one to ten years standing. Other similar and relative evidence, indicative of the dispute over the condition of the health of the deceased prior to November 30, 1915, was introduced.

On that date, however, a consultation was held in plaintiff's presence between Dr. McNamara and Dr. Varney, a specialist on skin diseases, and the latter then told the plaintiff that his wife was suffering from an eruption of the nerves. It was decided, as a result of this consultation, to prescribe Fowler's solution of arsenic, and Dr. McNamara thereupon wrote out a prescription directing the taking of three drops of this substance in water after meals, three times daily.

This prescription was handed to the plaintiff, who sent it to a drug store at 563 Dix avenue, in Detroit, this establishment being the property of some of the defendants. There is some confusion in the record as to who were the actual owners of the drug store at the time the prescription was filled, but this question did not become material because of the directed verdict for the defendants. It is clear, however, that the prescription was filled at this drug store, and that it was delivered at the Marx home late that afternoon by one of the clerks. The bottle containing it bore a label similar to those pasted on ordinary druggist's bottles but there was nothing to indicate the poisonous nature of the liquid. On the label appeared Dr. McNamara's name, followed by the direction: "Teaspoonful in water after meals three times daily. 11-30-15." Upon receipt of this medicine, Mrs. Marx

was given a teaspoonful, in accordance with directions. Immediately thereafter she appeared to be in great agony and threw herself from side to side of the bed, complained of pains in her stomach and tried to vomit. She soon became unable to speak distinctly. Plaintiff returned to his home about five o'clock, and at that time the face and body of Mrs. Marx were swollen and she could answer the plaintiff's questions only indistinctly and with difficulty. Plaintiff immediately tried to get Dr. McNamara by telephone, but owing to the doctor's absence, was not able to get him until about 12 o'clock midnight, when the doctor went to plaintiff's home.

The record shows that when the doctor arrived he was very much astonished to discover Mrs. Marx's condition, but when shown the bottle, he immediately scratched out the word "teaspoonful" and substituted "three drops" and administered an antidote for the overdose that she had taken. He thereupon left the house, stating in effect that he wished to go to the drug store to see his written prescription. In his testimony Dr. McNamara states that he found this just as he had written it—"three drops after every meal." This is undisputed, which seems to indicate conclusively that the mistake in the directions on the label was due to the negligence of someone at the drug store. Thereafter, Dr. McNamara removed the bottle containing the arsenical solution, without saying anything to the plaintiff about it. The latter missed it, and he called at the doctor's office in regard to it. The doctor admitted having it and offered it to the plaintiff, but plaintiff insisted that he return it, which he did. When it was returned, there was a label pasted over the original label, which stated in part: Directions, Poison. Fowler's Solution.

Lydia Marx suffered almost continuously from this time until the date of her death, February 7, 1916.

Her condition is thus described by the nurse who took care of her:

"I found her very sick and delirious part of the time—most of the time. Her mouth and throat were very sore, they was just a solid canker. She could not eat scarcely anything. She had no appetite. What we did give her was forced, of course; liquid, something very soft. And she was very nervous and had spells, she would jerk off the bed. They would go then, and then they would come on. I am not positive but I think in the evening she was worse that way. She seemed to be more delirious at night than she was during the day, and the bowels were very bad. They were a slimy substance streaked with blood, the urine scant."

The above described condition seems to have continued until her death, whereupon the plaintiff brought this action, claiming that the overdose of Fowler's solution had caused arsenical poisoning and was the direct and proximate cause of her death.

At the conclusion of the testimony for the plaintiff, counsel for defendant Schultz moved for a directed verdict, which motion was granted by the trial court, who, in addressing the jury, stated the following:

"In this sort of cases it becomes necessary, in this and other cases like it, it becomes necessary for the plaintiff to prove by a preponderance of evidence, by the evidence of experts, those who know, what was the cause of the party's death, that the party died from the administration of the medicine which it is alleged was administered to the deceased. * * *

"I am satisfied, gentlemen of the jury, that the plaintiff has not shown by evidence which is necessary to establish his case, that this wife of the plaintiff in the case died from the effects of the overdose of this arsenical preparation which was administered to her out of this bottle in question and in my view it is not a case that should be submitted to the jury. * * * It is an interesting question as to who owned this drug store at that time, and that would have been a question which the judge would have felt it would be

his duty to submit to you to determine on the evidence in the case as to who were the owners of this drug store and I would also have instructed you that whoever was the owner was responsible for any injury that occurred. But I direct you, gentlemen of the jury, to render a verdict of not guilty or no cause for action in this case."

KUHN, J. (*after stating the facts*). Fourteen assignments of error are relied upon by the plaintiff and the principal reason urged for reversal in this court is that the court erred in directing a verdict in favor of the defendants and in not submitting to the jury the question as to the cause of the death of plaintiff's wife.

Preliminary to a discussion as to whether or not there was evidence in the record to warrant the submission of the case to the jury, it is necessary to consider a claim urged now by counsel for the defendants. It is urged that the general assignment of error that "the court erred in directing a verdict in favor of the defendants" is not specific enough, and that under Supreme Court Rule No. 11 judgment should not be reversed for that reason, relying upon the case of *Jackson Bridge & Iron Co.* v. *Insurance Co.*, 122 Mich. 433. We are of the opinion, however, that the present situation falls within the rule announced in *Conely* v. *Dudley*, 111 Mich. 122, which is referred to in the *Bridge & Iron Co. Case, supra*, as an exceptional case. Here, as in that case, no testimony was offered by the defendants and there can have been no possible uncertainty as to what was meant by the assignment as made. It was equivalent to saying that there were facts in the case upon which a jury might find plaintiff entitled to recover. No one could possibly have been misled. See, also, *Wolfe* v. *Stack*, 153 Mich. 445.

Was there any testimony in the case to warrant the submission of the controversy to the jury? The fol-

lowing hypothetical question was submitted to Dr. Swartz, a physician of 25 years' practice and a graduate of the University of Michigan, who stated that he had made a study of the effect of arsenic on the human body:

"*Q.* The evidence in this case shows that on the morning of November 30, 1915, Dr. Francis W. McNamara, the physician in attendance, wrote out a prescription for Fowler's solution of arsenic as a remedy for a skin rash, from which Lydia Marx was complaining; that the prescription directed three drops of that solution after each meal as a dose, but by mistake the directions on the label of the bottle, when it came from defendants' drug store, where the prescription was filled, read 'One teaspoonful after meals.' That one teaspoonful was given Lydia Marx, according to those directions, and immediately thereafter she appeared to be in great pain, suffered inward convulsions, threw herself from one side to the other of the bed, and continually tried to vomit. That her whole body became greatly swollen. Her mouth and tongue so increased in size that she could hardly talk. That after November 30, 1915, large ulcers came in her mouth and nose; her eyes were swollen and liquid appeared therein. Her appetite was poor and she complained at times of pains about her heart and an irritable condition of her bowels. That the movement of her bowels was frequent and the substance passed therefrom was bloody and yellow in color. That she was delirious off and on from the time she received the overdose of the solution of arsenic, and her general conditions heretofore named continued down to the time of her death, February 7, 1916. In your opinion, would such conditions be caused by the overdose of Fowler's solution of arsenic which Lydia Marx received, and would the said overdose be the proximate cause of her death? * * *

"*A.* Those symptoms are caused by an excessive dose of arsenic and probably would result in her death."

We are of the opinion that this testimony was sufficient to warrant the drawing of an inference favor-

able to the plaintiff sufficient to present the disputed question of fact—which should have been presented to the jury—as to the cause of the death of the plaintiff's wife. As to whether the testimony of the defendants' witnesses outweighed that of the plaintiff's is a question for the jury to determine in the first instance.

Some question is also made by plaintiff's counsel of the undue limitation by the trial court of the examination of Dr. McNamara, whom plaintiff was required to call. An attempt was made to show certain incidents that occurred between the doctor and the plaintiff, in order to make it appear that Dr. McNamara had become adverse and unfriendly to the plaintiff's cause. We are of the opinion that the judge should have been more liberal in allowing a showing of this character to be made, in view of the fact that Dr. McNamara, being the attending physician, it was almost obligatory upon the plaintiff's counsel to put him on the stand in order to make his case.

Other questions are discussed by counsel for the defendants which might be properly before the court if judgment had been obtained against them, but as upon this record the only assignments of error are upon the part of the plaintiff, we do not consider that these questions become material in the discussion of the case at this time.

Upon the record as here presented, we are of the opinion that the trial court erred in directing a verdict for the defendants, and the cause must therefore be reversed and a new trial ordered, with costs to the appellant.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

HOLMES *v.* CONNELL'S ESTATE.

1. WILLS—CONSTRUCTION—INTENT.
   In the construction of a will the cardinal duty of the court is to find the intention of the testator.
2. SAME—LEGACY AS COMPENSATION FOR SERVICES.
   A clause in testator's will providing a legacy for his housekeeper, with the statement therein that it "is given as a token of my regard and appreciation of her services," *held*, to indicate his intention to place a just estimate on the value of her services and to compensate her therefor.
3. SAME—ACCEPTANCE—CLAIM AGAINST ESTATE—ESTOPPEL.
   Plaintiff, having accepted the legacy given her as compensation for her services as housekeeper for testator, is thereby precluded from thereafter maintaining a claim for the same against his estate.

Error to Muskegon; Vanderwerp, J. Submitted October 30, 1919. (Docket No. 70.) Decided December 22, 1919.

Julia M. Holmes presented a claim against the estate of Patrick J. Connell for services rendered. The claim was disallowed by the commissioners, and plaintiff appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Reversed, and no new trial ordered.

Alex. Sutherland, for appellant.

R. J. Macdonald (*D. A. Macdonald,* of counsel), for appellee.

BIRD, C. J. Julia M. Holmes, the plaintiff, presented a claim against the defendant estate for "time, labor and services for four years last past in caring for, nursing and housekeeping for Patrick J. Connell in his lifetime, at $15 per week, $3,120." The commis-

For authorities discussing the question of law governing construction of wills generally, see note in 2 L. R. A. (N. S.) 443.

sioners disallowed the claim. On appeal, in the circuit court, she was awarded the full amount of her claim.

On behalf of the estate it is insisted that the trial court was in error in refusing to direct a verdict for the defendant. This contention is based upon the defense of payment. It appeared by the evidence that the testator made a will in November, 1916, a few months before his decease, in which he gave plaintiff a legacy amounting to $5,315. It is claimed that the language of the will is such that it clearly appears to have been the intention of the testator to thereby compensate plaintiff for her services. That after the will was probated plaintiff accepted this legacy and thereby precluded herself from maintaining a claim against the estate. The complaint of the defense is that the trial court should have charged the jury in accordance with this contention and so put an end to the case.

The record discloses that plaintiff's mother married the deceased when plaintiff was a mere child. Plaintiff grew to womanhood in Patrick's family and later married. Her husband lived only a few years and in 1909 she and her two children returned to the home of Patrick where they remained and she cared for the old people until the fall of 1913, when her mother died. Patrick was then 77 years old and in feeble health. His physician advised him that if he would prolong his life he should remove to Arizona. He did so and induced plaintiff to accompany him and serve him as housekeeper and nurse. They lived there four years when Patrick died. Plaintiff then returned to Muskegon, her home city. The testimony shows many expressions of Patrick, indicating that he was very fond of plaintiff and greatly appreciated the splendid care which she had given him.

In November, 1916, he made a will disposing of an estate, as nearly as can be gathered from the record, of about $10,000. He gave plaintiff a legacy which

was valued at $5,315 and the balance he gave to relatives and friends, save a small trust fund of $500, the income from which he directed should be devoted to maintaining his lot in the cemetery, and to religious purposes. The bequest to plaintiff was as follows:

"(2) I give, devise and bequeath to my daughter, Julia M. Holmes, my home near Tucson, Arizona, my automobile, and all my household goods and furniture; also 250 shares of the capital stock of the P. J. Connell Company, in addition to the insurance which has already been assigned to her. Mrs. Holmes has been my housekeeper and companion for years, and this bequest is given as a token of my regard and appreciation of her services."

The cardinal duty of this court is to find the intention of the testator. This must be gathered from the face of the will, if the language will permit. If the provision is ambiguous, or is subject to a double construction, and, therefore, involved in doubt, the court will place itself in the situation of the testator as nearly as it can and view it from the angle from which he viewed it. *Sondheim* v. *Fechenbach*, 137 Mich. 384. A careful study of the language of the will convinces us that it was the intention of the testator to pay his debt to plaintiff with the provision which he made for her in his will. The words, "Mrs. Holmes has been my housekeeper and companion for years, and this bequest is given as a token of my regard and appreciation of her services," used in connection with the language making the bequest, is persuasive that he had in mind the payment of his debt to plaintiff. As is pointed out by counsel, the word "appreciate" is defined as meaning to "estimate justly," or to set a price or value on. Bouvier Law Dictionary, p. 217. The testator was very appreciative of plaintiff's services. This he made clear by the will and by reason of this appreciation he undertook to place a just estimate on the value of her services by giving her what amounted

to $5,315, a sum much in excess of plaintiff's own estimate of her services.

If we are to look beyond the face of the will to gather testator's intention it becomes more apparent that this was his intention. The size of the estate would lend credence to this view. If testator intended to give her $5,315 without reference to the sum he owed her, and to this gift was to be added the amount due her for services, it would practically exhaust the estate and leave very little to satisfy other provisions of the will, and no one knew this better than he. Had the estate been a large one, plaintiff's contention would be more plausible, and the same would be true had he made payments from time to time on account of her services. Should we construe the provision in accord with the contention of plaintiff there would be little or nothing left of the estate, and his bequests to other legatees would be defeated, or nearly so. While the testator manifested great appreciation of plaintiff's services and kindness, we are not persuaded that he intended to give her practically his entire estate. In support of this construction, see *Rubert* v. *Rubert,* 126 Mich. 589; *In re McNamara's Estate,* 155 Mich. 585.

In view of the fact that plaintiff had accepted the legacy we think there was no basis for her recovery in the present suit. The motion of defendant should have been granted. The judgment will be set aside without a retrial, with costs to appellant.

SHARPE, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

HARVEY *v.* GEORGE.

1. PRINCIPAL AND SURETY—BOND—DISCHARGE OF SURETY—INJURY TO SURETY.

   A surety on a building contractor's bond is not released from liability because the owner did not withhold 10 per cent. until final payment, as provided in the contract, where the money was used to liquidate demands for which, if unliquidated, the owner would be liable.

2. SAME—QUESTION FOR JURY—VERDICT NON OBSTANTE VEREDICTO.

   In an action by the administratrix of the owner against a building contractor and his surety on the bond, where, under the testimony, it was a question for the jury as to whether any payments were made by the owner other than for materials and labor which the contract obligated him to pay, the court below was in error in setting aside the verdict of the jury in favor of plaintiff and directing a verdict in favor of the surety because the owner had not withheld the 10 per cent. provided for in the contract.

Error to Wayne; Sharpe (Nelson), J., presiding. Submitted October 24, 1919. (Docket No. 11.) Decided December 22, 1919. Rehearing denied April 10, 1920.

Assumpsit by Alice M. Harvey, administratrix of the estate of William M. Harvey, deceased, against Henry F. George, principal, and the Fidelity & Deposit Company of Maryland, surety, on a bond. Judgment for plaintiff against defendant George, and for defendant surety *non obstante veredicto*. Plaintiff brings error. Reversed as to defendant surety and judgment entered on the verdict.

Wilkinson, Routier & Hinkley, for appellant.

Warren, Cady, Ladd & Hill (*Horace W. Bigelow*, of counsel), for defendant surety.

BIRD, C. J. Defendant George, a building contractor,

entered into a written contract on January 20, 1915, with Dr. Harvey, plaintiff's intestate, to construct a residence for him in the village of Grosse Point, for the sum of $11,832.22. In order to secure the faithful performance of the contract the defendant surety company joined with George in a bond in the sum of $6,000, running to Dr. Harvey. When the residence was finally finished Dr. Harvey found he had paid out on account thereof $3,303 more than the contract price. On account of the disinclination of the principal and surety to make good their undertaking this suit was begun.

The surety company interposed several special defenses, namely: The failure of Dr. Harvey to observe the conditions contained in the bond and contract. At the conclusion of the evidence motions were made by both parties for a directed verdict, but these were overruled, the court being of the opinion that the jury should pass upon the question whether the conditions had been observed by Dr. Harvey, and if not, whether they had resulted prejudicially to the surety company. The questions were accordingly submitted to the jury and they returned a verdict for the plaintiff in the sum of $2,000.

Subsequently, upon motion of the surety company, the court directed a judgment for the surety company, notwithstanding the verdict of the jury, on the sole ground that the failure of Dr. Harvey to retain 10 per cent. of the contract price until the work was finished was, as a matter of law, prejudicial to the surety company, citing in support thereof the cases of *Prairie State Bank* v. *United States*, 164 U. S. 227 (17 Sup. Ct. Rep. 142); *Fidelity & Deposit Co.* v. *Agnew*, 152 Fed. 955 (82 C. C. A. 103); *Justice* v. *Surety Co.*, 218 Fed. 802 (134 C. C. A. 490); *Wells* v. *Surety Co.*, 222 Fed. 8 (137 C. C. A. 546); *People* v. *Banhagel*, 151 Mich. 43.

The stipulations of the contract concerning payment are as follows:

"Article 3. The owner agrees to pay the contractor in current funds for the performance of the contract, eleven thousand eight hundred and thirty-two dollars and twenty-two cents ($11,832.22), subject to additions and deductions as provided in the general conditions of the contract.

"Article 4. The owner agrees to make payments on account of this contract on the certificate of the architect, as follows:

"Less ten (10%) per cent. to be withheld until final payments shall be made on or about the first of each month. Before any payment is due, the contractor shall file with the said architects a correct schedule of the value of all materials actually built into the building and of all labor performed between payments and shall also file waivers of liens or sworn statements of all liabilities under this contract.

"In no case, however, shall the contractor be entitled to a payment which, in the judgment of the architect, will leave the balance withheld insufficient to complete the work.

"Article 5. * * * It is further agreed between the parties hereto that the said owner shall, between the first and tenth of every month, pay all bills for materials furnished on the premises for masonry, cut stone, iron and carpentry under this contract, said bills being approved by said contractor. Also the said owner shall pay to the said contractor or to his subcontractors for materials and labor in the amounts due for payrolls as the work progresses and shall pay the sum of forty ($40.00) dollars per week to the contractor, beginning February seventh (7th), 1915, and to terminate May fifteenth (15th), 1915. Balance of money due the said contractor as per schedule, furnished before first payment is made and filed with architect, with exception of percentage withheld, to be paid as follows:

"On the mason, cut stone and iron work, when building is cleaned down and accepted by said owner and architects. On the carpenter work when interior woodwork is finished and accepted by said owner and

architects. Percentage to be withheld as otherwise provided in this contract."

The record discloses that Dr. Harvey paid to the material men and to George for payrolls and $40 per week for himself, as provided in the contract, the sum of $16,173.35. Adding to this sum certain items for grading, and deducting the contract price of $11,832.-22, leaves an overpaid balance of $4,638.96. Reducing this excess payment by the cost of "extras" leaves a net overpayment of $3,303. The contractor testified that Dr. Harvey kept records of all moneys paid and to whom it was paid, and that "there was never any 10 per cent. withheld." That Dr. Harvey did not withhold the 10 per cent. in making payments must be conceded, but plaintiff's counsel say the reason for the non-observance of the stipulation was due to the fact that the Doctor was under contract obligation to pay for labor and materials, and that when he did so the surety company was in no wise prejudiced; citing *Doyle* v. *Faust,* 187 Mich. 108; *People* v. *Traves,* 188 Mich. 415.

1. Counsel contend that the case of *Doyle* v. *Faust, supra,* laid down the rule that "where money is used to liquidate demands, for which, if unliquidated, the plaintiff would be liable, does not release the bonding company even though the 10 per cent. was not withheld." If counsel are right in their interpretation of this opinion, and we think they are, a question of fact was raised under the proofs whether any payments were made by Dr. Harvey other than for materials and labor. The contract obligated him to pay these items and also the $40 per week to the contractor. Presumably the latter was for services. The testimony shows that Dr. Harvey paid to material men and to George for payrolls, the sum of $16,173.35. There is no testimony to show that he paid anything to the contractor as profits, and we discover no claim

of counsel that there was such a showing. George did not testify that anything was paid him on account of profits. The jury had the canceled checks, bills and receipts for moneys disbursed. They had the testimony of the contractor and others who were engaged upon the work. From all this testimony the jury could determine approximately what the actual cost of construction was. By comparing this cost with the sum actually paid by Dr. Harvey it could be ascertained with reasonable certainty whether anything was paid to the contractor as profits. A survey of the whole account is rather persuasive that there were no profits in the job for the contractor, and that his prospective profits were absorbed by the cost of material and the high price of labor. The testimony, at least, is open to that inference. The question was one for the jury and we are of the opinion that the first impression of the trial court was the right one.

