MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JUNE 8 TO SEPTEMBER 27, 1910

JAMES M. REASONER
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LANSING, MICHIGAN.

SUPREME COURT.

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JUNE TERM, 1910.

In re MOULD.

1. HABEAS CORPUS—RES JUDICATA—INFANTS—CUSTODY.
   In proceedings to determine the right of a parent or guardian to the care and custody of a child, the determination of the right by a court of competent jurisdiction is conclusive on another court exercising the same jurisdiction upon the same facts.
2. SAME—APPEAL AND ERROR.
   On appeal from such finding, the court would not disturb a finding of fact based upon competent testimony.
3. SAME.
   Courts are bound to consider the interest of the child in awarding custody to either claimant.[1]
4. SAME—STATUTES.
   That the petitioner is described as guardian of the child is immaterial except to show petitioner's interest in habeas corpus to determine the legality of detention by a probation officer of an alleged delinquent resident of another county. Act No. 6, Pub. Acts Extra Session 1907.
5. SAME.
   Any person may make the application (3 Comp. Laws, § 9860); and the issue is between the child and the person detaining her, between the child and the law and procedure invoked as authority for her detention.
6. SAME—STATUTES.
   A petition for habeas corpus in favor of an infant of twelve years, alleging that she is not a person mentioned by 3 Comp. Laws, § 9859, and is unlawfully imprisoned on a charge of having committed a felony in a county where she does not reside, under a commitment by the probate court to the probation officer, is not concluded by a refusal of another court exercising like jurisdiction to discharge the accused.
7. CRIMINAL LAW—INFANTS.
   A child of twelve years cannot be prosecuted for a felony in any court.

[1] As to State guardianship of children, see note to *Whalen* v. *Olmstead* (Conn.), 15 L. R. A. 593.

8. SAME.

The commission of a felony renders the infant a delinquent child.

9. SAME—JURISDICTION OVER JUVENILE OFFENDERS.

The inquiry as to whether such infant is a delinquent child under Act No. 6, Pub. Acts Extra Sessions 1907, should take place in the county of her residence.

Habeas corpus proceedings by Florence J. Chappell against Ada Freeman, a probation officer, to obtain the release from custody of Lois Mould, an infant. Submitted May 26, 1910. (Calendar No. 24,070.) Writ granted June 8, 1910.

Louis W. McClear, for petitioner Chappell.

William Van Dyke and *Allan H. Frazer*, for respondent Freeman.

Exercising original jurisdiction, this court issued the writ of habeas corpus to bring before the court Lois Mould, a female child 12 years of age, who, it was represented, was unlawfully restrained of her liberty by the probation officer of Wayne county. This officer produced the child, as she was commanded to do, and returned that she had her in custody by virtue of an order of the probate court of Wayne county, and also by virtue of an order, finding, and decree of the circuit court for Wayne county. The order of the probate court, juvenile division, made May 11, 1910, is as follows:

"A petition having been heretofore filed in this court wherein it is alleged that Lois Mould, alias Mole, is a juvenile delinquent person within the meaning of the statutes of the State of Michigan, and on the 14th day of April all parties interested being then represented in open court or having notice, and it then appearing to the court necessary and for the best interests and welfare of said child and the public, the court placed said child in the care and custody of Ada Freeman, a duly appointed probation officer, and ordered said child detained for a period of 30 days, and on the 23d day of April a new complaint having

been filed in such matter and after due notice to all persons interested come on for hearing before this court, on the 4th day of May instant, at 8:30 a. m., and Louis W. McClear, an attorney, appearing for the alleged guardian of said child, and requesting an adjournment to this date, and upon hearing this day, said Louis W. McClear again appearing and asking that said matter be further continued, it is ordered that said matter be and the same is hereby continued to the 18th day of May inst., at 9 o'clock in the forenoon, and, it still appearing to the court that the interests of said child and public interests require that said child be detained in the custody of some suitable and proper person, it is further ordered that said Lois Mould, alias Mole, be, and she is hereby, committed to the care and custody of Ada Freeman, a duly appointed probation officer of this court, with full power and authority over the person of said Lois Mould, alias Mole, until the further order of this court, but not to exceed a period of 30 days from the date hereof, unless otherwise ordered."

The complaint of April 23d referred to in the order sets out upon information and belief that Lois Mould is a resident of Livingston county, Mich., in which county her guardian also resides; that she is a delinquent child, and has violated the laws of the State, in that she committed the crime of perjury in the recorder's court of Detroit in giving her testimony in a cause depending in that court, she being sworn as a witness upon the trial of said cause. The details are set out at length. There is no order or decree of the circuit court for the county of Wayne set out in said return. There is an opinion and finding of Judge Donovan, one of the judges of that court, in habeas corpus proceedings in the matter of Lois Mould, which is here set out:

"I find on listening to argument of counsel for petitioner and respondents, and upon reading record of testimony taken in recorder's court and before the police department prior to trial, showing facts and circumstances surrounding crime committed against child in this case, Lois Mould, and showing to my satisfaction that crime was committed, and that child did make frank and free statements to police department and to others, and after

reading record in application to Supreme Court of this State that child be released on bond, I am satisfied that crime was committed against child, and that child did make a frank statement showing guilt of her father, and that within 11 days after committing of offense Florence J. Chappell had herself appointed guardian in Livingston county, this State, with connivance of father of child, who was on trial in recorder's court for offense against child and influencing child to deny truth and perjure herself on trial of father, and that such child did perjure herself on the trial of her father and was properly committed by Hon. William F. Connolly, one of the judges of the recorder's court for the city of Detroit, for committing perjury during the trial of the People of the State of Michigan v. Charles Mould, father of said child, and then properly transferred to juvenile division of probate court, Wayne county. I further find that, while said child was found so under arrest she was properly taken before probate court in accordance with statute, and there properly complained against. The record in case discloses that child was under subpœna and bond to answer, appear, and testify in recorder's court, and came to recorder's in response to subpœna and bond, and, while being there adjudged by such court competent to testify, perjured herself. I find that juvenile division of probate court has jurisdiction over children of any county who commit felonies within this county, and of child in this case. In consideration of facts disclosed to me by arguments of counsel and records before me, I find that best interests and welfare of child demand that she be not given to petitioner in this case, and that she be turned over by this court on this writ to Ada Freeman of this city, county, and State, and further, that she be left within jurisdiction of juvenile court of this county, to be disposed of, and that, if such jurisdiction fail, I remand child to custody of said Ada Freeman, she being a competent and trustworthy custodian for child and willing to accept responsibility thereof. In any event, I find, and, in so finding, hereby dismiss writ applied for, that petitioner for writ is only guardian of property of Lois Mould, and not guardian of her person; therefore, in accordance with decision found in the fourteenth Michigan [*Taff* v. *Hosmer*, 14 Mich. 249] and consistently followed in this State, and with holding of our Supreme Court, *In re Heather Children*, 50 Mich. [261 (15 N. W. 487)], I find

that petitioner has no such right or interest such as entitled her to apply to this court for a writ of habeas corpus, and for that reason writ is dismissed."

It is asserted by the said probation officer in her return that this finding and determination is not reviewable except upon certiorari, and in an original proceeding in this court is *res adjudicata* the right of said officer to the custody of the child. It is further stated in said return, in substance and effect, that the father of Lois Mould, a man upwards of 40 years of age, was arrested in Detroit, charged with having committed a rape upon her in that city; that she informed certain police officers that her father did commit this crime; that she was for a time detained as a witness, but was later enlarged, and went, with her aunt (who sued out the writ in this proceeding), to Fowlerville, in Livingston county, and remained with her until she appeared in the recorder's court in Detroit to give her testimony upon the trial of her father. Inferentially, at least, it is charged that the said aunt secured possession of her person for the purpose of influencing her with respect to the testimony she should give upon the trial of her father, and did influence her.

The father was convicted of an assault and committed to the Detroit house of correction, to serve a short sentence. The mother of the child is said to be living, at what place is not stated, but she does not live, and for some time has not lived, with her husband. It is set up in the petition for the writ, and is not disputed, that from February 21st until February 26th the girl was detained by the police. On the last mentioned day an order was made by the recorder transferring her to the probate court, juvenile division. On the same day, the probate court, juvenile division, ordered the county agent to investigate the case and make a proper report, and meantime committed the girl to the probation officer, who now has her in custody, to be kept at the House of the Good Shepherd at the expense of the county. A complaint was made in said probate court March 30th, charging the girl to be a

delinquent child, and on April 8th the judge of that court held that the said complaint conferred no jurisdiction upon the court, and that the recorder had no authority to transfer the matter to the probate court. The matter was therefore dismissed, with the further holding and determination that as the father of the child had apparently made his home with her aunt and would probably, when his sentence expired, return there, he would detain the child as one not having proper parental care, for five days, and place her in charge of said probation officer, to be detained in "the place of detention provided by the county of Wayne." On April 9th the child was charged in the police court with having committed perjury. A warrant was issued, and she was arrested, arraigned on April 12th, and, in default of bail, committed to the county jail. On April 14th she was discharged. The same person who had made the complaints referred to made two petitions on April 8th and filed them in probate court, in one of them charging that the child was a delinquent and in the other that she was a neglected and dependent child. On April 14th she was by order of that court committed to the said probation officer. From time to time the matter was adjourned. During all of the time the child has been in custody.