In this view of the case it becomes unnecessary to determine whether a presumption of injury to the surety would arise upon mere proof that the stipulation had been violated by the owner.

The judgment for the defendant surety company must be vacated and a judgment entered in the trial court for plaintiff on the verdict of the jury. The plaintiff will recover his costs in both courts.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred. SHARPE, J., did not sit.

PHILLEY *v.* PHILLEY.

DIVORCE—EXTREME CRUELTY—INTENTION — POSSIBILITY OF RECONCILIATION.

In proceedings for a divorce by a husband on the ground of extreme cruelty, where the record sustains the finding of the court below that the acts of misconduct on the part of the wife were largely due to her run down physical condition and her highly nervous temperament, and that she had no intention of being cruel to plaintiff, and in view of the facts that in the meantime she has had treatment in a hospital with beneficial effect, and that her viewpoint has changed, the decree of the court below, who had the advantage of seeing and hearing the witnesses and of obtaining an impression as to whether the breach might not possibly be healed, dismissing the bill, will be affirmed.

Appeal from Allegan; Cross, J. Submitted October 15, 1919. (Docket No. 54.) Decided December 22, 1919.

Bill by Frank M. Philley against Lunella Philley for a divorce. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Clare E. Hoffman, for plaintiff.

Wilkes & Stone, for defendant.

KUHN, J. This is an action for divorce. The plaintiff, 38 years of age, was married to the defendant, 33 years of age, on the 4th of August, 1914. They have two children: Marion, born December 3, 1916, and Eldon, born August 28, 1918. At the time of their marriage, the plaintiff, his mother, and two sisters were living upon the old homestead—a farm of 100 acres, near the city of Allegan. This farm had

On relations between one spouse and relatives of other as affecting the question of desertion or cruelty, see notes in 13 L. R. A. (N. S.) 222, 34 L. R. A. (N. S.) 758, and L. R. A. 1915E, 161.

been devised by the father to the plaintiff, subject to the life estate of the mother, charged with the payment of a legacy of $2,000 to the sisters within three years after the mother's death.

On the day of their marriage, the mother and the sisters moved their household goods from the farm to Allegan, where they took up their residence, and the son took the farm, paying a rental therefor to the mother. The plaintiff and his wife lived together until the 25th of November, 1918, when the plaintiff filed this bill for divorce, charging the defendant with extreme cruelty, setting forth as specific grounds of cruelty the fact that his wife had a violent temper and refused to permit him to hold social intercourse with his relatives; threatened to leave him, her home and their children, saying that she would never return; that she repeatedly threatened to kill herself; that she assaulted him on two occasions; that she threatened to kill the plaintiff and the children; accused him of not being loyal to her and indulged in fits of sulking and anger to such an extent that it became impossible for him to longer live with her as his wife. Some of these allegations are denied by the defendant.

After hearing the proof, the trial judge dismissed the plaintiff's bill and made the following finding:

"The proofs fail to sustain the allegations of the bill of complaint. The acts of which the plaintiff complains are the result of a nervous condition of the defendant and not of any intention of being cruel to the plaintiff."

A lengthy review of the testimony in this record will serve no good purpose. The record cannot be read without gaining the impression that, in view of the fact that the little children—whose interest should be carefully considered—are vitally concerned, it is exceedingly unfortunate that another effort was not

made to effect a reconciliation. The disposition of the wife with reference to this is well shown by her testimony, a portion of which is quoted below:

"When I went to Ann Arbor, I must have weighed about 75 or 78 pounds; they told me I gained all of 15 pounds while there. When I left, I weighed 94¾ and mentally, things have changed a great deal. My mental attitude is changed entirely. There isn't the hopelessness about it because I realize that one had got to submit to circumstances, just accept whatever comes now and then, be contented with the little or much one can do with your own physical strength. I was putting too much nervous tension into my work, but I know now there is such a thing as relaxation that I didn't know then. Since my nerves and I got rested, I have not had any inclination to take my life; and I think Frank and I could work things out alone; that we could work things out very harmoniously, and I do realize that I have been at fault and that I can forgive. It would be easy to feel bitter about many things but I can forgive everything. I certainly cared for Frank, have the same tender, wifely regard and affection for him that I had when I married him, with more understanding, and the children are everything to me. I have suggested to Frank at various times relative to leaving the farm and trying it where it wasn't two babies and 100 acres and a lumbago back and hay fever in August and malaria fever at the hospital and several other things that have been described, and it would be the joy of my life to try it out under those conditions. It would be the joy of my life if Frank could take the same attitude that I do and I think we owe it to our children and to each other. In my honest judgment, Frank can't take the work himself and the burden that is connected with that 100-acre farm; it has been an awful load for Frank as well as me. I would like to forgive and forget and start fresh and I think Frank cares for me. I can't tell but I know he is naturally so tender and so good and so true to me that I don't believe—and naturally so not harboring any grudges nor anything like that when he is his best self, he is so fair and so true and

so kind in every way that I have felt it more and more, gradually.

"*Q.* Whether or not you did notice marked changes in his feeling or his actions toward you after he had been together for a week and as against where he would be down with his people?

"*A.* Why, there always has been, perhaps it was partly my attitude, but I know it's made a great difference, that there would be a coldness and a lack of sympathy with my viewpoint of things only after it had been discussed. There is a close family union between Frank and his mother and sisters and I would not injure that in any way.

"*Q.* Whether or not you felt you were ever taken into the inner circle of that holy of holies?

"*A.* I think possibly I was as much to blame for not being taken in closer because of many things, perhaps my oversensitiveness; I know I was oversensitive.

"*Q.* Now that you have got your nerves together, would you be oversensitive?

"*A.* Of course there is a natural tendency there; I know I would fight it a great deal harder than I ever have."

It can be gleaned from this statement on the part of the defendant that many of the acts of conjugal unkindness of which she was guilty while living with her husband, during the time she was bearing his children, owing to the strain of the hard work which she endured, are now acknowledged by her to be things which she ought not to have done. Her interference with his effort to keep on friendly relations with his mother and her threats to take her own life and those of her children are subject to extreme criticism and can only be excused by the fact that her physical condition rendered her not responsible for such acts.

The marriage relation is not to be lightly entered upon and its great responsibilities are not to be easily thrown aside. That this plaintiff has suffered greatly is a fact of which the record is convincing, but a careful study of the case still leaves the conviction that

the trial judge, who had the benefit of seeing and studying this frail woman as she testified on the witness stand, was justified in concluding, after a careful consideration of the facts in the case, that the acts of misconduct on her part were largely due to her rundown physical condition and her highly nervous temperament. In order to improve herself, she voluntarily went to the hospital at Ann Arbor and there, for the first time, seems to have come to a realization of the fact that she might, by an effort on her part, overcome her extreme sensitiveness and her nervous temperament. Coming back to the old homestead where her mother-in-law had taken her place and making an overture for reconciliation shows a disposition on her part which, at least, is to be highly commended.

Under these circumstances, we are not inclined to disturb the conclusion of the trial judge, who, as before said, had the great advantage of seeing and hearing the witnesses and of obtaining an impression as to whether the breach which occurred is one which might not possibly be healed.

The decree will be affirmed, with costs to the defendant.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

DRINAN *v.* CLOVER LEAF CASUALTY CO.

1. INSURANCE—ACCIDENT INSURANCE—FAILURE TO ISSUE POLICY—LIABILITY.

   Where plaintiff's husband made application for accident insurance in defendant company, and paid the premium, which had not been returned or a policy issued at the time of his death, defendant's liability would not be any greater than if the policy had been actually issued.

2. SAME—RESTRICTIVE POLICIES—REMEDY—COURTS.

   That many so-called accident policies are filled with such restrictions and limitations as to make it impossible to recover thereon in many cases is a condition to be remedied by the legislature and not the courts, whose duty it is to enforce the contracts as they are made by the parties thereto, if legal.

3. SAME—CONSTRUCTION OF POLICY—RESTRICTING LIABILITY.

   Plaintiff's contention that the proviso limiting defendant's liability to such loss as occurred within 30 days from the date of the accident applied to the loss of members of the body only, and not to loss of life, *held*, at variance with the plain provisions of the policy.

4. SAME.

   Plaintiff's husband having lived for more than two months after the accident, the conclusion of the court below that defendant was not liable, *held*, correct.

Case-made from Muskegon; Vanderwerp, J. Submitted October 29, 1919. (Docket No. 95.) Decided December 22, 1919.

Assumpsit by Sarah E. Drinan against the Clover Leaf Casualty Company on a policy of insurance. Judgment for defendant on a directed verdict. Plaintiff appeals. Affirmed.

James E. Sullivan, for appellant.

Cross, Foote & Sessions (*H. P. Samuell,* of counsel), for appellee.

KUHN, J. The plaintiff's husband, David Drinan, was a resident of the city of Muskegon, engaged in the flour and feed business. On May 31, 1918, he paid to Mr. Cotharin, who was the general agent of the defendant insurance company, $10, as a premium for accident insurance in said company, and received from him the following receipt:

"$10.00 May 31, 1918.

"Received of David Drinan.....ten dollars. Being payment due with application for $10.00 insurance in the Clover Leaf Casualty Company, Jacksonville, Illinois, which payment will be at once returned to the applicant if his application be not accepted. If accepted no further payment will be due until May 31st, 1919.

"Form No. 287.

"W. H. COTHARIN, Detroit, Mich."

No policy of insurance was issued on this receipt and on June 24, 1918, Mr. Drinan met with an accident, in falling off a high stool in his office, and received serious injuries. It is claimed that as a result of these injuries he died on the 29th of August, 1918.

The defendant company was notified of the accident by Mr. Drinan during his lifetime and some correspondence was had with the company with regard to the claim, it being asserted by the company that the application had never been received by it. A new application was sent to Mr. Drinan which he filled out and signed, but up to the time of his death, no policy had been issued.

Suit was brought by the plaintiff, claiming that a contract existed between the defendant company and David Drinan, based upon the receipt that was issued, and that David Drinan was insured for one year from May 31, 1918, against accident and injury which would entitle plaintiff to an indemnity of $5,000 against defendant by the said contract. To this the defendant pleaded the general issue and attached to the plead-

ings a notice of special defenses. It was claimed that the only form of policy which the defendant executed upon the application for $10 insurance was such a policy as was annexed to the notice and is known in the record as Exhibit "A."

The trial judge, after hearing the proofs, came to the conclusion that the plaintiff had no standing in court because, in his opinion, the liability of the company would not be any greater in this case than if the policy had been actually issued and that the policy which is referred to in the application itself and in evidence in the case was a limited policy, restricting the liability to a certain kind of accidents. That it clearly appeared that the accident which is claimed to have resulted in the death of Mr. Drinan was not covered by the contract of insurance, except, possibly, in one clause of the policy where the limit of the liability was $100. He held further that there could be no liability under this latter provision of the policy because it clearly provided that, in order to hold the insurer liable for this amount, the loss of life of the insured must result within 30 days from the accident, it appearing that the plaintiff's husband lived for more than two months after the date of the accident.

It is apparent that if the trial judge was correct in this conclusion it must necessarily effectually dispose of the various claims of the plaintiff in this litigation. It is unfortunately true that many so-called accident policies, filled with such restrictions and limitations as to make it impossible to recover thereon in many cases of accident, are allowed to be sold in this State. The remedy for this, however, lies with the legislature and not with the courts, whose duty it is to enforce the contracts as they are made by the parties thereto if the contracts are such as can be legally entered into.

Part 1 of the contract provides as follows:

"Part 1.

"Indemnity for Death, Dismemberment or Loss of Sight.

Payments in One Sum	Value First Year Under Part 1	Annual Increase Under Part 1	Value After 5th Year Under Part 1
For loss of life.....	$5,000.00	$500.00	$7,500.00
For loss of both eyes....	5,000.00	500.00	7,500.00
For loss of both hands..	5,000.00	500.00	7,500.00
For loss of both feet....	5,000.00	500.00	7,500.00
For loss of one hand and one foot	5,000.00	500.00	7,500.00
For loss of one hand....	1,250.00	125.00	1,875.00
For loss of one foot.....	1,250.00	125.00	1,875.00
For loss of one eye.....	500.00	50.00	750.00

"Payments shall not be made for more than one loss enumerated in above 'Payments in One Sum.'

"(The loss of any member or members specified above shall mean the loss by actual and complete severance at or above the wrist or ankle; loss of eye or eyes shall mean the irrecoverable loss of the entire sight thereof.)

"Provided such loss shall result within thirty days from date of accident, from accidental bodily injuries, solely and independently of all other causes, and only if such injuries are sustained as follows:

"(1) While actually riding as a passenger in a place regularly provided for the transportation of passengers within a steam, surface, underground or elevated railroad car, or steamboat, provided by a common carrier for passenger service only (aerial machines or conveyances excepted); or

"(2) While riding as a passenger in any passenger elevator (elevator in mines excepted), in a place regularly provided for the sole use of passengers; * * *"

It is the contention of plaintiff's counsel that the paragraph in parentheses should be read as if no parentheses were there and that the proviso immediately following should apply only to the explanatory and parenthetical sentence immediately preceding it.

With this construction, however, we cannot agree because the reading of this part of the policy clearly indicates that the proviso does not refer to the paragraph in parentheses but refers to that part of the policy immediately preceding the parenthetical sentence.

We see no escape from this conclusion that the trial judge was clearly right in construing the policy as he did and that the plaintiff, being bound by its terms, had no standing in court.

The judgment of the court below will therefore be affirmed.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

PRESTON *v.* PRESTON.

1. CONTRACTS—PARTIES IN INTEREST—RIGHT OF THIRD PARTY TO MAINTAIN SUIT—APPLICABILITY OF STATUTE.

   On rehearing the case of *Preston* v. *Preston*, 205 Mich. 646, that part of the former opinion invoking the statute (3 Comp. Laws 1915, § 12361), providing that "in all equitable actions persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs," is eliminated, and the applicability of said statute is undetermined.

2. SAME—GENERAL RULE—EXCEPTION.

   Where a blind daughter was present when an agreement between her father and mother, whose duty it was to support her, was made for her benefit, she was not a

stranger within the rule announced in *Modern Maccabees* v. *Sharp*, 163 Mich. 449, but rather a party to the contract, thus coming within the exception announced in *Palmer* v. *Bray*, 136 Mich. 85, and therefore could enforce the contract in equitable proceedings.

Appeal from Newaygo; Barton, J. Submitted January 29, 1919. (Docket No. 48.) Decided May 29, 1919. Resubmitted November 5, 1919. Former opinion affirmed December 22, 1919.

Bill by Nettie Preston against Shinar Preston and others for the reformation of a deed. From a decree for plaintiff, defendants appeal. Affirmed.

William J. Branstrom and *Charles B. Cross*, for plaintiff.

White & Reber, for defendants.

ON REHEARING.

KUHN, J. In the majority opinion (205 Mich. 646), the second contention advanced by the counsel for the defendants — that the agreement made between two persons for the benefit of a third, a stranger to the consideration, will not support an action by the latter either at law or in equity—is answered by calling attention to section 12361 of 3 Compiled Laws of 1915, a part of the judicature act, and which section is set up in the opinion.

A rehearing was granted by this court for the reason that it appeared that the question of whether this section was applicable to the situation here presented was not argued in the briefs of counsel nor upon the oral argument, and briefs were invited and have been submitted with reference to this question. As there is a doubt in the minds of some of my associates as to the applicability of this statute, and as, for the pur-

pose of this case, after mature consideration, the decision with reference to this point may be rested on other grounds, it becomes unnecessary to invoke the statute, and that part of the majority opinion with reference thereto need not be considered to have any deciding force or effect.

By the decision of this court in *Knights of Modern Maccabees* v. *Sharp*, 163 Mich. 449 (33 L. R. A. [N. S.] 780), the conclusion with reference to this rule is stated to be that a stranger to a contract for whose benefit the contract is made cannot enforce it and that no difference should be made in proceedings at law and in equity, although it appears from an earlier decision of the court—the case of *Palmer* v. *Bray*, 136 Mich. 85—that the court said:

"It has been repeatedly held by this court that in a suit in equity a person for whose benefit a promise is made may enforce it in his own name. See *Corning* v. *Burton*, 102 Mich., at page 95 (62 N. W. 1040)."

It was there further said:

"* * * That principle has no application to this case, for several reasons. In this case, though the consideration (which was entirely adequate) was furnished by Betsey Doolittle, the mortgagor's promise to pay the principal was made to his children. They were not, therefore, strangers to the contract. On the contrary, they were parties to the contract. The cases relied on are not authority for the proposition that one may not enforce at law a promise made directly to himself on a consideration furnished by a third person, and it has been distinctly held that he may. See *Clark* v. *Clark*, 134 Mich. 602 (96 N. W. 924); *Rorabacher* v. *Lee*, 16 Mich. 169."

With reference to the general statement of the rule, see 30 Cyc. p. 34.

In announcing the rule in the *Maccabee Case, supra*, the late Justice OSTRANDER, in writing the opinion, had exceptions in mind for he said:

"* * * To what extent and under what circumstances an exception to the rule should be recognized in favor of the enforcement by children of contracts (other than those creating trusts), made for their direct or indirect benefit, by persons nearly related to them or by those sustaining the duty to provide for them, is a subject which needs to be considered no further than this, that the mutual promises of a father and mother, who each hold the certificate of a beneficial association in which the other is named beneficiary, never to change the beneficiaries so named, create no legal or equitable interest of the children in the fund derived on the death of the surviving parent, although, if no such change had been made, they would have been the legal beneficiaries, and although the mutual promises of the parents contemplated that in such case they should be the legal beneficiaries."

Let us examine the situation before us. Here we have a girl, deprived of her eyesight, who claims to have been present when the alleged agreement was made. The duty to support her clearly rested upon the father and mother. Her story as to how the agreement was consummated is set forth in the record as follows:

"Next morning, it was soon after breakfast, I went into the front room and sat down in the chair on the west side of the room, and I could hear father near his desk on the east side of the room, and pretty soon I heard mother walking into the room and father spoke to her about going down town to sign the deed, and she says, 'Well, I haven't found out yet what I am to have,' and she says, 'I didn't intend to sign a deed unless a provision is made so that Nettie and I will have a plenty to depend on for our home and support,' and she says, 'I have decided that I will sign the deed if you will agree to give me $1,000, give Nettie a thousand dollars, you and I have a joint deed on the house and lot; and have it fixed in the deed so that when we are through with the home the house and lot and the contents will belong to Nettie and Nettie will have a home with us as long as we live, and you provide what we need for the home.' After wait-

ing a little bit, father says, 'Well, I will agree to that.'" * * *

It thus appears that when the agreement was made the party for whose benefit it was made was present and that it was in her hearing and within the confines of a small room. She was unable to see, but she clearly heard her father say in her presence that he would agree to the proposition as stated by the mother. Can it be said that under these circumstances the plaintiff was not privy to the contract? And was not, in effect, in the situation thus created, the promise made by the father directly to the blind girl?

We are of the opinion that the plaintiff was, under these circumstances, a party to the contract and that the situation comes under the exception to the rule referred to in the *Maccabee Case, supra,* and announced by this court in the case of *Palmer* v. *Bray, supra.* For a recent discussion of the New York rule, with reference to exceptions of this kind, see *Seaver* v. *Ransom,* 224 N. Y. 233 (120 N. E. 639).

As the above opinion reaches the same conclusion that the majority of the court reached before, the opinion heretofore announced is hereby affirmed.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

PEOPLE *v.* MOORE.

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—AFFIDAVIT — CRIMINAL LAW.

Where it appeared from an affidavit offered in support of a motion for a new trial, that affiant was in the court room, without being subpœnaed, waiting to testify as a witness for defendant who was charged with assault with intent to commit the crime of rape, when he was informed by a former deputy sheriff that he would not be allowed to testify because he had been in the court room, and that, believing this, he left at once without being sworn; that he had no opportunity to tell defendant's attorneys what he could testify to in detail; and it appearing that his testimony would have contradicted the complaining witness, and, if believed by the jury, would have strongly supported defendant's story and the theory of the defense, *held*, under all the circumstances of the case, that the trial court was in error in not granting the motion.

Exceptions before judgment from Allegan; Cross, J. Submitted October 16, 1919. (Docket No. 110.) Decided December 22, 1919.

Horace Moore was convicted of an assault with intent to commit the crime of rape. Reversed.

Charles Thew and *Clare E. Hoffman,* for appellant.

KUHN, J. The claims of the people and of the respondent with reference to the offense charged in the information in this case are thus stated with clearness and conciseness in the charge of the court:

"In the information filed in this case, the people charge this respondent with the offense of assault with intent to commit the crime of rape.