The county agent made a report, in which, among other things, he stated that the—

"Child did live with aunt at Fowlerville. The aunt keeps a little notion store and the uncle drives a wagon for a coal dealer. They are both hard-working people and well spoken of."

As to the child's testimony in court he stated:

"She says the first story she told the police she did not understand. She said she did not know the meaning of the word 'intercourse.' When her aunt explained it to her the meaning of the word, she said, 'No; that was not so,' and that is the reason she changed her statement. I understand that doctors have examined this child and some say she is all right and some say she is not, but the majority are with the girl."

OSTRANDER, J. (*after stating the facts*). If this was a proceeding brought to determine the right of a parent or guardian to the care and custody of a child, it would be urged with propriety that the determination of the right by a court of competent jurisdiction ought not to be reviewed or set aside by another court exercising the same jurisdiction upon the same facts. *In re Sneden*, 105 Mich. 61 (62 N. W. 1009, 55 Am. St. Rep. 435). In the case supposed an appellate court would not disturb a finding of fact based upon competent testimony (*Carpenter* v. *Carpenter*, 149 Mich. 138 [112 N. W. 748]; *Smith* v. *Kiel*, 150 Mich. 417 [114 N. W. 229]), and any court would be bound to consider the interest of the child in awarding custody to either claimant. It is true the person suing out the writ describes herself as guardian of the child. This is of no significance except as showing her interest. Any person may make the application. 3 Comp. Laws, § 9860. The issue here does not arise between persons claiming the right to custody of a child. The issue is between the child and the person who detains her, between the child and the law and procedure invoked as authority for her detention.

It is alleged in the petition that the child is imprisoned by an officer, and that she is not one of the persons mentioned in 3 Comp. Laws, § 9859. In such a case it is no bar to habeas corpus proceedings in this court that some other court exercising a like jurisdiction has refused to discharge the imprisoned person. And no finding or order of such other court in such a proceeding can be relied upon in this court as authority for the detention. The single question which is presented for determination, therefore, is whether the probate court for Wayne county had authority to commit this child. We assume, for the purposes of decision, that she is charged before that court with having committed a felony in the county of Wayne, and that, if she were more than 14 years of age, she might be tried for the offense charged in that county. She is not 14 years of age. Therefore she cannot be prosecuted for

the felony in any court. Whether she has committed a felony may be inquired about. If she has, her status is thereby fixed. She is a delinquent child.

A careful reading of the statute (Act No. 6, Pub. Acts 1907) passed at the extra session of the legislature leads us to the conclusion that the probate court for Wayne county is, in this case, without jurisdiction to make the inquiry and to thereafter dispose of this child as the result thereof may seem to warrant. The statute is in many respects one of uncertain meaning. It is, however, a general law in force in every county of the State. It appears to be contemplated that the probate court of each county shall have jurisdiction over the delinquent, dependent, and neglected children, or those charged as such, resident in the county. It is not always easy to determine the precise meaning which the legislature intends shall be given to the words "residence" and "resident" in a particular statute. With respect to the statute under consideration, we think it is reasonably clear that jurisdiction of the court does not depend upon the place where the alleged offense is committed, the commission of which is the basis for charging the child as delinquent. So long as the child may not be prosecuted for the crime, there is no good reason for saying that status, although depending upon the fact of a crime committed, must be determined in the county where the offense was committed. There is much reason for saying that a child resident in any county may be charged in that county as a delinquent, dependent, or neglected child upon facts none of which occurred in that county. Section 5 of the act provides that the sworn petition to be filed in the probate court shall set forth that the child is a "resident in said county," with the facts which show that the child is a delinquent, dependent, or neglected child within the meaning of section 1 of the act. At the same time, it must be admitted that in other portions of the law language is employed which appears to support the idea that the probate court of the county in which the child shall be found or shall be apprehended has jurisdiction.

Notably is this true of the provisions found in section 6, which provides for the transfer of cases pending in police and justice's courts, together with all papers connected therewith "to the said court," upon which said transfer "the said court may proceed to hear and dispose of the case in the same manner as if said child had been brought before the court upon petition, as hereinbefore provided." The legislature has provided no method or procedure for transferring a case from the police magistrate of one county to the probate court of another county, and none for transporting in custody a child committing depredations in one county to the county of his residence.

We do not hold or intimate that a child may not become resident in a county, within the meaning of this law, independent of the place of residence of his parents or guardian. We hold upon the facts of this case that Lois Mould was not, and is not, a resident in the county of Wayne within any meaning which may be given to the words of the statute. She is described in the complaint as a resident of Livingston county. She went into Wayne county in obedience to the process of a court of record. She was resident in Livingston county, living there with her relatives, one of whom was and is, by order of the probate court of that county, guardian of her estate if not of her person. If her conduct in court in Wayne county was such that she may be charged with being a delinquent child, the necessary inquiry can as well be made in Livingston county, her status as well determined in that county. While the law is in a sense remedial in character, it is nevertheless a penal law. The essential thing to the child, and to the public, is the inquiry upon the result of which her status depends. It better accords with established notions of justice, and with the general purpose of this general law, to hold that the inquiry should be had in the county of her home rather than in a county in which she was never in any sense a resident. So much significance we feel bound to give to the language which requires the petition to show that the child complained about is

"resident in said county." We have no doubt that, as enforcement of the law proceeds, necessary amendments to its provisions will be made by the legislature.

Upon the hearing, the child was given in custody to Miss Ada Freeman, the probation officer of Wayne county. An order will be entered requiring her to deliver the child to the petitioner upon request. The child was in the custody of petitioner and lived with her when she was summoned to appear as a witness in Wayne county. If there is apprehension that the child should not remain with her, the courts of Livingston county are open; and, if she is regarded as a delinquent child, a proper petition in the probate court for that county will institute the statute inquiry. We award no costs.

McALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

In re KNOTT.

1. HABEAS CORPUS — PROCESS — COMMITMENT FOR CONTEMPT — AMENDMENT OF RECORD.

   The amendment of a commitment for contempt of court in habeas corpus proceedings, by correcting a date to correspond with the true facts, is not ground to quash the commitment, though corrected by the attorney for the petitioner, and subsequently approved by the court.

2. SAME—RETURN OF RESPONDENT—REQUIREMENTS.

   The commitment of a respondent in habeas corpus for failure to make a more complete and explicit return to the petition as ordered by the court, is not an exercise of inherent jurisdiction to compel obedience to orders, but is the method which the statute specifies in case of failure to return the facts relating to any transfer of custody. 3 Comp. Laws, §§ 9869-9873.

3. SAME—JURISDICTION—VALIDITY OF WRIT.

A petition for the writ of habeas corpus by the mother of an infant less than five years old, showing that the father who lives in the county where the petition is filed has surreptitiously removed the infant from her custody and control and unlawfully restrains the child of his liberty, in said county or elsewhere, with other averments showing jurisdiction, sufficiently alleges the petitioner's right of custody in order to give the court jurisdiction.

4. SAME—INFANTS—GUARDIAN AND WARD—PARENTAL CUSTODY AND CONTROL.

Although the provisions of 3 Comp. Laws, § 8701, confer upon the father, as the natural guardian of the infant, the right to be appointed guardian in preference to any other person, and in case of his decease give to the mother the right, they do not conflict with the authority of a court of competent jurisdiction to award the custody to any suitable person, as required by the best interests of the infant.

5. SAME.

But until the right to such custody has been judicially determined, and as between parents of a minor who are living together, there is no rule, statute or other authority which permits either, as of right, to dispose of a child to the exclusion of the other.

6. SAME.

After separation of the parents, the right of custody is *prima facie* in the mother.

7. SAME—JURISDICTIONAL AVERMENTS.

Both parents of the infant being in the jurisdiction of the court and the home of the child being in Wayne county where the writ is issued, a petition which so alleges and shows that the child is detained in the county or elsewhere, by the father, contains a sufficient allegation that the control of the imprisonment and of the child's person is within the jurisdiction to enable the court to issue the writ.

8. SAME—PETITION—SUFFICIENCY.

The wife need not allege that the respondent is an unfit person to have the custody of the child, or that he is not properly caring for it, or that the petitioner is a suitable custodian of the infant, when the petition shows the detention by the one parent as against the other.

9. SAME—RETURN.

A return that the child is outside the jurisdiction of the court is not conclusive and is traversable.

10. SAME—RETURN—PLEADING.

The return of the respondent to the writ is incomplete, inexplicit, and insufficient, under 3 Comp. Laws, § 9869, where the respondent admits removing the infant from his mother's care, but denies having the child in custody or under his power from the time of the application for the writ, claiming that the child was in Canada when he last heard of it.

Certiorari to Wayne; Rohnert, J. Submitted May 26, 1910. (Calendar No. 24,009.) Decided June 9, 1910.

Habeas corpus proceedings by Elizabeth Knott against Frank M. Knott to obtain the custody of Kenneth W. Knott, an infant. An order committing respondent for contempt of court in refusing to make a more complete and explicit return to said writ is reviewed by respondent on writ of certiorari. Affirmed.