"It is the claim of the people that on the 2d day of September, 1918, in the township of Leighton in this

county, the respondent, Horace Moore, feloniously assaulted one Matilda Joldersma with the intent then and there to commit the crime of rape.

"It is the claim of the people that on the date alleged that Matilda Joldersma was in the field near her home picking elderberries when the respondent, Horace Moore, came where she was and proposed to her to go over in the cornfield, that she refused, and that he then by force and against her will took hold of her and threw her upon the ground, placed his hand over her mouth so she could not scream, and pulled her skirts up over her hips and placed his knee between her legs and tried to separate them, when Fred Ryder and John Joldersma came and prevented him from accomplishing his purpose.

"The people claim that the respondent is thereby guilty of the offense here charged against him.

"The respondent claims that he was in the field on the day in question and that he saw Matilda Joldersma and she called for him to come over in the field where she was, and that he went over where she was and she sat down on the ground and he sat down on the ground beside her, that she moved up near him and that Fred Ryder and John Joldersma came over where they were and took him by the arms and led him away and afterwards brought him to Allegan.

"He claims he is not guilty of the offense here charged against him."

The trial resulted in a verdict of guilty and the case is here on exceptions before sentence.

Attorneys for the respondent rely on 38 assignments of error, many of them being discussed and argued in their brief. We have, at the time of writing this opinion, not been favored with a brief on the part of the people, although 15 days was allowed from the date that the case was submitted for the filing of such a brief, which time has long since expired.

The case was tried in one day and it is the claim of the counsel for the respondent that the trial was unduly hurried to such an extent that it unreasonably deprived counsel for the respondent of his right to

make a proper defense, as no opportunity was given to submit the necessary requests to charge and that the argument was limited so as not to allow time to properly argue the case. A motion for new trial was made, asking that a new trial be granted on the ground of newly-discovered evidence, misconduct of the jury, and because the verdict was against the clear weight of the evidence.

It appeared from the affidavit of Charles Smith, offered in support of the motion for new trial, that he came to the court to testify as a witness for the respondent without being subpœnaed, and that while standing in the court house, waiting to be called, he was told by one James C. Halloran, who was formerly deputy sheriff, that he would not be permitted to testify because he had been in the court room and that he could not be used as a witness, and, believing this statement, he left at once and was not sworn as a witness. He had no opportunity to tell nor did he tell either of the attorneys for Moore what he could testify to in detail, and that he was reluctant to do so as he did not want to be drawn into the case because he was on friendly terms with those interested. He further states that he lives on a farm adjoining the Moore farm on the north and was at home on Labor Day, the 2d of September, 1918—the date of the alleged offense—and that he saw the respondent cutting corn southwest of where he was at that time, working on the farm, and that he also saw the complaining witness, Matilda Joldersma, standing near the Ryder-Moore line fence, facing the respondent and waving her hand, it appearing to him that she was waving it to the respondent.

The theory of the defense was that the entire situation presented at the time of the alleged offense was one planned in advance by Fred Ryder and John Joldersma, who were watching the respondent on the

day in question and who were hiding within a few rods of the place where the crime was alleged to have been committed. It is also claimed that the complaining witness was a party to the plan. Without reviewing the testimony, we are convinced that there are a great many facts in the record that support this theory of the respondent and in view of this claim, in our opinion, the evidence of Charles Smith as to the conduct of the complaining witness was of very vital importance, not only in that it contradicted the complaining witness, but sustained the claim of the respondent that she was a party to a "put-up job" and aided in inducing the respondent to commit the crime. If his testimony were believed by the jury, it would have strongly supported the defendant's story and might have led to his acquittal of the charge made. It seems to us, in view of the seriousness of the charge against this boy, who, the record shows, was of a deficient mental development, that the trial judge erred in not granting a new trial so that this evidence might properly be brought before the jury for their consideration.

Those other errors which, upon examination, might be considered serious, are of such a character that in all probability they would not occur again upon a new trial. It would not, therefore, be profitable to discuss them.

We think, however, for the reason above stated, that the verdict should be set aside and a new trial granted.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

BACKUS *v.* BACKUS.

1. PLEADING—EQUITY—TRUSTS—REMEDY.
   Averments in a bill of complaint, among others, that plaintiff advanced to defendant a sum of money for the purpose of purchasing certain shares of bank stock, that defendant accepted the money with the understanding that he was to use it for said purchase for the account of plaintiff, and agreed to deliver said stock to plaintiff, and that while defendant has held said stock in his own name he really held it in trust for plaintiff, *held*, to sustain plaintiff's contention that an express trust is pleaded and that relief should be granted upon the theory of a trusteeship.

2. EQUITY—TRUSTS—PARTIES—THIRD PARTY—DEFENSES.
   That plaintiff did not deliver certain bank stock, owned by him, to the receiver appointed in judgment creditor's proceedings against him as he should have done, cannot be taken advantage of by defendant, who was a stranger to said litigation, in equitable proceedings to recover from him said stock which he holds as a trustee and wrongfully refuses to return or account for.

3. LACHES.
   Mere lapse of time is insufficient to constitute laches.

Appeal from Wayne; Collingwood, J., presiding. Submitted October 17, 1919. (Docket No. 73.) Decided December 22, 1919.

Bill by Henry N. Backus against Newton D. Backus for the specific performance of an express trust. From a decree dismissing the bill, plaintiff appeals. Reversed, and decree entered for plaintiff.

Lodge & Brown, for plaintiff.

Anderson, Wilcox, Lacy & Lawson, for defendant.

KUHN, J. The parties to this litigation are broth-

ers, who, together with their father, Absalom Backus, organized a corporation in 1885 known as "A. Backus, Jr., & Sons," after they had been together in business since 1873. The father died before this cause of action arose and practically all of the stock of the corporation is owned by the plaintiff and defendant.

On July 3, 1911, the defendant owned 50 shares of the capital stock of the Dime Savings Bank, which he had purchased in February, 1909. The bank decided to increase its capital stock from $500,000 to $1,000,000, which it did by declaring a stock dividend of 20 per cent., and giving its stockholders the right to purchase 80 per cent. of their holding at $160 per share. By this right being conferred upon him, the defendant had the option to purchase 40 shares of the bank stock at $160 per share.

It is the claim of the plaintiff that on or about July 3, 1911, the defendant agreed with him to purchase the said 40 shares of the stock in the bank for the plaintiff and that thereupon the defendant, who was the secretary and treasurer of the corporation, in charge of its finances, made out the corporation's check, payable to his own order, for $6,400 and deposited it in his own private bank account and drew his personal check for a like sum of $6,400 in payment of the 40 shares of stock, which were issued to him. It is further claimed that the $6,400 disbursement out of the company's funds was charged to the plaintiff on the books of the corporation.

While the check was issued to the defendant, N. D. Backus, the stub of the check book was made out to appear that the check was payable to the order of H. N. Backus. It also appears that four dividends of $90 each were turned over by the defendant to the plaintiff.

The trial judge allowed a large amount of testimony to be introduced as to the affairs of the corpora-

tion which had no relevancy to the issue here involved but would be proper to be considered in an accounting between the two brothers. The testimony conclusively showed, however, that there was considerable ill feeling between the two brothers which, to say the least, is most unfortunate. It was further made to appear that 14 years before July 3, 1911, for the purpose of evading the collection of a certain note given by the plaintiff to the First National Bank of Bay City, which he claimed had been improperly obtained from him, that he transferred to the defendant upon the books of the corporation all of his capital stock in the corporation excepting two shares; that thereafter suit was brought against the plaintiff on the note in question and a judgment obtained in November, 1897, against him for $5,608.28; that a judgment creditor's proceeding was instituted and a receiver appointed on March 10, 1899. This judgment was paid by the plaintiff on August 3, 1913, and on August 25, 1913, a stipulation was filed, discontinuing the judgment creditor's proceeding.

The bill herein was filed on February 26, 1916. In the first serious contention that presents itself for our consideration, as to what the real character of this bill is and what the relief asked for is, it is the contention of the counsel for the defendant and appellee that the bill is one for the enforcement of specific performance of the contract and that if this is found to be true, that no relief could be given to the plaintiff because of the statute of frauds; and further because the relief asked for is impossible because of the hypothecation of this stock to the Wayne County and Home Savings Bank before knowledge of the commencement of this suit was brought to the defendant and that the bank is not a party herein.

The plaintiff contends that while the bill of complaint is, perhaps, inartificially drawn, that it clearly

appears from the averments therein that an express trust is pleaded and that in its entirety it is framed upon the theory of a trusteeship and that relief should be granted to the plaintiff upon that theory.

While the trial judge, in his findings, states that the proceeding is one asking for a specific performance of the contract, nevertheless we are of the opinion that a study of this bill sustains the contentions of the counsel for the plaintiff. Following are some allegations from the bill:

"3. Because he was not desirous of availing himself of his aforesaid rights of purchase, he transferred the same to the complainant, and complainant, to wit, on or about the 3d day of July, 1911, advanced to defendant the sum of sixty-four hundred ($6,400) dollars, for the purpose of purchasing forty (40) shares of the capital stock of said Dime Savings Bank at the price at which it was offered to said stockholders, viz., one hundred and sixty ($160) dollars per share; and said defendant then and there accepted said money, with the understanding that he was to use the same for said purchase, for the account of complainant, and then and there agreed to deliver the same to complainant, and said money was advanced by complainant to said defendant in trust for said purpose.

"4. Upon information and belief, complainant says that said money was used by said defendant for said purpose, and forty (40) shares of said capital stock were issued to said defendant, but in his name; and that from the time of the issue of said stock to said defendant, as aforesaid—while the defendant has held the same in his own name, he has really *held the same in trust for complainant.*"

While the bill itself prays that the defendant may be decreed and ordered by this court to assign and transfer this stock to the plaintiff, it also has a prayer for general relief. The trial judge, after hearing the evidence, made the following finding of fact:

"* * * after hearing all the testimony, the court is convinced that some time in July, 1911, there was an arrangement by which Newton D. Backus was to buy the bank stock for Henry N. Backus, that he did so buy it, and that the money was charged to Henry N. Backus, and that Henry Backus, to all intents and purposes, had paid for this stock."

Without going into detail as to the testimony to support this finding, we are convinced that the trial judge was right in this conclusion as to the facts as the record abundantly sustains this finding. But the judge was of the opinion, notwithstanding this conclusion as to the facts, that if the stock was owned by the plaintiff, Henry N. Backus, at the time of the agreement, the stock should have been delivered to the receiver who was appointed on March 10, 1899, and who had never been discharged, and that the plaintiff could not in equity now enforce the agreement of July 3, 1911. With reference to this legal conclusion of the trial judge it must be borne in mind that in the case presented before us, neither the judgment plaintiff—the First National Bank of Bay City—nor the receiver, nor the corporation, whose money was used to buy the stock, is complaining. Here, an outsider seeks to shield himself under this technical defense from the penalty of his own wrongdoing. He was a stranger to the entire litigation and should not be allowed in a court of equity to invoke the defenses which an intervening creditor or the receiver might claim.

It is contended that the doctrine of laches should be made to apply to this case and that the delay between July 3, 1911, and February 26, 1916, when this bill of complaint was filed, does not show diligence on the part of the plaintiff in bringing his suit. It is a fundamental doctrine which has been approved by this court many times that the mere lapse of time is not sufficient to constitute laches. The situation here

presented is a peculiar one. We have two brothers, engaged in the same business, whose business affairs were closely intermingled, and there would be a natural hesitation on the part of one of the brothers to enforce a claim of this kind in the courts against the other. One would naturally be reluctant to air such a family dispute and it sufficiently appears in the record—at least according to the claims of the plaintiff —that the defendant faithfully promised him to transfer the Dime Bank stock to him from time to time during said period. Attempts at reconciliation were made and these culminated, in 1914, in the following letter being written by the plaintiff to the defendant:

"DETROIT, MICHIGAN, December 26th, 1914.
"MR. N. D. BACKUS.

"My dear brother: I have already spoken to you in person, but as you asked me to write you, I hereby offer you my apology for any wrong or wrongs that you claim I have ever done you.

"I am writing this, relying on your promise that my affairs be straightened up on the books of the corporation of A. Backus, Jr., & Sons, not later than Tuesday noon, December 29th, 1914, and that you will also deliver to me by the same date, Dime Bank stock which you bought for me, with the accrued dividends to date, and also give my account credit for money advanced for Cadwell patent, for the benefit of the corporation, and credit me the money due me, which was transferred to S. E. Backus' account, and perpetuate the brotherly love for each other as it existed in years gone by.

"Yours, with best wishes,
"H. N. BACKUS."

To this, the following reply was received:

"DETROIT, MICH.,
"December 28, 1914.

"MR. H. N. BACKUS,
"Detroit, Michigan.
"My dear brother:

"Replying to your letter of December 26th, will

say you have evidently failed to grasp my idea. I told you I desire an acknowledgment of the many cowardly, sneaking methods employed by you to force results, which more gentlemanly upright methods would have accomplished.

"Regarding the affairs of the corporation, I will refer you to my attorneys, Messrs. Anderson & Wilcox, in the Moffat building.

"As to the brotherly love which you mention, I am unable to understand how you could imagine me dense enough to think you have any brotherly feeling for me after the way you have mistreated me.

"Yours respectfully,

"N. D. BACKUS."

These exhibits are set forth to show the state of mind that the parties were in in the last effort to effect an amicable settlement of this matter.

We are satisfied that this is not a case where the doctrine of laches can be properly invoked. See the following Michigan cases: *Wright* v. *Wright,* 37 Mich. 55; *Wykoff* v. *Sewing Machine Co.,* 43 Mich. 309; *Gamble* v. *Folsom,* 49 Mich. 141; *Seymour* v. *Rolling Mills,* 56 Mich. 117; *Chase* v. *Boughton,* 93 Mich. 285; *Metropolitan Lumber Co.* v. *Iron Co.,* 101 Mich. 577; *Fred Macey Co.* v. *Macey,* 143 Mich. 138 (5 L. R. A. [N. S.] 1036).

We are satisfied, after careful consideration of this case, that the equity court, under the theory of a trusteeship, can give full and adequate relief to the plaintiff. In our opinion, the defendant should be ordered to transfer to the plaintiff the stock which he bought for him and the unpaid accrued dividends thereon, which he received. If, on account of having the stock hypothecated, he is unable to do this, a decree may be entered against him for the value of the stock and if counsel are unable to agree as to the present value thereof, the case may be remanded to

the circuit court, with instructions to take testimony as to the value of this stock.

The decree of the lower court will be reversed and a decree here entered, in accordance with this opinion, with costs to the plaintiff and appellant.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

MEEUWSEN *v.* CLOUGH & WARREN CO.

1. PLEADING—DEFENSES—CONTRACTS—ACT OF PUBLIC ENEMIES—NEW TRIAL.

   The defense that a contract was made subject to delay or failure caused by fires, strikes, riot, the act of God or the public enemies should be specially pleaded, and comes too late when urged for the first time upon motion for new trial.

2. PRINCIPAL AND AGENT—SELF-CONSTITUTED AGENT—RATIFICATION—SCOPE OF AGENT'S AUTHORITY.

   Where a principal adopts the contract of a self-constituted agent, who has assumed to act for such principal without authority, he is bound to inquire and ascertain the extent the self-constituted agent assumed to act in his behalf, and the principal, when he becomes such by adopting his acts, is bound by all acts within the scope of the assumed authority.

3. SAME—ACTS OF AGENT—RATIFICATION—CONTRACTS—CONSTRUCTION.

   Where defendant corporation adopted the act of its secretary in contracting with plaintiff to pay him a commission on an order for goods for his services in assisting to procure the same, by accepting the benefit of such services and paying therefor as goods were shipped, and it clearly

appears that by the contract it was intended to pay a commission upon the whole order, defendant is liable, in an action thereon, although, because of the war with Germany, it was unable to secure certain dyes and was compelled to cancel part of the order.

4. SAME—CONTRACTS—PARTIES TO CONTRACT—WRONG NAME.
Although defendant's secretary contracted in the name of another corporation, where the affairs of the two corporations were closely interwoven, and defendant adopted the act of its secretary, the contract was binding upon it.

Error to Lenawee; Hart (Burton L.), J. Submitted November 4, 1919. (Docket No. 97.) Decided December 22, 1919.

Assumpsit by Peter Meeuwsen against the Clough & Warren Company and the Manophone Corporation for commissions on the sale of goods. Judgment for plaintiff. Defendant Manophone Corporation brings error. Affirmed.

Franklin J. Russell and *Baldwin & Alexander*, for appellant.

Charles L. Robertson and *James H. Cornelius* (*L. W. Harrington*, of counsel), for appellee.

KUHN, J. The plaintiff, in March, 1917, was a manufacturers' agent engaged in placing contracts between the assemblers of talking machines and the manufacturers of cabinets. Defendant Clough & Warren Company, prior to December 20, 1916, was engaged in the manufacture and sale of pianos and organs at Adrian, Michigan. The defendant Manophone Corporation is a corporation, organized on December 20, 1916, at which time it took over the plant and business of the defendant Clough & Warren Company and since that time has been engaged in the manufacture and sale of talking machines and talking machine cabinets at the city of Adrian. The Clough

& Warren Company has not been engaged in any business since it transferred its plant and business to the defendant Manophone Corporation, although it has not been formally dissolved. There were different stockholders, but Mr. Warren, who was treasurer of the Clough & Warren Company, became the vice president and treasurer of the Manophone Corporation, and Mr. Essex, who was secretary of the Clough & Warren Company, became secretary of the Manophone Corporation.

About March 1, 1917, the Manophone Corporation received a letter from the Playerphone Talking Machine Company of Chicago, stating that it was in the market for talking machine cabinets, and on March 7, 1917, Mr. Essex went to Chicago for the purpose of calling on the Playerphone Company. On March 8th, the plaintiff and Mr. Essex met in Chicago and the latter gave the plaintiff a writing known in the record as Exhibit "A," which reads as follows:

"CHICAGO, 3/18/17.

"For services rendered replacing contract with Playerphone Company, we agree to pay Mr. P. Meeuwsen 5% commission.

"CLOUGH & WARREN CO.,
"By L. W. ESSEX, Sec'y."

On the following day, Mr. Essex and the plaintiff called upon the Playerphone Company, the visit resulting in an order being given to the Clough & Warren Company for cabinets of the value of $67,500. This order was subsequently transferred to the Manophone Corporation and due shipment made to the amount of $26,630.65. Cabinets of the value of $3,448.92 were returned as defective and were credited to the Playerphone Company account, which left the net business done the sum of $23,181.73.

It is claimed that the Playerphone Company order was subsequently cancelled for the reason that Ger-

man dyes were necessary to meet the specifications of the Playerphone Company and that these dyes were not obtainable, by reason of the war with Germany. It is claimed for the plaintiff that he is entitled to recover a commission of 5% on the full amount of the Playerphone order, whether any shipments were made or not. The defendant Clough & Warren Company claims that Exhibit "A" was not authorized by it and was not a valid and binding obligation upon it. The defendant Manophone Corporation claims that the writing in Exhibit "A" was never authorized by it and that it never knew of the writing and that it was not a valid contract binding upon it and that the only contract or agreement between the plaintiff and the defendant Manophone Corporation of which the latter has knowledge was to pay a commission of 5% on shipments actually made to the Playerphone Company. The Manophone Corporation paid the commissions upon such shipments made and settled for by the Playerphone Company.

The case was tried before the court without a jury and the trial judge found that the writing known as Exhibit "A" was not a valid contract as to the defendant Clough & Warren Company and dismissed the case as to it. He further found that the writing was a valid contract between the plaintiff and the defendant Manophone Corporation and that the plaintiff was entitled to recover a commission of 5% on the full amount of the Playerphone order.

A motion for a new trial was made in which motion it was urged for the first time that the defendant should be excused or relieved from the obligation to pay the commission because of the provision in the contract which stipulated that the performance of the contract was to be subject to delay or failure caused by fires, strikes, riot, the act of God or the public enemies. Such a defense, if urged upon the trial,

should have been specially pleaded under the notice of the special defense which was annexed to the plea of the general issue in order to comply with Circuit Court Rule No. 23. But, nevertheless, while such a defense may have been known to the defendant Manophone Corporation, it was not urged upon the trial and no notice of it given, and the first suggestion made with reference to it was upon the motion for new trial. We are of the opinion that, having been made at that time without any other notice having been given of it, it came too late and cannot now be urged.

The meritorious question involved in the controversy is whether or not the court erred in holding the writing (Exhibit "A") to be a valid contract between the plaintiff and the defendant Manophone Corporation. The affairs of the two defendant corporations were so interwoven as might very readily and easily have led a person to believe that, so far as their business was concerned, they were one and the same company. There is no dispute that the Manophone Corporation was informed that Meeuwsen was to have a 5% commission. The question is, Upon what was he to receive the commission? The memorandum in writing, showing what the contract entered into by Meeuwsen and Essex was, clearly indicates that it was intended to be upon the whole order. The Manophone Corporation accepted the benefit of Mr. Meeuwsen's services, approved the contract which was made by him, and proceeded to send him commissions as the goods were shipped and paid for.