Louis C. Wurzer, for petitioner.

Schmalzriedt, Spaulding & Herald, for respondent.

On the 19th of April, 1910, upon the petition of Frank M. Knott that day filed, a writ of certiorari was allowed by one of the justices of this court to review certain proceedings had in the circuit court for the county of Wayne, in the course of which and for refusal to obey an order of one of the judges of that court the petitioner was committed, and is now imprisoned. A return to the writ was filed May 10, 1910, and, upon the suggestion that the cause might be treated as a motion and speedily disposed of, briefs were filed by counsel on the part of plaintiff in certiorari on May 28th, on behalf of the respondent on June 1st. The proceeding was begun by filing on the 9th of March, 1910, a petition for a writ of habeas corpus. It is set out in the petition that the petitioner, Elizabeth Knott, is the wife of Frank M. Knott, the plaintiff in certiorari; that as a result of their marriage there was born one son, Kenneth W. Knott, now 4½ years old; that the parties resided together at 123 Owen avenue in the city of

Detroit; that on or about February 23, 1910, while petitioner was absent from home, the said Frank M. Knott entered the same and surreptitiously removed the child, and has ever since that time illegally and unlawfully restrained the child of his liberty and detained him from the custody of petitioner, and since the 23d of February, 1910, has not resided with petitioner as her husband at the said home. The fourth paragraph of the petition is as follows:

"That the said Kenneth W. Knott is now imprisoned, concealed and detained from the custody of your petitioner by the said Frank M. Knott, in the city of Detroit, or elsewhere, and that the said Kenneth W. Knott is not committed or detained by virtue of any process, judgment, decree, or execution specified in the eighth section of chapter 273 of Compiled Laws of Michigan of 1897, and that the said confinement, restraint, and detention is without legal cause or pretense."

The writ was issued on March 9, 1910, and on that day was served upon Frank M. Knott. He did not produce the child, but filed a return, in which he admits the marriage to petitioner; that the child, Kenneth W. Knott, is the child of petitioner and himself; and that he is about 4½ years old. He admits that himself and wife and their child resided at 123 Owen avenue, Detroit, as stated in the petition, and that on or about the 23d of February, 1910, he took the child from the home. His purpose and the reason for said action are alleged to be:

"To have the said child cared for; that the said petitioner had left the said child at said last-mentioned place, and was neglecting the said child, and spending nearly all her time in consultations with one George A. Fritch and his counsel, and other witnesses; that she became infatuated with the idea that it was her duty at all hazards to her reputation and home to endeavor to clear the said Fritch upon the charge of manslaughter then laid against him, and of which he has since that time been convicted; that said petitioner attempted to get this respondent to join with her in a fraudulent endeavor by proving a false alibi for the said Fritch to assist in clearing him, and that

she became very bitter towards this respondent because he refused so to do, and seemed determined to break up their said home; that this respondent, believing that the said petitioner would recover from her infatuation as above mentioned, and would return to her home, and fearing that she would take said child from said home and deprive this respondent of any right of access to him, and believing that she in her present state of mind was unfit and unsuitable to have the care and custody of said child, placed the said child with friends who would care for it until the said petitioner and this respondent should arrange their difficulties."

He further returned:

"That neither at the time of the issuing of said writ nor at any time since was the said Kenneth Knott, mentioned in the said writ of habeas corpus, in his custody or in any manner under his power or restraint, and that he did not have him in his custody or under his power or restraint at the time of the application for said writ, and that he has not had said child at any time since; and further states that he has not at any time since the issuing of the said writ, or since the issuing of any writ in relation to said matter by the said court prior to the issuing of the first above mentioned writ, transferred the custody or restraint of the said Kenneth Knott to any person. Respondent further says that he does not know at the present time the whereabouts of the said child; that, when he last knew of the whereabouts of the said child, he was in the Dominion of Canada."

The circuit judge before whom the writ was made returnable, upon reading the return, and on March 15th, determined that the return which was made was partial, evasive, incomplete, and insufficient, not in compliance with the statute, and he ordered the said Knott to make a more complete and explicit return. He refusing in open court to make any further return, and offering no excuse for such refusal, an attachment was issued against his body. Having been arrested by virtue of the attachment and brought before the court, and still refusing to obey the writ of habeas corpus, "and openly and wilfully refusing to make a sufficient return as required by the order of this court," he was ordered to be committed to close custody

in the county jail without being allowed the liberties thereof, there to remain until he should make a complete and sufficient return. Upon the 19th of March, 1910, while the said Knott was in custody, his counsel brought on for hearing a motion to quash the writ of habeas corpus, the writ of attachment, and the commitment. The court denied the motion.

It is contended:

(1) That the petition was insufficient to justify the issuance of a writ of habeas corpus.
(2) That the return was sufficient to show that the court had no jurisdiction in the matter and therefore no further return should have been required.
(3) That, even if the prior proceedings were regular, the commitment is void because it was altered by the attorney for the petitioner after it had been signed by the clerk of the court and delivered to the sheriff for service.

OSTRANDER, J. (*after stating the facts*). The order for the commitment was made March 15th, as appears by the record of the court. The commitment was issued that day. The clerk, by inadvertence, dated it March 14th, and recited therein that the order therefor was made on March 14th. This correction of the commitment was asserted as a reason for quashing the same. With respect to this the court said:

"As far as the change in the writ is concerned, the court approves of the change in conformity with the facts."

This after counsel for both parties, in response to the inquiry of the court, admitted that the changes made conformed to the fact. The respondent was in any event in custody and the change in the commitment affected him in no way. It would have been mere matter of form to hand it to the clerk for correction.

The statute requires the person upon whom any such writ shall have been duly served, if such person shall have had the party in his power or custody or under his restraint at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint

to another, to particularly state in the return to whom, at what time, for what cause, and by what authority such transfer took place, and, further, that if the person upon whom the writ has been served shall refuse or neglect to make a full and explicit return to the writ within the time required by law, and no sufficient excuse shall be shown for such a refusal or neglect, it shall be the duty of the court before whom such writ shall have been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person and commit him to the jail of the county until he shall make return to the writ. See 3 Comp. Laws, §§ 9869–9873. It will be perceived that in committing the respondent the court was not exercising the inherent jurisdiction and power of courts to compel obedience to the orders of court, but was following the method which the statute affirmatively requires shall be followed to enforce obedience to the command of the writ. If, therefore, the court had jurisdiction to issue the writ, and if the return thereto, the child not being produced, was evasive and not full and explicit, the action of the court has affirmative legislative approval.

It is said that the petition fails to show that the petitioner is entitled to the custody of the child as against the respondent, and, on the other hand, shows that the respondent is legally entitled to said custody. This contention is based, in part, upon the provisions of 3 Comp. Laws, § 8701. This section is a part of chapter 234, the title of which is "Guardians and Wards," and relates to the powers of judges of probate to appoint guardians for minors. There can be no doubt that the father is the natural guardian of his child, nor that the statute just referred to contemplates that, as against all other relatives and all other persons, the father, and, in case of his decease, then the mother, they being, respectively, competent to transact their own business and otherwise suitable, are entitled to be appointed guardians of the persons of minor children. It is also provided (3 Comp. Laws, § 8689)

that in case of the separation of husband and wife having minor children, the mother of said children shall be entitled to the care and custody of all such children under the age of 12 years. There is nothing in either provision which interferes with the right of a court of competent jurisdiction, upon investigation and upon consideration of the best interests of a minor child, to commit said child to the custody of either the father, the mother, or of some other suitable person. But until the right to such custody has been judicially determined, and as between parents of a minor who are living together as husband and wife, there is no rule, statute or other, which permits either, as of right, to dispose of a minor child to the exclusion of the other. It is averred in the petition for the writ of habeas corpus that since the 23d day of February, 1910, these parties have not resided together as husband and wife at their home. The answer of respondent indicates a serious estrangement. If the petition is treated as asserting a separation of the parents, then it asserts also a *prima facie* right of the mother to the custody of this child.

It is said that the statute (section 9858) limits the right to the writ to cases where persons are restrained or imprisoned within the State, and limits the jurisdiction of the circuit court for Wayne county (section 9860) to cases of restraint within the county, and there is no allegation in the petition that the child is within the State or within the jurisdiction of the court. We do not feel called upon to enter at this time into a nice discussion of the effect of the apparent legislative limitations upon the use of the writ of habeas corpus. See *In re Jackson*, 15 Mich. 417; *Rivers* v. *Mitchell*, 57 Iowa, 193 (10 N. W. 626); 21 Cyc. p. 309. The parents of the child are both of them within the jurisdiction of the court, and their home and that of the child is in Wayne county. It is alleged in the petition that the child is detained, imprisoned, or concealed by the father in the city of Detroit or elsewhere. This is equivalent to the allegation that the restraining force, the

control of the detention, and of the person of the child is within the jurisdiction, and it does not appear that the place of detention can be more specifically stated. What we are now required to decide is whether the allegation is sufficient for purposes of jurisdiction to issue the writ. We hold that it is sufficient.