It is the claim of the defendant that it did not have full knowledge of the contract as made by Essex and that Essex had not been authorized to make the contract which the plaintiff relies upon. The trial court held that, as a matter of law, under the peculiar circumstances of this case, that having accepted the benefits of Mr. Meeuwsen's services, if it did not have full

knowledge of the contract, it was its legal duty to make the needed inquiry of Essex or of Meeuwsen to discover all of the terms of the commission contract. This conclusion in law, in our opinion, finds support in the decisions of this court.

In *Busch* v. *Wilcox*, 82 Mich. 336 (21 Am. St. Rep. 563), in commenting upon the law with reference to the binding effect of the acts of a self-constituted agent. the following is stated:

"The law, as we conceive it to be, is this: When a person deals with an authorized agent, he is bound to inquire and ascertain the extent and limit of his authority to bind the principal, and the principal is bound by all acts of the agent within the scope of his authority; and when the principal adopts the contract of a self-constituted agent, who has assumed to act for such principal without authority, he is bound to inquire and ascertain the extent the self-constituted agent assumed to act in his behalf, and the principal, when he becomes such by adopting his acts, is bound by all acts within the scope of the assumed authority; and in both cases the liability of the principal extends to the frauds or misrepresentations of the agent committed or made while acting within the scope of the real or assumed authority. We entertain no doubt upon the law that should govern the case."

We think it necessarily follows, under the circumstances of this case, that the defendant Manophone Corporation, by adopting the acts of its self-constituted agent, sought to appropriate to itself all the benefits to be derived from the contract made by him with Meeuwsen as fully as if it had itself induced it in the first instance. This being true, it must also assume the liabilities which attach to it. See, also, *Ripley* v. *Case*, 86 Mich. 261; *Sokup* v. *Letellier*, 123 Mich. 640; *Dodge* v. *Tullock*, 110 Mich. 480.

The judgment should be, and is, hereby affirmed.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

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ABATEMENT—See NUISANCE (1).

ABILITY TO FULFILL CONTRACT—See FRAUD (7).

ABSENT WITNESS—See CRIMINAL LAW (3, 6).

ABUSE OF DISCRETION—See CRIMINAL LAW (3, 6); DISMISSAL AND NONSUIT.

ABUSE OF PROCESS—See FALSE IMPRISONMENT (2).

ACCELERATION—See WILLS (12).

ACCEPTANCE—See WILLS (15).

ACCIDENT INSURANCE—See INSURANCE (4-7).

ACCIDENTAL INJURY—See MASTER AND SERVANT (10).

ACCOUNTING—See FRAUD (13); PARTNERSHIP; TRUSTS (7, 9); VENDOR AND PURCHASER.

ACQUIESCENCE—See BOUNDARIES.

ACTION.

Under the judicature act (3 Comp. Laws 1915, § 12407), suits may be commenced by simply filing the declaration with indorsed notice thereon; it being the evident intention of the legislature to change the former rule requiring service by omitting any reference whatever thereto. *Christe* v. *Springfield Fire & Marine Ins. Co.*, 12.

See DEATH (1).

ACTS OF AGENT—See PRINCIPAL AND AGENT.

ADEMPTION—See WILLS (4-6).

ADMISSIONS—See EVIDENCE (4, 12, 13).

ADVERSE POSSESSION.

On a bill to quiet title to land, testimony of plaintiffs *held*, to show such an open, notorious, continuous, exclusive, distinct, and hostile possession to the land in question as to make out a title by adverse possession. *Woodruff* v. *Venia*, 177.

See BOUNDARIES (2).

AFFIDAVITS — See CRIMINAL LAW (3); FALSE IMPRISONMENT (1); NEW TRIAL.

AFTER EVENTS—See TRIAL (1).

AGENCY—See PRINCIPAL AND AGENT.

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AMENDMENTS—See PARTIES (2).

ANNUAL EXPENSES—See MUNICIPAL CORPORATIONS (11).

APPEAL AND ERROR.

1. Where plaintiff administrator, in ejectment for the possession of a farm devised to the defendant son of testator, subject to the debts of the estate, did not appeal from that part of the judgment in favor of the purchaser of a part of said farm from defendant, whether said part of the judgment was erroneous, *held*, not before the court. *Sylvester* v. *Button*, 24.

2. Where a claim of appeal was not filed within 20 days after the entry of decree, as provided in 3 Comp. Laws 1915, § 13754, the court has no jurisdiction to entertain the appeal. *Munroe, Boyce & Co.* v. *Ward*, 369.

3. On appeal from a directed verdict for defendant, the question as to whether plaintiff's testimony is sufficiently convincing to support a verdict is not before the court. *Ottaway* v. *Gutman*, 393.

4. Where the record in a criminal case does not contain a report of the argument of counsel for defendant, the Supreme Court will assume that the argument was made exactly as indicated in the charge of the court. *People* v. *Eamaus*, 442.

5. The right of appeal is a statutory one, and unless the mandatory provisions of the statute are complied with,

APPEAL AND ERROR—Continued.

the court has no jurisdiction to entertain the appeal. *Bishop* v. *Judge of Recorder's Court of Detroit*, 537.

6. Under Act No. 118, § 23, Pub. Acts 1891, appeals from the police court of the city of Detroit are controlled by the general laws of this State applicable to appeals from convictions by justices of the peace to the circuit court in criminal cases. *Id.*

7. In the absence of any provision in the general laws of the State or in the charter of the city of Detroit authorizing the recorder's court of said city to extend the time for appeal from the police court to said recorder's court beyond the limit of 10 days fixed in the statute (3 Comp. Laws 1915, § 15786), said court has no authority to grant leave for a special appeal after the expiration of said 10 days. *Id.*

8. Mandamus will lie to compel the judge of the recorder's court of the city of Detroit to vacate an order granting special leave to appeal from a conviction in the police court of said city to said recorder's court after the expiration of the 10 days fixed in the statute; there being no showing that said appeal was prevented by any action or nonaction on the part of the court or its officers beyond the control of appellant. *Id.*

9. This court will only reverse a case upon the question of the weight of the evidence when the verdict is against the overwhelming weight of the evidence. *Simmons* v. *Petersen*, 508.

10. An assignment that "the court erred in directing a verdict in favor of the defendants," where defendants offered no testimony, and there could be no possible uncertainty as to what was meant by the assignment, *held*, sufficiently specific. *Marx* v. *Schultz*, 655.

11. The weight of the testimony is primarily for the jury. *Id.*

See CERTIORARI; CONTRACTS (3); MASTER AND SERVANT (6); PLEADING (4).

APPROVAL BY BOARD OF ESTIMATES—See MUNICIPAL CORPORATIONS (3).

ARGUMENT OF COUNSEL—See APPEAL AND ERROR (4); CRIMINAL LAW (4).

ASSAULT—See CRIMINAL LAW (7); NEW TRIAL.

ASSIGNMENTS—See WILLS (7).

ASSIGNMENTS OF ERROR—See APPEAL AND ERROR (10).

ASSUMPSIT.

1. Where a declaration alleged that defendant promised to sell plaintiff certain land at its cost price, but that he

ASSUMPSIT—Continued.

charged more than the cost price, and it is expressly stated that the action is in assumpsit to recover the overpayment, and reliance is had upon defendant's promise, the action is one of assumpsit, and it is immaterial that tortious conduct is alleged by way of aggravation. *Straus Land Corporation* v. *Dupuis*, 399.

2. The conduct of the trial court in treating the action as one of fraud and deceit and in instructing the jury that, for plaintiff to recover, the necessary elements of fraud and deceit must be found, *held*, reversible error. *Id.*

3. The action being to recover the overpayment, evidence of the value of the land was inadmissible. *Id.*

ASSUMPTION—See APPEAL AND ERROR (4).

ATTORNEY AND CLIENT.

A letter introduced in evidence, written by one of the defendants in disbarment proceedings to the complaining witnesses subsequent to the misconduct charged, bearing upon defendants' good faith, even if mailed (which the court ruled was not proven), *held*, insufficient to justify defendants' contention that the proceedings should be dismissed, since an act subsequent to the misconduct complained of would not preclude subsequent inquiry into their conduct. *In re Coburn and Glocheski*, 351.

See EVIDENCE (2).

ATTORNEYS' FEES—See PARTNERSHIP (2).

AUTHORITY TO BOND—See MUNICIPAL CORPORATIONS (2-11).

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BEQUEST OF PROCEEDS OF REALTY—See WILLS (5, 6).

BILL IN AID OF EXECUTION—See FRAUDULENT CONVEYANCES.

BILLS AND NOTES.

1. Between the immediate parties to a bill or note, parol evidence is admissible to show that the instrument was, to the knowledge of the parties, intended to be the obligation of the principal, and not of the agent, and that it was given and accepted as such. *Lexington State Bank* v. *Rose City Creamery Co.*, 81.

2. Where the evidence shows that in the making of a mortgage by a corporation, certain of its directors indorsed the note given therewith in their official capacity, intending thereby to give validity to the instrument executed, the mortgagee, on foreclosure proceedings, is not entitled

BILLS AND NOTES—Continued.

to a decree for deficiency against said directors personally. *Id.*

3. A bank which discounts a note for a customer, crediting the proceeds thereof to his account, is not a *bona fide* purchaser for value, unless such credit was drawn upon before the maturity of the note, and before notice of facts invalidating it in the hands of the payee. *Central Savings Bank & Trust Co.* v. *Stotter*, 329.

4. Where, in an action upon promissory notes by the transferee thereof, there was proof of fraud in the inception, and upon the record the plaintiff failed to establish its *bona fide* holding, the court below was in error in striking out the evidence of fraud and directing a verdict for plaintiff. *Id.*

BONA FIDE HOLDER—See BILLS AND NOTES (3).

BONDS—See FRAUD (1, 2); MUNICIPAL CORPORATIONS (2-11); PRINCIPAL AND SURETY.

BOOKS OF ACCOUNT—See EVIDENCE (3-6).

BOUNDARIES.

1. To establish a boundary line by agreement and acquiescence, not only must there have been an express agreement, and monuments erected and acquiesced in, but a doubt or controversy must have existed as to the true line; otherwise the statute (3 Comp. Laws 1915, § 11975) prohibiting the conveyance of land by parol renders the agreement inoperative. *Phelps* v. *Brevoort*, 429.

2. Where there was no dispute between the parties as to the true line and no agreement as to the location of a fence erected by one of the parties separating their several holdings, the party advantaged by the erroneous location of the dividing line may not profit by the mistake. *Id.*

3. A description in a deed "600 feet in width," *held*, to mean 600 feet at right angles. *Id.*

BREACH OF CONTRACT—See CONTRACTS (2, 4, 5); DAMAGES (1, 2); RAILROADS (11, 12).

BREACH OF TRUST—See TRUSTS (6, 7).

BREACH OF WARRANTY—See WARRANTY.

BUILDING CONTRACT—See PRINCIPAL AND SURETY (7, 8).

BUILDING RESTRICTIONS—See COVENANTS.

BURDEN OF PROOF—See CONTRACTS (4); NEGLIGENCE (6); VENDOR AND PURCHASER (2).

CANCELLATION OF INSTRUMENTS.

Evidence that the grantor, 74 years of age, in the last stages of tuberculosis, physically and mentally weakened, deeded his entire property to a stranger in blood at whose house he was a guest, although he was on good terms with his family, for the claimed consideration of support for life, etc., which was left in parol, *held*, in view of the very brief life expectancy of grantor, to support the conclusion of the court below that the deed was not only inequitable because for a grossly inadequate consideration, but was the result of undue influence. *Bennett* v. *Fleming*, 278.

See CONTRACTS (6).

CANCER—See MASTER AND SERVANT (10).

CAPIAS AD RESPONDENDUM—See FALSE IMPRISONMENT.

CAPITAL EXPENDITURES—See MUNICIPAL CORPORATIONS (11).

CARRIERS.

1. In an action against a railroad company for damages to fruit alleged to have been caused by delay in its shipment, testimony by plaintiff as to the condition of the peaches at time of shipment, that while he examined only 80 or 85 baskets of peaches out of a shipment of 389 baskets, he examined four or five baskets in each load, that he could see the peaches through the openings between the slats of which the baskets were made, that he personally saw every basket as it went into the car, that from this method of inspection he was able to testify as to the quality and condition of the fruit of the entire lot, and that this was the usual, ordinary, and general way in which shippers and purchasers of fruit, when shipping, examine it, *held*, sufficient to present a question of fact for the jury as to the condition of the peaches at the time of inspection before shipment, and that the court below was in error in limiting recovery to the 80 baskets actually examined. *Perkett* v. *Manistee & Northeastern R. Co.*, 32.

2. In such action, testimony by a witness for plaintiff as to the condition of apples shipped by plaintiff after arrival at their destination, that he only inspected about 15 barrels of the apples at the time of the actual delivery to the consignee, but later on, when the apples were sold, that he actually handled every barrel himself and opened the barrels and made inspection, that he had had 30 years' experience and was able to testify, from the inspection made, whether or not they had become heated, *held*, in connection with other testimony offered, to present a question of fact for the jury as to the condition of the apples at the time of their delivery to the consignee, and the court below was in error in limiting recovery to 37 barrels. *Id.*

CARRIERS—Continued.

3. In an action against a railroad company for personal injuries alleged to have been caused by plaintiff's slipping upon ice and snow on the step of the car and falling to the ground as she was about to alight, the disputed question of fact as to whether the ice and snow had accumulated during the trip, and since the train left its starting point in the morning, was properly submitted to the jury. *Chalker* v. *Detroit, etc., R. Co.*, 138.

4. Even if the ice and snow had accumulated during the trip, still if it rendered the steps dangerous to pass over, a duty was imposed upon defendant to warn and assist plaintiff in alighting, and where it is admitted by the brakeman that he did neither, failure of the court to instruct the jury in this respect was reversible error. *Id.*

5. Uncontradicted evidence that the train did not stop at the station platform, that the distance from the last step to the ground was about 20 inches, that the ground was so slippery that a stool could not be kept in place and so was thrown aside, and that passengers were compelled to step to the slippery ground, rendered it the duty of defendant to warn and assist plaintiff, and where it is conceded that it did not do so, the court below was in error in neglecting to instruct the jury that if defendant's failure in these respects contributed to her injuries and increased her damages she would be entitled to recover therefor. *Id.*

See STREET RAILWAYS.

CERTIORARI.

On certiorari to review disbarment proceedings, where there was evidence of defendants' misconduct, this court will not decide, as a question of law, that the evidence was not clear and convincing; that question being clearly within the province of the trial court. *In re Coburn and Glocheski*, 350.

CHANGE OF PROPERTY—See WILLS (4).

CHANGED CONDITIONS—See CONTRACTS (5).

CHARACTER EVIDENCE—See CRIMINAL LAW (10).

CLAIM AGAINST ESTATE—See WILLS (15).

CLERK OF COURT—See EVIDENCE (14); PRINCIPAL AND SURETY (2-6).

COMMENCEMENT OF ACTION—See ACTION.

COMMENT BY COURT—See EVIDENCE (9).

COMMON COUNCIL—See MUNICIPAL CORPORATIONS (2-12).

COMMUTATION OF DEFERRED PAYMENTS—See MASTER AND SERVANT (2-4).

COMPENSATION INSURER—See MASTER AND SERVANT (8).

COMPENSATION OF TRUSTEE—See TRUSTS (8).

COMPETENCY OF WITNESS—See RAILROADS (13).

COMPLIANCE WITH RULE—See TENDER (2).

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CONDUCT OF TRUSTEE—See TRUSTS (7).

CONFESSION—See EVIDENCE (12, 13).

CONFLICTING TESTIMONY—See WARRANTY (5).

CONSIDERATION—See VENDOR AND PURCHASER.

CONSTITUTIONAL LAW.

1. The legislature may not do by indirection that which it cannot do directly. *Brennan* v. *Recorder of the City of Detroit*, 36.

2. *Held*, that the legislature may not, by providing for a system of recording or certifying convictions of violations of the "motor vehicle law" to the secretary of State, nullify the right of municipalities, under section 28, Art. 8, of the Constitution, to the reasonable control of its highways. *Id.*

3. Act No. 514, Local Acts 1903, annexing the city of West Bay City to, and consolidating the same with, the city of Bay City, and providing that the rights, privileges, or franchises granted by the common council of Bay City shall extend over the entire consolidated city, *held*, not unconstitutional because not within the object expressed in its title. *City of Bay City* v. *Saginaw-Bay City Railway Co.*, 419.

4. Where a street railway company was operating in the cities of West Bay City and Bay City under separate franchises, expiring at different times, and the two cities were consolidated by Act No. 514, Local Acts 1903, upon the expiration of its franchise in the former city, the provisions of the franchise of Bay City immediately went into effect in the annexed territory, as provided in said act, the effect not being to impair a contract within the inhibition of section 10, Art. 1, Constitution of the United States, since the West Bay City franchise had already expired. *Id.* 420.

CONSTRUCTION OF ACT—See MASTER AND SERVANT (1-3, 13).

CONSTRUCTION OF CHARTER—See MUNICIPAL CORPORATIONS (2-12).

CONSTRUCTION OF CONTRACT—See CONTRACTS (1-9); PRINCIPAL AND AGENT (3); SPECIFIC PERFORMANCE; TRUSTS (9).

CONSTRUCTION OF POLICY—See INSURANCE (6).

CONSTRUCTION OF STATUTE—See MASTER AND SERVANT (1-3, 13); STATUTES.

CONSTRUCTION OF WILL—See WILLS.

CONTENTS OF DESTROYED BOOKS—See EVIDENCE (6, 7).

CONTENTS OF RECORD—See APPEAL AND ERROR (4).

CONTINUANCE—See CRIMINAL LAW (3, 6).

CONTRACTS.

1. Where several instruments are made at one and the same time having relation to the same subject-matter they must be taken to be parts of one transaction and construed together for the purpose of showing the true contract between the parties. *Interstate Construction Co.* v. *United States Fidelity & Guaranty Co.*, 265.

2. In an action for damages by the general contractor on a public building against a subcontractor for breach of contract in refusing to perform on the ground that plaintiff's delay until July 17th in having the building ready for defendants to begin work amounted to a breach thereof, a telegram from plaintiff to defendants bearing the same date as the contract stating that "you are to start work about May 1st," *held*, admissible for the purpose of showing the true contract between the parties, although the contract provided that the work should be "commenced promptly upon notice." *Id.*

3. Where the evidence clearly shows that plaintiff's agent notified defendants that it was expected work would begin about May 1st, the admission of the telegram, whether admissible or not, *held*, not prejudicial. *Id.* 266.

4. In order to justify defendants' refusal to perform, the burden was upon them to establish, by a fair preponderance of the evidence, that the neglect of plaintiff was so unjustifiable, unreasonable, and inexcusable as to amount to a breach of the contract. *Id.*

5. Defendants having elected to repudiate the contract, claiming a breach, evidence of the changed condition of the labor market in the meantime, which would have imposed upon them an extraordinary and unwarranted burden, *held*, admissible. *Id.*

6. A written contract whereby a father deeded certain premises to his son, who was to conduct a saloon business thereon, pay existing incumbrances against the same, and then execute a life lease to the father, who was to have "a living out of the proceeds of such business without charge being made therefor," construed and *held*, that upon paying the incumbrance and executing the life lease the deed had become absolute, but that the father was entitled to specific performance of the agreement for his support, the amount thereof, in excess of the income from the property which had been turned over to him

CONTRACTS—Continued.

upon discontinuance of the business, being made a lien thereon. *Whitman* v. *Whitman*, 337.

7. In an action for the purchase price of a carload of iron, where defendant claimed as an offset damages for plaintiff's failure to deliver iron under another contract made in November, 1917, under which three cars were immediately ordered, although by its terms shipments were not to begin until January, 1918, an instruction by the court to the jury that no orders given by defendant for shipment prior to January should be considered in determining defendant's damages, *held*, correct. *E. C. Humphreys Co.* v. *Rathbone Manfg. Co.*, 405.

8. Where plaintiff insisted upon a change in the contract in regard to the terms of payment, to which defendant reluctantly consented, on January 4th, upon plaintiff's promise that shipments would begin immediately, defendant's contention that thereby plaintiff waived the time fixed in the contract for shipments to begin, so as to render it liable for damages for failure to ship on orders given prior to January, *held*, not tenable. *Id.*

9. Where defendant's order, given on January 4th, was later canceled or merged in an order given on January 25th, so that plaintiff was not in default until it failed to make shipment of said order, the construction given the contract by the court that plaintiff would not be in default if shipment was made upon the last day of January, *held*, not prejudicial. *Id.*

10. In an action for certain automobile parts and repairs furnished by plaintiff, an automobile distributor, to defendant, a local agent for same, which liability defendant admitted, but claimed a set-off, alleging the making of an oral agreement between plaintiff's manager and himself that he should be allowed a discount on the cost price of cars in addition to that provided in the written contract if he would purchase 25 additional cars, testimony both for and against the making of the claimed agreement, *held*, to present a question of fact peculiarly within the province of the jury. *Doyle* v. *Widrig*, 411.