It is said that the petition does not allege that the respondent is unfit to have the custody of the child or that he is not caring for him in a proper and reasonable manner, or that the petitioner is a fit person to have his care and custody or that she is in condition to care for him properly, and that there is no statement in the petition from which it may be inferred that the child would be benefited by the transfer from the custody of respondent to that of the petitioner; that, unless such a showing is made on the hearing, the court would be obliged to dismiss the writ because it could not properly make an order giving the child into the custody of the mother.

The argument assumes that the child is in the custody of the father, and it must rest upon some notion of a legal right of one parent as against the other, in the absence of judicial determination, to dispose of the child—an argument already answered. It may be added that it is the husband who is here asserting such right of disposal and admits having placed the child beyond the care and control of his mother; that without a return which shows what he has done with his child, and without his production of the child, the court is in no position to make intelligently any order in the premises.

It is said that, in any event, the return is sufficient because it appears therefrom that the child is outside of the State of Michigan. It does not appear by the return that the child is outside of the State of Michigan or outside of the county of Wayne, or that it was outside of the jurisdiction when the return to the writ was made. It would not be beyond the power of the court to inquire into the fact if respondent had returned absolutely that at the time the writ issued and at the time the return was made the

child was outside of the State. Such an allegation is traversable. In this case the allegations found in the return are not traversed, for the very good reason that the return itself was adjudged by the court to be an insufficient return. Clearly the law would need amendment if the jurisdiction of a court in habeas corpus proceedings depended upon the allegations in the return to the writ.

We find no error in the proceedings. We find the return incomplete, not explicit, and not such an one as the statute requires to be made. The petitioner in habeas corpus will recover of the respondent (the plaintiff here) costs of this court to be taxed as in a cause heard upon motion.

HOOKER, MOORE, MCALVAY, and BLAIR, JJ., concurred.

VILLAGE OF TRENTON *v.* RUCKER.

1. WATERS AND WATERCOURSES—EASEMENTS AND SERVITUDES—FLOWING LANDS—DRAINS.
   Residents of villages are subject to the rule, applicable to rural localities, that their land is bound to receive the flow of surface water from adjacent higher land, coming in substantially its natural amount and condition.[1]

2. SAME—MUNICIPAL CORPORATIONS—VILLAGES.
   Municipalities may not collect and discharge surface waters in unnatural volume upon private land.

3. EQUITY — PLEADING — AFFIRMATIVE RELIEF — PRAYER OF ANSWER.
   Without a prayer in defendant's answer for affirmative relief, the court of equity cannot enjoin complainant from discharging upon his real property waters artificially collected.

[1] For rights as to flow of surface water, see note to *Gray* v. *McWilliams* (Cal.), 21 L. R. A. 593.

4. WATERS AND WATERCOURSES—EASEMENTS—VILLAGES.
In a village which has no sewage system, a property owner may not interfere with the natural flow of water across his lands not in process of improvement, and may be enjoined by the village from interfering with the flowage of surface water which has from time immemorial drained across his land.

OSTRANDER, MOORE, and STONE, JJ., dissenting.

Appeal from Wayne; Murphy, J. Submitted February 10, 1910. (Docket No. 130.) Reargued July 1, 1910. Decided July 14, 1910.

Bill by the village of Trenton against J. Dean Rucker to restrain defendant from interfering with certain drains. From a decree for defendant, and an order adjudging complainant to be in contempt for violation of said decree, complainant appeals. Reversed, and decree entered for complainant.

Lehman, Riggs & Lehman, for complainant.

Frank W. Atkinson, for defendant.

Defendant is the owner of a lot in the village of Trenton, lying between Front street and the Detroit river, 82½ feet by 160 feet. The block lying immediately to the northwest of defendant's lot and across Front street slopes somewhat to the south and east. The water collecting on said block has, for a great many years, run in a southeasterly direction, crossing Front street in front of defendant's lot, and thence across defendant's lot to the Detroit river. Defendant had been the owner of the lot in question about nine years before the filing of the bill herein. Some time prior to his purchase thereof, the water, collecting on the block to the northwest, instead of being permitted to find its way to defendant's lot over the surface, was carried by an underground drain to Front street, and thence across Front street, under the surface of the street, to defendant's lot, whence by a natural channel it reached

the river. About eight years ago, the complainant, by agreement with the defendant or his agent, put in a six-inch tile drain across defendant's lot, from Front street to the river, to carry said water, the tile being laid in the old channel. Just before the village filed its bill of complaint, defendant stopped up the drain, causing the water to back up on Front street. This he did because, he says, he learned that a sewer had been connected with the drain higher up by one Stokes, and it was his understanding that surface water only should be carried through it. Thereupon the bill of complaint herein was filed, praying for an injunction against defendant restraining him from obstructing said drain. A temporary injunction was issued. Defendant answered, admitting that from time immemorial the surface water collecting on the block, lying to the northwest of his lot, had reached the river by running across his land. He asked that the injunction be dissolved, and the bill of complaint dismissed, but prayed for no affirmative relief. After a full hearing in open court, and on March 5, 1909, the following decree was entered:

"(1) That the bill of complaint filed in this cause be and the same is hereby dismissed.