11. Evidence that defendant's contract with plaintiff was made in said manager's office, that he had charge of the associate dealers and sold them cars, that he hired and discharged the help and sometimes signed checks, and that plaintiff admitted that next to himself said manager was "it," together with surrounding circumstances, *held*, sufficient to send the question of his authority to make said agreement to the jury. *Id.*

12. On rehearing the case of *Preston* v. *Preston*, 205 Mich. 646, that part of the former opinion invoking the statute (3 Comp. Laws 1915, § 12361), providing that "in all equitable actions persons having an interest in the subject of the action and in obtaining the relief demanded

CONTRACTS—Continued

may join as plaintiffs," is eliminated, and the applicability of said statute is undetermined. *Preston* v. *Preston*, 681.

13. Where a blind daughter was present when an agreement between her father and mother, whose duty it was to support her, was made for her benefit, she was not a stranger within the rule announced in *Modern Maccabees* v. *Sharp*, 163 Mich. 449, but rather a party to the contract, thus coming within the exception announced in *Palmer* v. *Bray*, 136 Mich. 85, and therefore could enforce the contract in equitable proceedings. *Id.*

See FRAUD (7); HUSBAND AND WIFE (1, 2); INSURANCE (5); PLEADING (4); PRINCIPAL AND AGENT (3, 4); PRINCIPAL AND SURETY; RAILROADS (11, 12); SPECIFIC PERFORMANCE.

CONTRACTS AS AFFECTED BY WAR—See WAR (5).

CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE (1-4); RAILROADS (1, 16).

CONTROVERSY—See BOUNDARIES.

COPIES—See EVIDENCE (5).

CORPORATIONS—See BILLS AND NOTES (2); FRAUD (13).

COURSE OF EMPLOYMENT—See MASTER AND SERVANT (7).

COURT RECORDS—See EVIDENCE (14).

COURTS—See TENDER; WAR (1, 2).

COURTS, DUTIES OF CLERKS OF—See PRINCIPAL AND SURETY (3-6).

COVENANT TO HEAT—See LANDLORD AND TENANT (1).

COVENANTS.

In proceedings to restrain the erection of a garage in a residential district in violation of restrictions contained in defendants' deed, evidence *held*, to sustain the findings of the court below that the contemplated building was in violation of said restrictions, entitling plaintiffs to relief. *Swan* v. *Mitshkun*, 70.

CREDIBILITY OF WITNESSES—See CRIMINAL LAW (2); EVIDENCE (7); NEGLIGENCE (1, 2); WITNESSES.

CRIMINAL LAW.

1. Where the recorder of the city of Detroit conducted an investigation for the discovery of crime under authority of Act No. 196, Pub. Acts 1917, he was exercising functions analogous to those of grand juries, upon whom secrecy is enjoined by 3 Comp. Laws 1915, § 15703, and his act in making his findings in a so-called "presentment" part of the official records of his court was there-

CRIMINAL LAW—Continued.

fore illegal, and the issuance of warrants out of his court some time later charging the president of the board of water commissioners with the commission of various offenses recited in said "presentment" would not validate his unwarranted act. *Oakman* v. *Recorder of the City of Detroit*, 15.

2. In a prosecution for hunting and trapping for game without a hunter's license, an assertion in the prosecutor's opening statement that defendant had been guilty of the same offense five days previously, and the admission of testimony of said offense, *held*, to be error, which was not cured by the court's instruction that said testimony was admitted solely as affecting defendant's credibility, since the statement was made and the testimony admitted before it was known that defendant would be a witness. *People* v. *Wheaton*, 173.

3. The denial of a continuance in a criminal case cannot be said to have been an abuse of discretion on the part of the trial judge, where the affidavit gave no intimation as to what testimony the witness, whose presence was desired, would give bearing upon the issue to be tried. *People* v. *Eamans*, 442.

4. Argument in a criminal case by defendant's counsel asking the jury how they would like their son convicted under the testimony in the case, *held*, improper. *Id.*

5. In a prosecution for keeping and maintaining a house of ill-fame, evidence that defendant, though making her home elsewhere, did, within the time charged, control, manage, conduct, keep, and maintain said place as a house of ill-fame, through the agency of another, *held*, properly admitted. *Id.* 451.

6. The denial of a continuance in a criminal case cannot be said to have been an abuse of discretion on the part of the trial judge, where it was not made to appear what defendant expected to prove by the absent witness. *Id.*

7. Where defendant was charged in the complaint and warrant with felonious assault "with intent to ravish and carnally know," followed by a statutory charge of assault, at the same time and place, with a dangerous weapon, without a specified intent, an offense springing out of the same transaction and covered by the same testimony, and the examining magistrate, after an examination of the whole matter, including taking testimony, came to the opinion that an offense not triable by a justice had been committed, and there was probable cause to believe the accused guilty thereof as charged, and so certified to the circuit court, he made a "judicial determination" adequate to confer jurisdiction and afford the basis for filing an information in said court, although his said return did not specify the offense committed. *People* v. *Mathews*, 526.

CRIMINAL LAW—Continued.

8. An information containing two counts, charging two distinct crimes, where they were committed by the same acts, at the same time, and the same testimony must be relied on for conviction, *held*, not defective for duplicity, and election could not be required. *Id.*

9. The trial court was not in error in allowing the prosecutor to dismiss the second count and proceed upon the first. *Id.*

10. Refusal by the trial court to give a requested instruction to the jury that defendant was "entitled to the benefit of good character even if they should find positive evidence tending to show commission of the crime," that it was "admissible not only in case where doubt exists, but may be offered for the purpose of creating a doubt," *held*, not error, where the charge as given was favorable to defendant, and in essentials fairly complied with the general rule upon good character testimony. *Id.*

11. *Held*, that the charge as a whole properly submitted to the jury the principles of law applicable to the questions of fact submitted for their determination. *Id.* 527.

See CONSTITUTIONAL LAW (2); MANDAMUS; NEW TRIAL; STATUTES.

CROSSING ACCIDENT—See RAILROADS (1, 6-10, 13-16).

CURING ERROR—See FRAUD (11).

CUSTODY OF MINOR—See HABEAS CORPUS.

CUSTOM OF INDUSTRIAL ACCIDENT BOARD—See MASTER AND SERVANT (14).

DAMAGE TO FRUIT—See CARRIERS (1, 2); INSURANCE (2, 3).

DAMAGES.

1. The general rule of damages for failure to deliver goods sold is the difference between the contract price and the market price at the time and place of delivery. *Solomon* v. *Richardson*, 415.

2. If there were no market price at the place of delivery, then the market price at the nearest place where there was one could be shown, and the difference between this price and the contract price, with the added cost of transportation, would be the measure of damages. *Id.*

3. Where there was no testimony justifying the trial court in applying any other or different rule of damages than the general one, it was reversible error to apply a rule allowing special damages. *Id.*

4. Future damages are limited to such as the evidence makes reasonably certain will necessarily result from the injury sustained. *Main* v. *Grand Rapids, etc., R. Co.*, 473.

DAMAGES—Continued.

5. Where there was no evidence that plaintiff's injuries were permanent, except as to a slight scar upon the face, instructions that plaintiff would be entitled to recover for future damages without distinct differentiation or direct instruction that under the evidence there was no element of permanency for them to consider, except as to the cut upon the face, *held*, reversible error. *Id.*

6. In an action under the survival act for the death of a boy 13 years old, by electrocution, where the evidence shows that he lived only about an hour after the injury, and the distinction between the "survival act" and the "death act" in this case is largely technical, there being no long period of suffering of mental and physical distress warranting a large verdict to the actual survivor, the verdict for $6,500 *held*, to a degree excessive, and reduced to $5,000, for which amount judgment is affirmed conditional on acceptance. *Swaczyk* v. *Detroit Edison Co.*, 495.

See FRAUD (5); INSURANCE (3); LANDLORD AND TENANT (2); RAILROADS (10).

DEATH.

1. The recognized test in this State distinguishing between the two causes of action, survival and instantaneous death, is whether the active cause of death continued to operate directly upon the injured person until life was extinct; that he did not regain consciousness is not a test of instantaneous death. *Swaczyk* v. *Detroit Edison Co.*, 494.

2. Testimony by a disinterested witness that deceased lived about an hour after he found him lying on the ground in contact with a "live wire," which was supplemented by the testimony of two boys, companions of deceased, to the same effect, *held*, to present a question of fact for the jury as to whether death was instantaneous. *Id.*

3. In an action for the death of a boy caused by his coming in contact with a live wire which defendant had left attached to a lunch wagon standing in front of a vacant lot after service was discontinued, and which fell to the ground after said wagon was moved by a third party without defendant's knowledge or consent, the trial court was not in error in submitting the case to the jury on the issue as to whether such time had elapsed since the wires fell upon the ground and became a public menace that defendant should have observed their dangerous condition and remedied it, in the exercise of reasonable care and vigilance in the conduct of its business under the circumstances shown, and in view of the dangers connected with the business in which it was engaged. *Id.* 495.

4. Although the declaration did not contain the words "inspect" or "inspection," the conclusion of the trial court

DEATH—Continued.

that there was enough in the declaration to warrant the submission to the jury on that issue, *held*, justified. *Id.*

5. *Held*, that the verdict for plaintiff was not so against the weight of the evidence as to require a reversal. *Id.*

See DAMAGES (6); NEGLIGENCE (9); RAILROADS (6, 8-10).

DEATH ACT—See DEATH (1).

DECLARATION—See ASSUMPSIT (1); DEATH (4).

DEEDS—See BOUNDARIES (3); CANCELLATION OF INSTRUMENTS; CONTRACTS (6); COVENANTS; EVIDENCE (8).

DEFENSES—See CONTRACTS (4); EQUITY; FRAUD (6, 7); PLEADING (4).

DEFICIENCY DECREE—See BILLS AND NOTES (2).

DEFINITION—See BOUNDARIES (3); INSURANCE (2); STREET RAILWAYS (1).

DEGREE OF CARE REQUIRED—See NEGLIGENCE (5); TRIAL (4).

DELAY IN TRANSIT—See CARRIERS (1).

DEPENDENTS—See MASTER AND SERVANT (9).

DESCRIPTION—See BOUNDARIES (3).

DETERMINATION—See TRUSTS (3).

DETROIT CHARTER—See MUNICIPAL CORPORATIONS (2-11).

DILIGENCE IN DISCOVERING FRAUD—See FRAUD (12).

DIRECTED VERDICT—See APPEAL AND ERROR (3, 10); BILLS AND NOTES (4); NEGLIGENCE (2); PRINCIPAL AND SURETY (8).

DISBARMENT PROCEEDINGS—See ATTORNEY AND CLIENT; EVIDENCE (2).

DISCHARGE—See MORTGAGES.

DISCHARGE OF SURETY—See PRINCIPAL AND SURETY (7).

DISCRETION—See DISMISSAL AND NONSUIT; MASTER AND SERVANT (2, 4, 13).

DISCRETION OF COURT—See TRIAL (5).

DISMISSAL—See APPEAL AND ERROR (8).

DISMISSAL AND NONSUIT.

Where after a chancery case was at issue it was placed upon the calendar and automatically went upon each succeeding term calendar and finally was transferred to the "no progress" list and dismissed by the court in pursu-

DISMISSAL AND NONSUIT—Continued.

ance of the judicature act (3 Comp. Laws 1915, § 12574), without being reached or ever having been called for hearing, because of stress of business and illness of the judge, although counsel were anxious to try said case and had so advised the court and clerk, its dismissal was premature and not within the discretion of the court. *Detroit Lumber Co.* v. *Oakland Circuit Judge*, 62.

DISPOSITION OF FUND—See WILLS (11).

DIVORCE.

In proceedings for a divorce by a husband on the ground of extreme cruelty, where the record sustains the finding of the court below that the acts of misconduct on the part of the wife were largely due to her rundown physical condition and her highly nervous temperament, and that she had no intention of being cruel to plaintiff, and in view of the facts that in the meantime she has had treatment in a hospital with beneficial effect, and that her viewpoint has changed, the decree of the court below, who had the advantage of seeing and hearing the witnesses and of obtaining an impression as to whether the breach might not possibly be healed, dismissing the bill, will be affirmed. *Philley* v. *Philley*, 672.

DRUGGISTS—See NEGLIGENCE (9).

DUAL CAPACITY—See PRINCIPAL AND AGENT (1).

DUPLICITY—See CRIMINAL LAW (8).

DURATION OF WARFARE—See WAR (2).

EJECTMENT—See APPEAL AND ERROR (1); EXECUTORS AND ADMINISTRATORS.

ELECTION OF COUNTS—See CRIMINAL LAW (8).

ELECTRICITY—See DEATH (2, 3).

EMANCIPATION—See HUSBAND AND WIFE (1).

ENFORCEMENT OF TRUST—See TRUSTS (1, 3).

EQUITY.

That plaintiff did not deliver certain bank stock, owned by him, to the receiver appointed in judgment creditor's proceedings against him as he should have done, cannot be taken advantage of by defendant, who was a stranger to said litigation, in equitable proceedings to recover from him said stock which he holds as a trustee and wrongfully refuses to return or account for. *Backus* v. *Backus*, 690.

See CONTRACTS (12, 13); NUISANCE (1); PLEADING (3); TRUSTS (1, 3); VENDOR AND PURCHASER.

ESTABLISHING BOUNDARY—See BOUNDARIES (1, 2).

ESTATES OF DECEDENTS—See HUSBAND AND WIFE (1, 2); WILLS.

ESTOPPEL—See FRAUD (8); RAILROADS (2); WILLS (15).

EVIDENCE.

1. An interpreter may be made an agent to converse, and then his translation is receivable as an agent's admission without calling him to the stand. *In re Coburn and Glocheski*, 350.

2. In disbarment proceedings, the testimony of witnesses as to statements of defendants made to them through an interpreter, at the time of the alleged misconduct, *held*, admissible. *Id.*

3. In order to entitle books of account to reception as evidence, it must appear that the party keeping and producing them is usually precise and punctilious respecting the entries therein, and that they are designed at least to embrace all the items of the account which are proper subjects of entry. *Munroe, Boyce & Co.* v. *Ward*, 369.

4. The books and papers of defendant, offered in evidence by plaintiff, were admissible as admissions on the part of defendant. *Id.* 370.

5. A ledger, into which was copied totals from a journal, the original entries being made in small account books and from them transferred to the journal, *held*, too indefinite to warrant its admission as evidence to sustain a claim based thereon. *Id.*

6. Testimony as to the contents of books destroyed by fire is competent as secondary evidence. *Id.*

7. Where the journal and account books had previously been destroyed by fire, testimony by the son of defendant, who copied the items into the journal, as to the contents of the destroyed books, and who had a material interest in the outcome of the litigation, *held*, not so satisfying and convincing as to warrant the appellate court in setting aside the judgment of the trial court rejecting the claim based thereon. *Id.*

8. Where there is no ambiguity in an instrument, parol evidence is inadmissible to vary or explain its meaning. *Phelps* v. *Brevoort*, 429.

9. Where, in a personal injury case, a physician, called by defendant, testified as to what plaintiff said to him about her headaches, that she said "something of that sort," that he "gathered that inference," the trial court properly permitted her, on rebuttal, to testify as to what she said instead of confining her answers to whether or not she so stated as the doctor testified, and on objection it was not error for the court to comment, "The trouble was that the doctor himself only was able to give his im-

EVIDENCE—Continued.

pression or inference from what she said." *Main* v. *Grand Rapids, etc., R. Co.*, 473.

10. Judicial notice may be taken by the courts that a state of war exists, and that congress has placed in the hands of the government the direction and operation of the railroads of the country during such emergency. *Kneeland-Bigelow Co.* v. *Michigan Central R. Co.*, 546.

11. In an action for personal injuries, testimony by plaintiff's daughter as to exclamations of pain and suffering by plaintiff in her presence, *held*, admissible. *Simmons* v. *Petersen*, 508.

12. In an action against a defaulting public official and his surety jointly on his official bond, proof of his oral admissions to the prosecuting attorney of his defalcations and a written confession were admissible so far as he was concerned, where substantial facts beyond mere conclusions of law were included. *Kent County* v. *Krakowski*, 631.

13. Such admissions, being admissible against the principal, cannot be excluded, and, being admitted as against him, will generally be considered against the surety. *Id.*

14. While it is the general rule that an order of a court of record cannot be proved in a collateral proceeding otherwise than by a journal entry, yet the neglect of the clerk of the court to make the proper entries in regard to money passing through his hands would not bar other available evidence upon the subject, in an action against him and his surety on his official bond. *Id.*

See ADVERSE POSSESSION; APPEAL AND ERROR (9); ASSUMPSIT (3); ATTORNEY AND CLIENT; BILLS AND NOTES (1, 4); CARRIERS (1, 2); CONTRACTS (2, 3, 5, 11); CRIMINAL LAW (2, 5); DAMAGES (3, 5); DEATH (2, 5); FRAUD (2, 10, 13); FRAUDULENT CONVEYANCES; HUSBAND AND WIFE (2); INSURANCE (3); MASTER AND SERVANT (4, 7, 10); MORTGAGES; NEGLIGENCE (1, 4, 6-8); RAILROADS (9); TRIAL (1); TRUSTS (7); WARRANTY (2, 5).

EXAMINATION OF WITNESSES—See TRIAL (5).

EXCEPTIONS—See CONTRACTS (13); FRAUDS, STATUTE OF.

EXCESSIVE SPEED—See RAILROADS (6, 7).

EXCESSIVE VERDICT—See DAMAGES (6); RAILROADS (10).

EXCHANGE OF PROPERTY—See FRAUD (4).

EXCITING SYMPATHY OF JURY—See FRAUD (11).

EXCLAMATIONS OF PAIN AND SUFFERING—See EVIDENCE (11).

EXECUTION OF CONTRACT—See VENDOR AND PURCHASER (1).

EXECUTORS AND ADMINISTRATORS.

Where defendant, without the consent of the administrator of his father's estate, took possession of a farm devised to him by his father subject to "my just debts and funeral expenses," and claims were allowed against the estate exceeding the value of the farm, which was practically the only property in the State available to pay the debts, the administrator being entitled to possession under 3 Comp. Laws 1915, § 13850, the evidence justified the court below in directing a verdict in his favor, in an action of ejectment. *Sylvester* v. *Button*, 24.

See APPEAL AND ERROR (1).

EXISTENCE OF RELATION OF TRUSTEE AND CESTUI QUE TRUST—See TRUSTS (4).

EXPENSES—See PARTNERSHIP (2).

EXPERT WITNESSES—See NEGLIGENCE (9).

EXPIRED FRANCHISE—See CONSTITUTIONAL LAW (4).

EXPLOSIVES—See NEGLIGENCE (4-7).

EXTENDING CORPORATE LIMITS—See CONSTITUTIONAL LAW (4); MUNICIPAL CORPORATIONS (13).

EXTENDING TIME FOR APPEAL ON PROPER SHOWING—See MASTER AND SERVANT (13).

EXTENSION OF TIME—See APPEAL AND ERROR (7).

EXTREME CRUELTY—See DIVORCE.

FALSE IMPRISONMENT.

1. In an action for false imprisonment and abuse of civil process, commenced by *capias ad respondendum*, a declaration, supported by affidavit, charging defendant with causing plaintiff's arrest and imprisonment without probable cause, and that the proceeding was subsequently voluntarily dismissed, *held*, to make a *prima facie* case of false imprisonment. *Rupright* v. *Muskegon Circuit Judge*, 385.

2. A further showing of ill will on the part of defendant toward plaintiff over the title to a gasoline motor that had been patented by plaintiff, and the fact that plaintiff was given his liberty upon condition that he would go away from the county and remain away, *held*, to make a *prima facie* case of the abuse of civil process. *Id.*

FALSE REPRESENTATIONS—See FRAUD (4).

FIDELITY BONDS, SCOPE OF—See PRINCIPAL AND SURETY (3).

FIDELITY INSURANCE—See PRINCIPAL AND SURETY (1).

FIDUCIARY RELATIONS—See TRUSTS (3).

FILING DECLARATION—See ACTION.

FINANCIAL ABILITY OF FATHER—See RAILROADS (9).

FINDINGS OF INDUSTRIAL ACCIDENT BOARD, CONCLUSIVENESS—See MASTER AND SERVANT (6, 10).

FIRE INSURANCE—See INSURANCE (1).

FITNESS OF PARENT—See HABEAS CORPUS.

FORECLOSURE—See BILLS AND NOTES (2).

FORM OF BOND—See PRINCIPAL AND SURETY (2).

FRANCHISES—See CONSTITUTIONAL LAW (4); MUNICIPAL CORPORATIONS (13).

FRAUD.

1. In an action for the value of certain bonds sold to plaintiff by defendant by reason of alleged fraudulent representations as to their value, the statute of frauds (3 Comp. Laws 1915, § 11983) requiring representation or assurance as to the credit, etc., of any other person to be in writing and signed by the party to be charged, in order to sustain an action thereon, has no application if defendant was the owner of said bonds or if he profited by the transaction. *Burleson* v. *Blair*, 222.

2. Where plaintiff's testimony as to defendant's representations that he was the owner of the bonds was corroborated, the court below was in error in holding that there was no proof to go to the jury on that question. *Id.*

3. Where defendant, the cashier of a bank at the time he sold the bonds for a brokerage firm, had an arrangement with said firm, of which he was a stockholder, to become its treasurer and director and take charge of the sale of bonds, in the near future, at an advance of salary over what he was receiving, and later received the position which he desired, *held*, to be such profit as to render inapplicable said statute of frauds, although he did not receive a direct commission. *Id.*

4. Where plaintiff is defrauded in an exchange of land he may disaffirm the contract, tender reconveyance and demand reconveyance or refund of what he parted with, and, if refused, bring suit to recover the same, or he may affirm the contract, retain what he received thereunder, and bring an action for fraud to recover his damages. *Barnhardt* v. *Hamel*, 232.

5. In the latter case his measure of damages would be the difference between what the value would have been if the representations had been true and the actual value of what he received. *Id.*

6. The acceptance by defendant of a note from plaintiff for the amount of undisclosed additional incumbrance upon land received by defendant in the exchange, not discov-

FRAUD—Continued.

ered until some time after the transaction had been completed, *held*, to amount to condonation of the misrepresentation, and not a bar to an action for fraud brought by plaintiff. *Id.*

7. Plaintiff's inability to fulfill his future obligations under his contract to purchase a farm from defendant, as part of the transaction, is not to be determined as a matter of law, where the contract recited that the balance is "payable in five years," and he is not shown to be in default, although he had paid nothing on the contract since it was executed, and had moved off the premises in question. *Id.*

8. The fact that plaintiff visited the farm with defendant's agent at a time of year when crops were not growing, and looked it over would not preclude him, as a matter of law, from making proof of material, fraudulent representations as to facts not then discovered by, or reasonably apparent to, him, such as the exhausted condition of the soil, possibility of drainage, or that the land had a clay subsoil. *Id.*

9. Whether the truth of said claimed representations of facts was apparent or discoverable by him under the circumstances is not a question of law. *Id.* 233.

10. Permitting witness to answer in the affirmative a leading question as to whether the farm in question was more susceptible to frosts than other farms in that vicinity, although no claim of this nature was made in the declaration, in view of testimony that in the "year of the big frost" there was a frost which was quite general in that part of the State, *held*, prejudicial. *Id.*

11. Where plaintiff's real claim of fraud related to the soil, and not the elements, but throughout the trial by evidence, argument, and ruling of the court the misfortunes and distress which befell plaintiff and his family by reason of failure of crops partly due to frost one season, and to unusually hot, dry weather another, was emphasized, *held*, prejudicial, although the court instructed the jury not to let their sympathy influence their verdict. *Id.*

12. In an action for damages for fraud in an exchange of land, no special diligence is required to discover the fraud or in bringing such action after discovery short of the statute of limitations. *Id.*

13. On a bill by stockholders of a corporation against the general manager, a capitalist who financed the operations, and a company which purchased assets of the corporation, charging bad faith and responsibility for its losses, the conclusion of the court below that plaintiffs had failed by proper proof to maintain their charges, *held*, supported by the record. *Kelley* v. *Parr*, 297.

See BILLS AND NOTES (4).

FRAUDS, STATUTE OF.

Where defendant bought 25 additional cars under an oral agreement, and was allowed the claimed additional discount on the last four cars purchased, it cannot be contended that the agreement for said additional discount was void under the statute of frauds (3 Comp. Laws 1915, § 11835), because an oral one involving more than $100, since it comes within the exception therein provided. *Doyle* v. *Widrig*, 411.

See FRAUD (1, 3).

FRAUDULENT CONVEYANCES.

On a bill in aid of execution to set aside the conveyance of certain lots by the debtor to his present wife, in pursuance of an ante-nuptial contract whereby she paid about one-half of the value of the lots at the time of the transfer, said conveyance being alleged to be in fraud of plaintiff's rights as a creditor, testimony that the debt represented by the judgment is a part of the cost of constructing a house upon the premises in question, and that defendant did not intend to pay the debt, *held*, to justify the decree of the court below setting aside said conveyance, but subject to the claim and lien of the wife for the amount paid. *Cozadd* v. *Parrott*, 52.

FUTURE DAMAGES—See DAMAGES (4).

GENERAL ISSUE—See PARTIES (3).

GENERAL RULE—See DAMAGES (1).

GOOD CHARACTER—See CRIMINAL LAW (10).

GOOD FAITH—See TRUSTS (2).

GOVERNMENTAL AGENCY—See WAR (4).

GOVERNMENTAL DETERMINATION BINDING UPON COURTS—See WAR (1).

GRAND JURY—See CRIMINAL LAW (1).

GROWING FRUIT—See INSURANCE (2).

HABEAS CORPUS.

On certiorari to review habeas corpus proceedings by the father against the grandmother for the custody of a minor son, where the respondent failed to show that the father is not a fit person to have the care and custody of his son, the order of the trial judge awarding custody to the grandmother will be vacated, and an order entered awarding permanent custody of the child to the father. *In re Goldinger*, 99.

HAIL INSURANCE—See INSURANCE (2).

HARMLESS ERROR—See TRIAL (1).

HEARSAY—See EVIDENCE (2).

HEIRS—See WILLS (7).

HIGHWAYS AND STREETS—See CONSTITUTIONAL LAW (2); MUNICIPAL CORPORATIONS (1, 13); RAILROADS (2-5); STREET RAILWAYS (2).

HOSPITALS—See MUNICIPAL CORPORATIONS (2).

HOSTILE WITNESS—See TRIAL (5).

HUNTING WITHOUT LICENSE—See CRIMINAL LAW (2).

HUSBAND AND WIFE.

1. In an action by a married woman against an estate for services rendered to deceased, evidence of an agreement between the husband and the wife emancipating the latter is insufficient to entitle her to recover; it must also appear that the party receiving such services assented to the arrangement and understood that contract relations between himself and the wife existed, and that she expected compensation. *In re Burnham's Estate,* 361.

2. Evidence that deceased told witness that "I want them (claimant and her husband) to have all I got, and I want them to have it to pay for everything she has done for me. Whatever I owe them they can always put in a claim and get it. I have enough property or money so they can always get what's coming to them," *held,* insufficient to prove that deceased supposed that contract relations existed between himself and claimant or that he was dealing with her. *Id.* 362.

3. In view of the effect of Act No. 196, Pub. Acts 1911 (3 Comp. Laws 1915, § 11478), defining and regulating the right of married women to their own earnings, which was neither raised nor discussed, as to services rendered after the act took effect, a new trial is granted. *Id.*

See FRAUDULENT CONVEYANCES.

HUSBAND AND WIFE LIVING APART—See MASTER AND SERVANT (9).

HYPOTHETICAL QUESTIONS—See NEGLIGENCE (9).

ILLEGAL PURPOSE—See MUNICIPAL CORPORATIONS (6).

IMPAIRMENT OF CONTRACT—See CONSTITUTIONAL LAW (4).

INADEQUATE CONSIDERATION—See CANCELLATION OF INSTRUMENTS.

INDEPENDENT CONTRACTOR—See MASTER AND SERVANT (7).

INDUSTRIAL ACCIDENT BOARD—See MASTER AND SERVANT.

INFANTS—See RAILROADS (6-10).

INFERENCES—See NEGLIGENCE (4, 6, 8, 9).

INFORMATION—See CRIMINAL LAW (8).

INJUNCTION—See COVENANTS; NUISANCE; TAXATION.

INJURY TO SURETY—See PRINCIPAL AND SURETY (7, 8).

INLAND LAKES—See WATERS AND WATERCOURSES.

INSPECTION—See CARRIERS (1, 2); DEATH (3, 4).

INSPECTION OF LAND—See FRAUD (8, 9).

INSTANTANEOUS DEATH—See DEATH (2).

INSTRUCTIONS—See ASSUMPSIT (2); CARRIERS (4, 5); CONTRACTS (7, 9); CRIMINAL LAW (10); DAMAGES (5); TRIAL (2, 4); WARRANTY (4); WITNESSES.

INSURANCE.

1. Where a fire insurance policy limited the commencement of an action thereon to 12 months next after the fire, and the declaration with rule to plead attached was filed five days before the expiration of said time limit, but was not served until four days after its expiration, *held*, that the action was commenced within the time limited in the policy. *Christe* v. *Springfield Fire & Marine Ins. Co.*, 12.

2. Fertilized growths on apple and pear trees, which in due course would have been apples and pears, *held*, to be within the terms of a hail insurance policy, indemnifying insured against damage to "growing grain, fruit, and other farm products," in the absence of a rule in said policy defining growing fruit. *Harris* v. *Michigan Mutual Hail Ins. Co.*, 182.

3. Where, in such action, it cannot be said that there was no competent evidence before the jury of the damages sustained, and no complaint is made that the judge's charge to the jury was erroneous, the judgment in favor of plaintiff will be affirmed. *Id.*

4. Where plaintiff's husband made application for accident insurance in defendant company, and paid the premium, which had not been returned or a policy issued at the time of his death, defendant's liability would not be any greater than if the policy had been actually issued. *Drinan* v. *Clover Leaf Casualty Co.*, 677.

5. That many so-called accident policies are filled with such restrictions and limitations as to make it impossible to recover thereon in many cases is a condition to be remedied by the legislature and not the courts, whose duty it is to enforce the contracts as they are made by the parties thereto, if legal. *Id.*

6. Plaintiff's contention that the proviso limiting defendant's liability to such loss as occurred within 30 days from the date of the accident applied to the loss of members

INSURANCE—Continued.

of the body only, and not to loss of life, *held*, at variance with the plain provisions of the policy. *Id.*

7. Plaintiff's husband having lived for more than two months after the accident, the conclusion of the court below that defendant was not liable, *held*, correct. *Id.*

See MASTER AND SERVANT (8); PRINCIPAL AND SURETY (1).

INTENT—See ACTION; BILLS AND NOTES (1); MUNICIPAL CORPORATIONS (10); WILLS (1, 2, 5, 13).

INTENTION—See DIVORCE; PARTNERSHIP (3); WARRANTY (1).

INTEREST IN LITIGATION—See PARTIES (1).

INTEREST ON LOAN—See PARTNERSHIP (3).

INTERFERENCE OF WAR REGULATIONS—See LANDLORD AND TENANT (1); RAILROADS (11, 12); WAR.

INTERPRETER—See EVIDENCE (1).

INTERVENERS—See PARTIES (1).

ISSUE—See DEATH (3).

JOINDER OF COUNTS—See CRIMINAL LAW (8).

JUDGE OF RECORDER'S COURT OF DETROIT—See MANDAMUS.

JUDGMENT—See MANDAMUS.

JUDICATURE ACT—See PLEADING (2).

JUDICIAL DETERMINATION—See CRIMINAL LAW (7).

JUDICIAL NOTICE—See EVIDENCE (10).

JURISDICTION—See APPEAL AND ERROR (2, 5, 7); MASTER AND SERVANT (5, 12); RAILROADS (11); TRUSTS (1).

JUSTICES OF THE PEACE—See APPEAL AND ERROR (6); CRIMINAL LAW (7).

LACHES.

Mere lapse of time is insufficient to constitute laches. *Backus* v. *Backus*, 690.

LAND CONTRACTS—See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. On a bill for the specific performance of an agreement in a lease to heat a store building, and for damages for failure to perform, defendant is liable if he failed to make use of the fuel available in heating said building, although because of fuel regulations it was impossible

LANDLORD AND TENANT—Continued.

for him to keep the temperature up to the standard required by the contract. *McDuffee* v. *Colwell*, 154.

2. Because of the difficulty in establishing with certainty the extent of plaintiff's damages, defendant should not be allowed to escape all liability growing out of his wrong, where the evidence shows that there was a loss. *Id.*

LEASE—See LANDLORD AND TENANT (1).

LEGACY AS COMPENSATION FOR SERVICES—See WILLS (14).

LIABILITY—See INSURANCE (4); PRINCIPAL AND SURETY (6).

LIABILITY OF INSURER—See MASTER AND SERVANT (8).

LIABILITY OF SURETY COMPANY—See PRINCIPAL AND SURETY (1, 4).

LIFE ESTATES—See WILLS (9).

LIMITATION OF ACTIONS—See FRAUD (12); INSURANCE (1).

LOSS OF FOOT—See MASTER AND SERVANT (1).

LOSS OF PROFITS—See LANDLORD AND TENANT (2).

MAINTAINING HOUSE OF ILL-FAME BY AGENT—See CRIMINAL LAW (5).

MANDAMUS.

Where, since the order to show cause was issued in mandamus proceedings to compel the recorder of the city of Detroit to take a complaint for violation of a city ordinance he has been succeeded in office by another, the determination of the matter will be binding upon the incumbent; the proceedings being directed to the judge officially. *Brennan* v. *Recorder of the City of Detroit*, 35.

See APPEAL AND ERROR (8).

MARKET VALUE—See DAMAGES (2).

MARRIED WOMEN—See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. Where an employee in the course of his employment sustained an injury to his leg, resulting in total incapacity for about a year, when his foot was amputated, he is entitled, under section 9 of part 2, of the workmen's compensation act (2 Comp. Laws 1915, § 5439), to compensation as for total incapacity up to the time of the amputation, and from that time, under section 10, part 2 (2 Comp. Laws 1915, § 5440), to the specific compensation provided therein for the loss of a foot, without any de-

MASTER AND SERVANT—Continued.

duction for payments made during the period of total incapacity. *Addison* v. *W. E. Wood Co.*, 319.

2. The workmen's compensation act (part 2, § 22) construed, and *held*, to provide (1) for a lump sum agreement between the parties with the approval of the industrial accident board, and (2) for a commutation of deferred payments without the consent of the employer if the discretion of the board is moved by special circumstances attending the case. *McMullen* v. *Gavette Construction Co.*, 586.

3. Said section *held*, not inconsistent and therefore void because by the second provision thereof the employer would be deprived of the right to retain future payments should the injured employee die prior to the expiration of the period within which he would have received weekly payments, leaving no dependents (part 2, § 12), or surviving dependents be deprived of them (part 2, § 7), since it is in furtherance of the central idea which underlies the legislation, viz., to provide for the misfortunes of employees by accident. *Id.*

4. A showing by the injured employee that he is permanently incapacitated for work at his trade of carpenter, that he might be able to do some kinds of clerical work where he could sit, that he requires the money to educate himself for such purpose, and that to pay medical and hospital bills his father mortgaged his farm, *held*, sufficient to authorize the board to exercise the discretion provided in said section. *Id.*

5. There being no provision in either the workmen's compensation act or the rules of the board for a rehearing by the industrial accident board after it has made a final order, the Supreme Court will not, on certiorari, review the action of the board denying such rehearing. *Pocs* v. *Buick Motor Co.*, 591.

6. The findings of the industrial accident board, in the absence of fraud, are conclusive, if there is evidence to support them. *Brown* v. *Bouschor*, 594.

7. Testimony that plaintiff's decedent, when injured, was an employee rather than an independent contractor, and that he was injured while in the course of his employment, *held*, sufficient to sustain the findings of the board. *Id.*

8. Where the compensation insurer of a lumber company accepted, by an indorsement on the policy, as within its terms, without any restriction, the employees of a subcontractor of said lumber company, and said subcontractor returned his entire pay roll, including employees not employed on said subcontract, and paid premiums thereon, his policy of insurance covered all of his employees, although the lumber company and the insurer were not aware that he had employees other than those employed on said subcontract. *Id.*

MASTER AND SERVANT—Continued.

9. Testimony that decedent left his wife about 22 months before his death, and that during that time he did not live with her or contribute to her support, although he occasionally visited her, *held*, to sustain the finding of the industrial accident board that she was not a dependent within the meaning of the workmen's compensation act. *Burdick* v. *Grand Trunk R. System*, 605.

10. On certiorari to review an award of compensation by the industrial accident board to plaintiff for disability from a cancer claimed to be caused by an injury to his hand nearly three years before, while in defendant's employ and for which settlement had been made in full, where there is no testimony amounting to legal evidence that the cancer, which is in another part of his body, is attributable to the injury to plaintiff's hand, the award will be set aside. *Ortner* v. *Zenith Carburetor Co.*, 610.

11. Where defendant insurance company took the initiative in regard to the accidental death of an employee of either a construction company or its president (the actual employer being somewhat in confusion) by filing a report of the accident with the industrial accident board, and thereafter, without protest or explanation, assumed to represent them in arbitration proceedings, and whenever occasion arose, accepting the award of compensation by the arbitration committee against it and the construction company, without appeal, any possible objection which defendant might have had as to parties as affecting its liability, *held*, to have been waived. *Diebel* v. *Spitzley & Widenman Construction Co.*, 618.

12. Where no appeal was taken from a final order of the industrial accident board, in proceedings under the workmen's compensation act, said board is without jurisdiction to grant a rehearing therein. *Pocs* v. *Buick Motor Co.*, *ante*, 591. *Id.* 619.

13. A showing that, through some oversight, no copy of the award of the committee on arbitration, in proceedings under the workmen's compensation act, was sent to defendants' attorneys, although it is a well-known and established custom of the board promptly to send one to the parties, to the insurance company carrying the risk, and to the attorneys for the parties, that as soon as defendants' attorneys learned of the award they promptly applied for an extension of time in which to perfect an appeal, *held*, sufficient to invoke the discretion of the board, under part 3, § 8, of said act, upon sufficient cause shown, to grant such extension, and the board was in error in holding that it was without discretion in the matter. *Collins* v. *Albert A. Albrecht Co.*, 627.

14. As to whether defendants had the right to rely upon said custom of the board and assume that when they received notice of the award their attorneys also received the same notice, and would properly protect their rights, *held*, primarily a question for the board. *Id.*

MATERIAL INTEREST OF WITNESS—See EVIDENCE (7).

MEASURE OF DAMAGES—See DAMAGES (2); FRAUD (5); WARRANTY (4).

MISREPRESENTATIONS—See FRAUD (8, 9).

MODIFICATION OF CONTRACT—See CONTRACTS (8).

MODIFICATION OF DECREE—See NUISANCE (2).

MONEY PAID AS TENDER—See PRINCIPAL AND SURETY (4).

MONEY PAID INTO COURT—See TENDER.

MORTGAGES.

On a bill for the discharge of a mortgage, the finding of the court below that said mortgage was included in the amount of another mortgage which has been fully paid, and therefore plaintiff was entitled to the relief prayed, *held*, sustained by the record. *Mahder* v. *Soule*, 40.

See BILLS AND NOTES (2).

MOTOR VEHICLE LAW—See CONSTITUTIONAL LAW (2); MUNICIPAL CORPORATIONS (1); STATUTES.

MUNICIPAL BONDS—See MUNICIPAL CORPORATIONS (2-11).

MUNICIPAL CORPORATIONS.

1. An ordinance of the city of Detroit regulating the speed of automobiles upon the streets of the city and fixing a greater penalty for its violation than that provided in the "motor vehicle law," *held*, not in contravention of the State law, since it does not make it less stringent or relax it. *Brennan* v. *Recorder of the City of Detroit*, 35.

2. By amendment to section 41, chap. 7 of the "old charter," in effect November 27, 1916, *held*, that the common council of the city of Detroit, with the consent of the board of estimates, had authority to issue bonds for the erection of buildings for hospital purposes. *Common Council of the City of Detroit* v. *Engel*, 106.

3. Where the common council of the city of Detroit allowed and approved a certain sum to be raised by taxation for the recreation commission fund, for the purchase of lands and buildings thereon for use as a play center, and the board of estimates refused the same as a tax item but passed it as a bond issue, as park and boulevard bonds, subject to the approval of the council, which body thereafter concurred, *held*, valid, although it would have been more orderly for the co· ncil to have acted first. *Id.*

4. *Held*, that bonds wrongly named are not therefore necessarily invalid, since it will be presumed that the proceeds of said bonds will be applied as legally authorized. *Id.*

MUNICIPAL CORPORATIONS—Continued.

5. Under the charter of the city of Detroit previous to its revision under the "home-rule law," the common council had power to raise by taxation for sewer purposes in one year $200,000 and also to bond for "such sums of money as shall be deemed necessary and expedient," provided the gross debt limitation was not exceeded. *Id.* 107.

6. There being no authority in said charter of the city of Detroit or in any special act authorizing the purchase of real estate "for extension of public service," bonds authorized for the purchase of certain frontage at the harbor line, *held*, invalid. *Id.*

7. Where the charter of the city of Detroit (Charter 1883, as amended) empowered the common council by and with the consent of the board of estimates annually to provide a public sewer fund, a public building fund, and a fund for the purchase or construction of public utilities, and to issue bonds therefor, and all necessary steps were taken under said authority to issue certain bonds for said purposes, without being submitted to vote of the people, *held*, that said bonds were valid although before said bonds were sold a new charter under the provisions of the home-rule act (Act No. 279, Pub. Acts 1909) went into effect requiring "approval by three-fifths of the electors voting thereon." *Id.*

8. The contention that action looking to the issue and sale of bonds should have been taken by ordinance rather than by resolution, *held*, not sustained, in view of title 6, chap. 1, § 6, of said charter. *Id.*

9. *Held*, that the school bonds and library bonds of the city of Detroit are not to be included in the two per cent. limit of indebtedness for municipal purposes specified in the charter. *Id.*

10. *Held*, that, in the adoption of the new charter, construing the "repealing clause" and the "saving clauses" together, it was not the intention to abate the right to carry out the sale of bonds authorized under the old charter. *Id.*

11. Under title 6, chap. 7, § 5, of the "new charter," bonds may be issued to meet "capital expenditures" so-called, as distinguished from ordinary annual expenses of a department for the coming year. *Id.* 108.

12. Where the charter of the city of Ypsilanti (section 323) imposed upon the common council the duty to assess and levy taxes to raise funds for paving and other municipal purposes, the council could not evade its responsibility by calling a special election of the voters in a ward to determine the amount of a proposed pavement to be levied against the property owners and the amount to be borne by the ward as a whole. *Scovill* v. *City of Ypsilanti*, 288.

MUNICIPAL CORPORATIONS—Continued.

13. Where a franchise is granted to use the streets of a municipality, and thereafter the territorial limits of the municipality are extended, the franchise immediately attaches without any further action on the part of the municipality to the newly acquired territory. *City of Bay City* v. *Saginaw-Bay City Railway Co.*, 419.

See CONSTITUTIONAL LAW (2); RAILROADS (2-5); STREET RAILWAYS (2, 3).

MUTUAL MISTAKE—See TRUSTS (8).

NATURE OF ACTION—See ASSUMPSIT (1).

NEGLIGENCE.

1. In an action for personal injuries caused by defendant's automobile to plaintiff when it backed upon him and struck him as he was crossing defendant's private driveway on the sidewalk on a public street, his testimony that he looked and did not see any automobile coming, although the day was clear, his eyesight and hearing were good, there were no obstructions in the way, and the garage was 92 feet from the sidewalk, *held*, although improbable, to present a question of fact for the jury. *Ottaway* v. *Gutman*, 393.

2. That plaintiff looked in the direction of the automobile so indifferently as not to see it coming, did not make him guilty of contributory negligence, as a matter of law, nor does the improbability of his testimony produce such result. *Id.*

3. In an action for personal injuries caused by a collision between defendant's automobile and plaintiff's buggy, where there were controverted questions of fact, the questions of defendant's negligence and plaintiff's contributory negligence were properly for the jury. *Simmons* v. *Petersen*, 508.

4. In an action for the destruction of plaintiff's houseboat by fire caused by an explosion on defendant's premises, any inference that plaintiff's husband appreciated the danger and was guilty of contributory negligence that could be drawn from his testimony that he had been aware for a few days that gasoline was escaping from defendant's premises onto the ground and a scum was forming on the surface of the water around his houseboat, and that he was looking for another location, *held*, for the jury rather than the court. *Woods* v. *Chalmers Motor Co.*, 556.

5. In storing upon its premises and handling for its purposes large quantities of gasoline, defendant was bound to exercise such reasonable care to avoid accident as was commensurate with the apparent dangers attending such use. *Id.* 557.

NEGLIGENCE—Continued.

6. While the burden was upon plaintiff to prove facts from which it might be fairly inferred that defendant's negligence was the proximate cause of the explosion, the evidence need not be direct and positive; proof sufficient to give room for a reasonable inference, or permissible presumption, of negligence on the part of defendant being sufficient to carry the case to the jury. *Id.*

7. Contradictory testimony as to whether defendant permitted gasoline to overflow and run at large, and to what extent, rendered the question of its negligence one for the jury. *Id.*

8. Even if there were no conflict in the testimony, if different inferences might reasonably be drawn as to its import, the question as to whether there was negligence would still be for the jury. *Id.*

9. In an action by plaintiff for the wrongful death of his wife, claimed to have been caused by an overdose of arsenic due to the negligence of defendants, the owners of a drug store, in substituting the word "teaspoonful" in the label on the bottle, for the words "three drops" in the doctor's prescription, the testimony of a reputable physician, in answer to a hypothetical question stating the facts and describing her symptoms thereafter, that such symptoms are caused by an excessive dose of arsenic and probably would result in her death, *held*, sufficient to warrant the drawing of an inference favorable to plaintiff sufficient to warrant presenting the disputed question of fact as to the cause of her death to the jury. *Marx* v. *Schultz*, 655.

See CARRIERS (3-5); DEATH (3); RAILROADS (1, 6, 8, 13, 14); TRIAL (4).

NEGOTIABLE INSTRUMENTS—See BILLS AND NOTES (3, 4).

NEW TRIAL.

Where it appeared from an affidavit offered in support of a motion for a new trial, that affiant was in the court room, without being subpœnaed, waiting to testify as a witness for defendant who was charged with assault with intent to commit the crime of rape, when he was informed by a former deputy sheriff that he would not be allowed to testify because he had been in the court room, and that, believing this, he left at once without being sworn; that he had no opportunity to tell defendant's attorneys what he could testify to in detail; and it appearing that his testimony would have contradicted the complaining witness, and, if believed by the jury, would have strongly supported defendant's story and the theory of the defense, *held*, under all the circumstances of the case, that the trial court was in error in not granting the motion. *People* v. *Moore*, 686.

See DEATH (5); PLEADING (4); RAILROADS (15).

NEWLY-DISCOVERED EVIDENCE—See NEW TRIAL.

NO PROGRESS—See DISMISSAL AND NONSUIT.

NON OBSTANTE VEREDICTO—See PRINCIPAL AND SURETY (8).

NOTICE—See BILLS AND NOTES (3); PRINCIPAL AND AGENT (1); WARRANTY (3).

NOTICE OF AWARD—See MASTER AND SERVANT (14)

NUISANCE.

1. Equity courts ought not to prohibit the conduct of a lawful business by a defendant on his own unrestricted premises except as a last resort to restrain an otherwise unavoidable nuisance existing in violation of a complaining party's rights. *Mackenzie* v. *Frank M. Pauli Co.*, 456.

2. On appeal from a decree perpetually enjoining defendant from continuing its woodworking mill in the vicinity of plaintiffs' homes, on the ground that the same constituted a private nuisance, there being a showing that the objectionable features constituting a nuisance can largely be avoided by alterations, etc., the decree is modified to imposing correction of, and enjoining, the offensive features in the conduct of defendant's business. *Id.*

OPENING STATEMENT—See CRIMINAL LAW (2)

OPERATION OF RAILROADS BY GOVERNMENT—See EVIDENCE (10); RAILROADS (11); WAR.

OPINIONS—See WARRANTY (1).

ORAL AGREEMENT—See CONTRACTS (10); FRAUDS, STATUTE OF.

ORDINANCES—See MANDAMUS; MUNICIPAL CORPORATIONS (1, 8); RAILROADS (5); STREET RAILWAYS (3).

PARENT AND CHILD—See HABEAS CORPUS.

PARKS AND BOULEVARDS—See MUNICIPAL CORPORATIONS (3).

PAROL EVIDENCE—See BILLS AND NOTES (1); EVIDENCE (8).

PART PERFORMANCE—See FRAUDS, STATUTE OF.

PARTIES.

1. Under 3 Comp. Laws 1915, § 12362, an attorney who acted as a go-between in the procurement of a trust agreement, and who was to receive part of the compensation to be paid to the trustee for his services, had such an interest in the subject-matter of the litigation as would give him the right to intervene in a proceeding involving the right of the trustee to recover under the contract. *Chandler* v. *Preston*, 245.

2. Where suit was commenced against the Grand Trunk Railway System, under the erroneous impression that it was

PARTIES—Continued.

a corporation, while in reality it was only an operating name used by the real defendant, the Grand Trunk Railway Company of Canada, a motion to amend the pleadings, after plaintiff had made its case on the merits, by substituting the name of the real defendant for the one named was properly denied, in the absence of evidence that service was made upon an officer of the real defendant. *Parke, Davis & Co.* v. *Grand Trunk Railway System*, 388.

3. It cannot be said that defendant's counsel waived the defect by pleading the general issue, where it nowhere appears that he was in court on that particular occasion representing the real defendant; the plea being filed for the defendant named in plaintiff's declaration. *Id.*

See EQUITY; MASTER AND SERVANT (11).

PARTIES IN INTEREST—See CONTRACTS (12, 13).

PARTIES TO CONTRACT—See PRINCIPAL AND AGENT (4).

PARTNERSHIP.

1. In a partnership accounting the finding of the court below that the action of one of the copartners in furnishing money and bidding in lumber sold to satisfy a judgment against the copartnership was not open to criticism, but that it safeguarded its interests, *held*, sustained by the record. *Munroe, Boyce & Co.* v. *Ward*, 370.

2. Amounts expended for lawyers and other expenses incurred by one of the copartners, in an effort to protect the interests of the copartnership, *held*, reasonable and proper charges to be allowed in a partnership accounting. *Id.*

3. Where money was advanced to a copartnership by one of the partners with the intention that it should be a loan and not a contribution to the capital, interest was properly allowed thereon in a partnership accounting. *Id.*

PAVING—See MUNICIPAL CORPORATIONS (12).

PAYMENT—See MORTGAGES.

PEDESTRIANS—See RAILROADS (1).

PERMANENT INJURIES—See DAMAGES (5).

PERSONAL INJURIES—See CARRIERS (3-5); DAMAGES (4, 5); EVIDENCE (9, 11); MASTER AND SERVANT (1, 4, 7, 10); NEGLIGENCE (1, 3); RAILROADS (1, 13); TRIAL (4).

PERSONAL PROFIT—See FRAUD (3).

PERSONAL PROPERTY—See WILLS (5).

PHYSICIANS AND SURGEONS—See NEGLIGENCE (9).

PLEADING.

1. In ejectment for a strip of land, where the case was tried upon the merits and no objection raised to the insufficiency of the description in the declaration until after judgment was entered for plaintiffs, the court properly allowed an amendment under 3 Comp. Laws 1915, §§ 12478, 12480, to correct the imperfection in affirmance of the judgment. *Ford* v. *Bailey*, 77.
2. Where a chancery cause was brought on to be heard in open court, without objection by either party, upon the supposition and theory by both court and counsel that the pleadings were perfected and the cause at issue as to all parties, but it was discovered after conclusion of the proofs and submission of the case that it was not in fact at issue as to all parties, the court was authorized under section 1, chap. 16, of the judicature act (3 Comp. Laws 1915, § 12478), to grant a motion perfecting the pleadings *nunc pro tunc*, where no new elements or issues were brought into the case, and was for the furtherance of justice. *Bennett* v. *Fleming*, 278.
3. Averments in a bill of complaint, among others, that plaintiff advanced to defendant a sum of money for the purpose of purchasing certain shares of bank stock, that defendant accepted the money with the understanding that he was to use it for said purchase for the account of plaintiff, and agreed to deliver said stock to plaintiff, and that while defendant has held said stock in his own name he really held it in trust for plaintiff, *held*, to sustain plaintiff's contention that an express trust is pleaded and that relief should be granted upon the theory of a trusteeship. *Backus* v. *Backus*, 690.
4. The defense that a contract was made subject to delay or failure caused by fires, strikes, riot, the act of God or the public enemies should be specially pleaded, and comes too late when urged for the first time upon motion for new trial. *Meeuwsen* v. *Clough & Warren Co.*, 697.

See DEATH (4); FRAUD (10); PARTIES (2, 3).

POISONS—See NEGLIGENCE (9).

POLICE COURT OF DETROIT—See APPEAL AND ERROR (6).

POLICE POWER—See STREET RAILWAYS (2).

POSSESSION OF DEVISED LANDS SUBJECT TO DEBTS—See EXECUTORS AND ADMINISTRATORS.

POWER OF ATTORNEY, REVOCABILITY—See WILLS (8).

POWER OF LEGISLATURE—See CONSTITUTIONAL LAW (1).

POWERS—See MUNICIPAL CORPORATIONS (7); WAR (3).

PRACTICE—See TENDER.

PRESENTMENT—See CRIMINAL LAW (1).

PRESUMPTIONS—See MUNICIPAL CORPORATIONS (4).

PRIMA FACIE CASE—See FALSE IMPRISONMENT.

PRINCIPAL AND AGENT.

1. Under well established rules of law, where the principals have knowledge of the fact that an agent is acting in a dual capacity, and assent thereto, he may recover for his services from either party. *Chandler* v. *Preston*, 245.

2. Where a principal adopts the contract of a self-constituted agent, who has assumed to act for such principal without authority, he is bound to inquire and ascertain the extent the self-constituted agent assumed to act in his behalf, and the principal, when he becomes such by adopting his act, is bound by all acts within the scope of the assumed authority. *Meeuwsen* v. *Clough & Warren Co.*, 697.

3. Where defendant corporation adopted the act of its secretary in contracting with plaintiff to pay him a commission on an order for goods for his services in assisting to procure the same, by accepting the benefit of such services and paying therefor as goods were shipped, and it clearly appears that by the contract it was intended to pay a commission upon the whole order, defendant is liable, in an action thereon, although, because of the war with Germany, it was unable to secure certain dyes and was compelled to cancel part of the order. *Id.*

4. Although defendant's secretary contracted in the name of another corporation, where the affairs of the two corporations were closely interwoven, and defendant adopted the act of its secretary, the contract was binding upon it. *Id.* 698.

See BILLS AND NOTES (1, 2); CONTRACTS (11); WARRANTY (2, 3).

PRINCIPAL AND SURETY.

1. A corporate surety for hire, unlike a gratuitous surety, may not invoke the rule of *strictissimi juris*, but its rights and duties are to be measured as in actions on contracts of insurance. *City of Grand Rapids* v. *Krakowski*, 483.

2. A bond, conditioned upon the faithful performance of the duties of his office, and to account for all moneys, etc., coming into his hands as such, given by the clerk of the superior court of Grand Rapids, naming said city as obligee instead of the people of the State of Michigan, as required by the statute, is nevertheless valid as a common-law obligation. *Id.*

3. It is not an unfair assumption that their bonds, conditioned for the faithful performance of the duties of their office, embrace every duty and obligation imposed upon the clerk of a court of record by statute, direct lawful

PRINCIPAL AND SURETY—Continued.

order, usage or rules of practice in the courts they serve. *Id.*

4. A surety company was liable upon its bond, conditioned for the faithful performance of the duties of his office by the clerk of a court of record and to account for "all moneys received by him as such officer, or paid into said office while he is acting as such officer," for money paid to him as a tender in an action then pending in said court, which he received and appropriated to his own use. *Id.* 484.

5. The bond of a public officer to faithfully perform the duties of his office is made for the benefit of any and all to whom he owes an official duty, and it is no longer required that actions upon such bonds be brought in the name of the obligee for the use and benefit of the party claimed to have been injured. 3 Comp. Laws 1915, § 12353. *Kent County* v. *Krakowski*, 631.

6. While no recovery could be had upon the bond of a defaulting court clerk unless it was shown that the money was paid to him pursuant to some mandate of the court, it is not necessary to show that the order was reduced to writing or recorded in the court journal. *Id.*

7. A surety on a building contractor's bond is not released from liability because the owner did not withhold 10 per cent. until final payment, as provided in the contract, where the money was used to liquidate demands for which, if unliquidated, the owner would be liable. *Harvey* v. *George*, 667.

8. In an action by the administratrix of the owner against a building contractor and his surety on the bond, where, under the testimony, it was a question for the jury as to whether any payments were made by the owner other than for materials and labor which the contract obligated him to pay, the court below was in error in setting aside the verdict of the jury in favor of plaintiff and directing a verdict in favor of the surety because the owner had not withheld the 10 per cent. provided for in the contract. *Id.*

See EVIDENCE (13).

PRIOR OFFENSE—See CRIMINAL LAW (2).

PRIVATE RIGHT OF WAY—See STREET RAILWAYS (1).

PROCESS—See PARTIES (2).

PROXIMATE CAUSE—See NEGLIGENCE (6).

PUBLIC ENEMIES—See PLEADING (4).

PUBLIC SERVICE—See MUNICIPAL CORPORATIONS (6).

PUBLIC UTILITIES—See MUNICIPAL CORPORATIONS (7).

PUBLIC UTILITIES COMMISSION—See RAILROADS (5).

QUESTION FOR JURY—See WARRANTY (1).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (3).

QUIETING TITLE—See ADVERSE POSSESSION.

RAILROADS.

1. In an action against a railroad company for personal injuries caused by plaintiff's being struck by defendant's train while backing over a street crossing, where the evidence as to defendant's negligence and plaintiff's contributory negligence was very conflicting, the issue was for the jury, under proper instructions. *Crawford* v. *Michigan Central R. Co.*, 159.

2. Where defendant railroad company, in 1910, constructed three stub tracks, constituting a siding, crossing certain streets in the city of Flint, without the latter's consent, but no objection was made thereto and said tracks were used until 1916, said city is estopped from requiring said tracks to be torn up and the streets returned to their original condition. *City of Flint* v. *Grand Trunk Western R. Co.*, 213.

3. In view of 2 Comp. Laws 1915, § 8232 *et seq.*, permitting the tracks of steam railroads built on private right of way to cross public highways and streets, and a resolution of the common council of the city of Flint authorizing the construction of certain stub tracks across certain streets in said city, by defendant steam railroad company, to facilitate the movement of freight, which resolution was later rescinded and the construction sought to be enjoined, although defendant had incurred considerable expenses in reliance thereon, *held*, that the completion of the tracks should be permitted. *Id.*

4. *Held*, that defendant should be permitted to connect the east end of said sidings with its main track, subject to the conditions imposed by the resolution of the common council authorizing said construction. *Id.* 214.

5. If the State laws as to the movement of trains over streets and highways is insufficient to safeguard those using the streets of a city, they may be supplemented by reasonable ordinances and by the maintenance of gates and the keeping of watchmen as may be required by the public utilities commission. *Id.*

6. In an action against a railroad company for the negligent killing of a boy 5 years and 2 months old at a public street crossing near the central part of a city, where hundreds of persons, including children, crossed daily, testimony that the train was running at from 40 to 60 miles an hour and that the electric bell was out of order, *held*, to present a question of fact for the jury as to defendant's negligence. *Robins* v. *Director General of Railroads*, 437.

RAILROADS—Continued.

7. Where the train was running at an unlawful rate of speed, it cannot be held, as a matter of law, that the accident was caused by the sudden and unanticipated act of the child. *Id.*

8. The mother of a boy 5 years and 2 months old is not, as a matter of law, guilty of negligence in permitting him to remain out of her sight for a few minutes on the porch of a hotel while she went into the office, during which time he wandered upon the tracks and was killed. *Id.*

9. Testimony of the father as to his financial ability, *held*, admissible for the purpose of bearing upon the probability of the child being put to work earning money for the father. *Id.* 438.

10. A verdict of $1,275 for the negligent killing of a boy 5 years and 2 months old, *held*, not excessive. *Id.*

11. The State courts will not entertain jurisdiction to compel the specific performance of a pre-war contract between plaintiff, a logging company, and defendant, a railroad company, for hauling logs at a specified rate, during the time said railroad is operated by the government under its war time powers, said defendant having been ousted and incapable of performing. *Kneeland-Bigelow Co.* v. *Michigan Central R. Co.*, 547.

12. The validity of the contract, defendant's liability for damages by reason of its breach, or duty to continue performance should changed conditions render such course possible, and plaintiff's rights in an action at law or in some other appropriate proceeding, are passed without prejudice and not determined. *Id.*

13. Witnesses who had sufficient opportunity to see a train when it was running, and to observe where it stopped, after striking an automobile on a highway crossing, *held*, competent to testify as to its speed in an action for personal injuries alleging negligence of defendant for running at an excessive rate of speed. *Fillingham* v. *Detroit, etc., R. Co.*, 644.

14. Conflict in the testimony as to whether a box car on the siding obstructed plaintiff's view of the approaching train, as to the speed of the train, and as to whether the crossing signals were given, *held*, to render them peculiarly questions for the jury. *Id.*

15. *Held*, that the verdict in favor of plaintiff was not against the great weight of the evidence. *Id.*

16. Where plaintiff stopped, looked, and listened, but saw and heard nothing, when about 50 or 60 feet from the track, if the view of the main track was so obstructed by a box car on the siding that after passing the obstruction there was no safety zone in which to stop, look and listen, the court below was not in error in not applying the rule

RAILROADS—Continued.

requiring the driver of an automobile to do so before proceeding to cross the track. *Id.*

See CARRIERS; EVIDENCE (10); WAR.

RAPE—See CRIMINAL LAW (7); NEW TRIAL.

RATIFICATION—See PRINCIPAL AND AGENT (2-4); WARRANTY (3).

REASONABLE CONTROL—See CONSTITUTIONAL LAW (2).

REASONABLE REGULATION—See STREET RAILWAYS (2).

REBUTTAL—See EVIDENCE (9).

RECONCILIATION—See DIVORCE.

RECORD—See APPEAL AND ERROR (4).

RECORDER'S COURT OF DETROIT—See APPEAL AND ERROR (7); CRIMINAL LAW (1).

REGULATION—See RAILROADS (4, 5).

REHEARING—See MASTER AND SERVANT (5, 12).

REINSTATEMENT—See DISMISSAL AND NONSUIT.

REMAINDERS—See WILLS (11, 12).

REMARKS OF COUNSEL—See TRIAL (3).

REMEDIES—See FRAUD (4); PLEADING (3); RAILROADS (12).

REPEALING CLAUSE—See MUNICIPAL CORPORATIONS (10).

REPRESENTATIONS—See WARRANTY (1).

REPRESENTATIONS AS TO CREDIT OF ANOTHER—See FRAUD (1).

REQUESTS TO CHARGE—See TRIAL (2).

RESCISSION—See TRUSTS (8).

RES JUDICATA—See TAXATION.

RESOLUTION—See MUNICIPAL CORPORATIONS (8).

RESTRICTING LIABILITY—See INSURANCE (5, 6).

REVIEW—See APPEAL AND ERROR (1); CERTIORARI.

REVOCATION—See WILLS (4, 5).

RIGHT OF INJURED PARTY TO SUE IN OWN NAME—See PRINCIPAL AND SURETY (5).

RIGHT OF MARRIED WOMEN TO EARNINGS—See HUSBAND AND WIFE (3).

RIGHT OF THIRD PARTY TO MAINTAIN SUIT—See CONTRACTS (12, 13).

RIGHT TO CONTEST—See WILLS (7).

RIGHT TO CROSS STREET—See RAILROADS (3).

RIGHT TO USE WHOLE OF SURFACE—See WATERS AND WATERCOURSES.

RIPARIAN OWNERS—See WATERS AND WATERCOURSES.

RETURN OF EXAMINING MAGISTRATE—See CRIMINAL LAW (7).

SALE OF REALTY BY TESTATOR—See WILLS (5, 6).

SALES—See CONTRACTS (10); DAMAGES (1, 2).

SAVING CLAUSE—See MUNICIPAL CORPORATIONS (10).

SCHOOL BONDS—See MUNICIPAL CORPORATIONS (9).

SCOPE OF AGENT'S AUTHORITY—See PRINCIPAL AND AGENT (2).

SECONDARY EVIDENCE—See EVIDENCE (6, 7, 14).

SECRECY—See CRIMINAL LAW (1).

SELF-CONSTITUTED AGENT—See PRINCIPAL AND AGENT (2).

SERVICE—See ACTION; INSURANCE (1); PARTIES (2).

SERVICES—See HUSBAND AND WIFE (1, 2); WILLS (14, 15).

SET-OFF AND RECOUPMENT—See CONTRACTS (7).

SETTLEMENT—See FRAUD (6).

SEVERAL INSTRUMENTS CONSTRUED TOGETHER—See CONTRACTS (1).

SEWERS—See MUNICIPAL CORPORATIONS (5, 7).

SNOW AND ICE—See CARRIERS (3-5).

SPECIAL APPEAL—See APPEAL AND ERROR (7, 8).

SPECIAL DAMAGES—See DAMAGES (3).

SPECIFIC ASSIGNMENTS—See APPEAL AND ERROR (10).

SPECIFIC PERFORMANCE.

In proceedings against the heirs of plaintiff's foster mother for the specific performance of a contract between plaintiff and his foster parents, contract construed, and *held*, to support the finding of the court below that it was the intention of the parties that plaintiff should be an heir at law of both foster parents and have such portion of their property as an heir at law would take. *McCrilles v. Sutton*, 58.

See CONTRACTS (6); LANDLORD AND TENANT (1); RAILROADS (11).

SPECIFICATION OF OFFENSE—See CRIMINAL LAW (7).

SPEED OF TRAIN—See RAILROADS (13).

STATE COURTS—See RAILROADS (11).

STATEMENTS OF FACT—See WARRANTY (1).

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES.

Requirements of the "motor vehicle law" for recording and certifying the convictions thereunder, *held*, merely incidents of the enforcement of the statute that do not affect the rule of conduct therein prescribed. *Brennan* v. *Recorder of the City of Detroit*, 36.

See ACTION; APPEAL AND ERROR (2, 6, 7); CONSTITUTIONAL LAW (2-4); CONTRACTS (12); HUSBAND AND WIFE (3); PARTIES (1); PLEADING (1, 2); RAILROADS (3).

STATUTORY BOND—See PRINCIPAL AND SURETY (2-5).

STATUTORY RIGHT OF APPEAL—See APPEAL AND ERROR (5).

STREET RAILWAYS.

1. A railway company operating its line on a private right of way cannot be said to be a street railway company in the ordinary meaning of that term. *People* v. *Detroit United Ry.*, 143.

2. Municipal regulations of the use of streets by a street railway are an exercise of the police powers of the city, and will be upheld if reasonable. *Id.*

3. An ordinance of the city of Detroit requiring "all cars carrying passengers operated upon any line of street railroad" in said city to "come to a full stop immediately before crossing any street or avenue in said city whenever signaled to stop by any person desiring to take passage thereon or to alight therefrom," *held*, not unreasonable. *Id.*

See MUNICIPAL CORPORATIONS (13).

SUBSEQUENT ACTS—See ATTORNEY AND CLIENT.

SUBSTITUTION—See PARTIES (2).

SUFFICIENCY OF PLAINTIFF'S TESTIMONY—See APPEAL AND ERROR (3).

SUFFICIENCY OF TITLE OF ACT—See CONSTITUTIONAL LAW (3).

SUPPORT AND MAINTENANCE—See CONTRACTS (6).

SURETY—See PRINCIPAL AND SURETY (5, 6).

SURETY FOR HIRE—See PRINCIPAL AND SURETY (1).

SURETYSHIP—See PRINCIPAL AND SURETY.

SURVIVAL ACT—See DAMAGES (6); DEATH (1).

TAXATION.

On a bill by the city of Detroit to enjoin the service of a writ of assistance, on the ground that it was entitled to have the value of improvements admeasured and set off to it, and that defendant tax title purchaser was entitled to the interest in the land only, independent of the building, where said question was decided adversely to plaintiff's claim in a former decision by the Supreme Court, the decree of the court below dismissing the bill was proper. *City of Detroit* v. *Triangle Land Co.*, 49.

See MUNICIPAL CORPORATIONS (3, 12).

TECHNICAL IRREGULARITY—See TENDER (2).

TENDER.

1. By long-settled practice in this State, money may be paid into court as a tender at any time before plea, as a matter of course, no statute or rule requiring any consent or special order by the court to authorize such payment before pleading, but if a defendant wishes to pay money into court after pleading he must obtain a judge's order for that purpose. *City of Grand Rapids* v. *Krakowski*, 483.

2. Requirement to enter a common rule as to the payment of a tender to the clerk of the court before pleading, which was not complied with, *held*, to be merely a technical irregularity, and that the purpose was served by the statement or voucher accompanying the check, which was accepted and cashed, stating the title and nature of the suit to which the payment applied, the amount and purpose of the payment, with the amount to be applied on certain assessments, to recover which the action was brought. *Id.*

See PRINCIPAL AND SURETY (4).

TERMINATION OF LIFE ESTATE—See WILLS (11).

TERMINATION OF TRUSTS—See TRUSTS (7).

THIRD PARTY—See EQUITY.

TITLE OF ACT—See CONSTITUTIONAL LAW (3).

TORT—See ASSUMPSIT (1, 2).

TOTAL INCAPACITY—See MASTER AND SERVANT (1).

TRESPASS—See WATERS AND WATERCOURSES.

TRIAL.

1. The admission of evidence of after events, although irrelevant, *held*, not prejudicial. *Burtch* v. *Child, Hulswit & Co.*, 206.

2. It was not error for the court below to refuse plaintiff's specific requests to charge, where the charge as given fully protected his rights, and all proper requests were either given or covered. *Interstate Construction Co.* v. *United States Fidelity & Guaranty Co.*, 266.

3. A ruling of the court below sustaining appellant's objection to remarks of counsel, and adding "I do not think that makes any difference and need not be considered by the jury," *held*, not reversible error. *Id.*

4. In an action for personal injuries, caused by defendant's automobile colliding with plaintiff's buggy at a street intersection, an instruction by the trial court that the jury were to determine whether, under all of the circumstances, the driver of the automobile did "everything possible after he had discovered the danger to prevent an accident," *held*, erroneous, as it held him to a higher degree of care than the law demands, and may have misled the jury. *Simmons* v. *Petersen*, 508.

5. Where it was almost obligatory upon plaintiff to put the attending physician upon the stand in order to make his case, the court below should have been more liberal in allowing plaintiff to examine him as to certain incidents between them in order to show that the doctor had become adverse and unfriendly to plaintiff's cause. *Marx* v. *Schultz*, 655.

See ASSUMPSIT (2); ATTORNEY AND CLIENT; CARRIERS (4, 5); CONTRACTS (10); CRIMINAL LAW (4, 9-11); DAMAGES (3, 5); DEATH (3); EVIDENCE (9); FRAUD (11); WARRANTY (4, 5); WITNESSES.

TRUSTS.

1. A trustee having accepted the trust is bound to execute it faithfully, and a court of equity has power to enforce its execution in behalf of the *cestui que trust*. *Chambers* v. *Chambers*, 129.

2. Where a testator bequeathed in trust to his brother, to be disposed of by him to the two children of another brother, deceased, "all the property, or its equivalent, I received under the last will," of said deceased brother, leaving the determination of said amount entirely to the judgment and discretion of said trustee, a "determination" by him that said amount was the sum of one dollar, *held*, to be in bad faith, where at the time it was made the courts had already determined that it was a substantial sum. *Id.*

3. Where the record shows that the trustee is deceased and no new determination can be made by him, the duty rests upon the court of equity to dispose of the question. *Id.*

TRUSTS—Continued.

4. The relation of trustee and *cestui que trust* begins with the execution of the trust agreement; during the preliminary negotiations no such relation exists. *Chandler* v. *Preston*, 244.

5. Although prior to the execution of a trust deed and agreement the proposed trustee offered to assume said trust for a certain compensation, he had a legal right, prior to its acceptance, to withdraw said offer and submit a new one naming a larger sum, notwithstanding his action was induced by information received from an agent of the *cestui que trust* that the latter would pay more than the sum first named. *Id.*

6. The withdrawal by the proposed trustee of his first offer, and his acceptance of a counter proposal by the *cestui que trust* naming a larger amount, did not constitute a breach of trust or a fraud upon the latter. *Id.*

7. On a bill for the removal of the trustee, for an accounting, for the termination of the trust, and to determine the amount of compensation to be paid the trustee for services already rendered, testimony *held*, to sustain the finding of the court below that in the sales of trust property made, and the prices obtained for same, the conduct of the trustee was not open to criticism. *Id.*

8. The fact that the sales of land during the existence of the trust did not amount to as much as contemplated, *held*, not to justify the holding of the court below that therefore the compensation of the trustee was fixed under a mutual mistake of fact and should be rescinded. *Id.* 245.

9. Where the trustee neglected to furnish the money at six per cent. to take up mortgages bearing seven per cent. when they matured, as the trust agreement provided he should do, he should be charged with the amount paid in interest in excess of six per cent. on the overdue mortgages after maturity. *Id.*

See EQUITY; PLEADING (3).

UNANTICIPATED ACT—See RAILROADS (7).

UNAUTHORIZED CROSSING—See RAILROADS (2).

UNDUE INFLUENCE—See CANCELLATION OF INSTRUMENTS.

UNITED STATES CONSTITUTION—See CONSTITUTIONAL LAW (4).

VALIDITY OF BOND—See PRINCIPAL AND SURETY (2).

VARIANCE—See FRAUD (10).

VENDOR AND PURCHASER.

1. In a suit to restrain summary proceedings, to set aside a certain land contract, and for an accounting, where the vendee denied the execution of the contract and also de-

VENDOR AND PURCHASER—Continued.

nied the correctness of the consideration expressed therein, the latter was still open to inquiry although she failed to prove that she did not execute the contract; the consideration being always open to inquiry, even where execution is not denied. *Higgins* v. *McGill*, 570.

2. Where plaintiff sustained the burden of proof that the consideration for each of two former contracts was $1,200, and that the consideration in the contract in dispute should be the combined balance owing on the two, she is entitled to an accounting on that basis with credit for all payments satisfactorily shown. *Id.*

WAIVER—See CONTRACTS (8); MASTER AND SERVANT (11); PARTIES (3).

WAR.

1. The existence of war and restoration of peace are determined by action of the legislative, supplemented by the executive, department of government, and such determination is binding upon the courts. *Kneeland-Bigelow Co.* v. *Michigan Central R. Co.*, 546.

2. War having been declared, that condition must be recognized by the courts as existent until the duly constituted national power of the country officially declares to the contrary, even though actual warfare has long since ceased. *Id.*

3. The government, in exercising its war-time power, *vis major*, or the greatest power of all, in taking over the railroads of the country and directing and operating them, has the power to initiate and change rates, fares, charges, etc., when the public interest requires, beyond any resistance by those against whom it is directed (39 U. S. Stat. chap. 418, p. 645; 40 U. S. Stat. chap. 25, p. 456). *Id.*

4. A railroad company, whose property has been so taken over by the government as a war measure, is but a subordinate governmental agency, serving under direction and at the will of the government. *Id.*

5. The existence of a state of war affects different contracts in different ways: Some are avoided or dissolved, others are rendered unenforceable for the time being, others, again, remain unaffected; the particular condition of each contract materially affecting the consideration of each case. *Id.*

See EVIDENCE (10); RAILROADS (11).

WARNING AND ASSISTING PASSENGER—See CARRIERS (5).

WARRANTY.

1. In an action by the purchaser of bonds against the seller, a brokerage corporation, for breach of warranty, where plaintiff notified defendant that he was ignorant of

WARRANTY—Continued.

the value of the bonds and that he relied upon its representations, and demanded a statement in writing from defendant direct that the bonds were good, in response to which defendant's secretary wrote that "We *know* that the bonds are *absolutely good*," *held*, to be open to the inference that more than a mere expression of opinion was intended and the question as to whether an expression of opinion or statement of fact was intended was properly submitted to the jury. *Burtch* v. *Child, Hulswit & Co.*, 205.

2. Testimony as to the secretary's authority to make the warranty, *held*, sufficient to submit to the jury. *Id.* 206.

3. Where plaintiff refused to buy without a statement in writing from defendant that the bonds were good, and the next day he received such statement signed by defendant by its secretary, and thereupon defendant received plaintiff's money and retained it after being advised of the circumstances under which it was received, defendant, as a matter of law, ratified the act of its secretary, if he acted without authority. *Id.*

4. Where there was some testimony that the bonds were worthless at the time they were sold in 1909, an instruction by the court that if the jury found that they were worthless, the measure of damages would be the amount plaintiff paid for them, with interest to the date of the trial, was not erroneous, where they were also instructed that if they found there was some intrinsic value in the bonds in 1909 they should ascertain that value, and the difference between that sum and what plaintiff paid for them, plus the interest, would be the proper measure of damages. *Id.*

5. Where certain letters written by plaintiff, introduced in evidence, were in conflict with his testimony on the trial that he relied on the representations of defendant, it was the province of the jury to determine which, if either, of these statements was true. *Id.*

WATERS AND WATERCOURSES.

Where there are several riparian owners to an inland lake, such proprietors and their lessees and licensees may use the surface of the whole lake for boating and fishing, so far as they do not interfere with the reasonable use of the waters by the other riparian owners. *Beach* v. *Hayner*, 93.

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (9, 11); CERTIORARI; DEATH (5); RAILROADS (15); WARRANTY (5).

WILLS.

1. The first and most important rule to be observed in construing wills is to ascertain the intention of the testator and to give effect to that intention if it be legally possible. *In re Manshaem's Estate*, 1.

WILLS—Continued.

2. The intention must be gathered from the whole will, and where possible, effect must be given to all of its provisions. *Id.*

3. While the will speaks from the death of the testator and not from its date, construction may often be aided by a consideration of the facts and circumstances existing at the date of the will. *Id.*

4. The rule as to ademption or the presumption of revocation through a change during the lifetime of the testator in the nature of the property devised or bequeathed does not apply where the proceeds of a certain property, and not the property itself, is the subject of the gift. *Id.*

5. Where testator in his will, after making certain specific bequests, and providing for certain expenses, gave to his two daughters the remaining personal property, and providing that, if it should not amount to $800, the two sons were to make up the deficiency, and stating that this provision, together with such gifts as he had already made them, should constitute their entire share in his estate, *held*, to negative the intention of testator that the daughters should share in the proceeds of the farm which the will directed should be sold and the proceeds divided equally between the two sons, but which was sold during his lifetime and the proceeds kept intact until his death. *Id.*

6. Where testator's will directed that the farm should be sold to the highest bidder, and provided that after the sale was consummated the entire rest and residue of the estate should go to the two sons in equal shares, the sale of the farm in testator's lifetime would not affect the rights of the sons under the will even if the sale was made with the avowed purpose of disinheriting them. *Id.* 2.

7. Assignees, grantees, and donees of an heir have no such interest in the will of the testator as will enable them to contest its validity, nor is the right of action itself assignable or the subject of conveyance. *In re Vanden Bosch's Estate*, 89.

8. A power of attorney to contest a will, accompanying an assignment by an heir of his right in testator's property, which conveyed no interest, cannot be said to be coupled with an interest rendering it irrevocable. *Id.*

9. Where a husband's will gave to his wife "$25,000, to be used and enjoyed by her during her life, and at her death to be equally divided between" his nephew and niece, *held*, to give the widow the use of the money for her life, a life estate, and no more. *Sellick* v. *Sellick*, 194.

10. That testator in one clause of his will gave said nephew and niece $5,000 to be paid presently, in no way modified

WILLS—Continued.

the plain, unambiguous language of another clause giving them $25,000, to be paid upon the death of the wife. *Id.*

11. Where the widow took under the statute and rejected the life estate in the $25,000 given her in the will, thereby diminishing the fund of the residuary legatee, *held*, that said sum should be placed in trust and the income therefrom paid to the residuary legatee during the life of the widow and at her death the *corpus* be paid to the remaindermen. *Id.*

12. While the doctrine of acceleration of the time of taking effect of the remainder upon the termination of the life estate by act other than the death of the life tenant must be recognized and applied in proper cases, such doctrine should not be applied where, by the election of the widow to take under the statute, a portion only of the legacies are diminished in order to make up the amount required by the statute to satisfy the widow's statutory rights. *Id.*

13. In the construction of a will the cardinal duty of the court is to find the intention of the testator. *Holmes* v. *Connell's Estate*, 663.

14. A clause in testator's will providing a legacy for his housekeeper, with the statement therein that it "is given as a token of my regard and appreciation of her services," *held*, to indicate his intention to place a just estimate on the value of her services and to compensate her therefor. *Id.*

15. Plaintiff, having accepted the legacy given her as compensation for her services as housekeeper for testator, is thereby precluded from thereafter maintaining a claim for the same against his estate. *Id.*

WITNESSES.

In an action for personal injuries caused by defendant's automobile, driven by his son, colliding with plaintiff's buggy, where it appeared that the conduct of the son at the time of the collision, and immediately thereafter, was not in violation of 1 Comp. Laws 1915, § 4816, it was error for the court to instruct the jury that his driving away from the place of the accident might be considered as bearing on his credibility as a witness, he having testified to very material matters. *Simmons* v. *Petersen*, 508.

See NEW TRIAL; RAILROADS (13).

WORDS AND PHRASES—See BOUNDARIES (3).

WORKMEN'S COMPENSATION ACT—See MASTER AND SERVANT.

WRIT OF ASSISTANCE—See TAXATION.

WRONG NAME—See PRINCIPAL AND AGENT (4).

YPSILANTI CHARTER—See MUNICIPAL CORPORATIONS (12).

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