"(2) That the injunction heretofore issued in this cause be and the same is hereby dissolved.

"(3) That the said complainant remove from the property of said defendant the underground system of drainage, placed in said property of said defendant by virtue of the said license, and discontinue the use of said property of said defendant for the purpose set up in said bill of complaint, or for any purpose whatsoever, within ninety days from the date of this decree."

After the entry of said decree, complainant took out the crocks it had laid in defendant's land, and compelled all sewers to be disconnected with the drain. Thereafter the surface water continued to flow through the box or pipe laid across Front street, and upon defendant's land, to the river through the ditch where the pipe had lain, as it had done since time immemorial, except that by the construction of a new drain from the center of the block north to

Pine street a considerable portion of the surface water was diverted in another direction. Defendant then petitioned the circuit court for an order holding the complainant in contempt, claiming that under the third clause of the decree above quoted, the complainant was bound to prevent any surface water from passing on or over defendant's land. After a full hearing on the contempt proceeding, the court held the complainant guilty of contempt, because it had failed to prevent all the surface water from passing onto and over defendant's land. Complainant appeals.

BROOKE, J. (*after stating the facts*). In what we have to say hereinafter, it will be borne in mind that the complainant village has no sewage system. That it is not claimed by defendant, that by reason of urban improvements, raising, grading streets, etc., therein, the natural course of the surface water has been diverted upon his land, or that the volume thereof has been increased by any act of complainant. He specifically admits in his answer that the water in question has flowed across his land from time immemorial. Under the circumstances disclosed by the record in this case, therefore, we are of opinion that the rules of law established by this court, relative to the care of surface water in rural districts, must control. A contrary holding would, it seems to us, place it within the power of any resident of a village to compel the village to enter upon the construction of a sewage system, whenever he happened to become the owner of a lot which from time immemorial had borne the servitude of carrying surface water from adjacent lands. Villages ordinarily are not wealthy enough to undertake expensive public works, and residents therein must be presumed to have taken up their homes there with a knowledge of this fact. In villages, taxes are lower and conveniences are fewer than in towns and cities. Those who choose to live in villages must bear the ordinary inconveniences incident to such residence. Treating this case as falling within the rural, rather than the urban, class, there is no difficulty in

holding that the defendant is bound, under our decisions, to receive the flow of surface water from the adjacent higher land, coming in substantially its natural amount and condition. *Boyd* v. *Conklin*, 54 Mich. 583 (20 N. W. 595, 52 Am. Rep. 831); *Rice* v. *City of Flint*, 67 Mich. 401 (34 N. W. 719); *Osten* v. *Jerome*, 93 Mich. 196 (53 N. W. 7); *Horton* v. *Sullivan*, 97 Mich. 282 (56 N. W. 552); *Finkbinder* v. *Ernst*, 126 Mich. 565 (85 N. W. 1127); *Cranson* v. *Snyder*, 137 Mich. 340 (100 N. W. 674). See, also, *Gregory* v. *Bush*, 64 Mich. 37 (31 N. W. 90, 8 Am. St. Rep. 797).

It seems to be settled law in several other States that municipalities are not obliged to provide artificial drainage for surface waters. They may not, however, collect them and discharge them in unnatural volume upon private lands. *Lynch* v. *Mayor, etc., of New York*, 76 N. Y. 60 (32 Am. Rep. 271); *Davis* v. *City of Crawfordsville*, 119 Ind. 1 (21 N. E. 449, 12 Am. St. Rep. 361); *Gilfeather* v. *City of Council Bluffs*, 69 Iowa, 310 (28 N. W. 610); *City of Atchison* v. *Challiss*, 9 Kan. 603; *Collins* v. *City of Waltham*, 151 Mass. 196 (24 N. E. 327).

Clause 3 of the decree in the court below was, in any event, unwarranted by the pleadings. Defendant sought no affirmative relief. *Thayer* v. *Lane*, Walk. Ch. (Mich.) 200; *Smith* v. *Rumsey*, 33 Mich. 183; *Booth* v. *Thompson*, 49 Mich. 73 (13 N. W. 363); *Andrus* v. *Scudder*, 120 Mich. 502 (79 N. W. 794). But this is unimportant, as we are of opinion that complainant was entitled upon the hearing to a decree enjoining defendant from interfering with the natural flow of surface water over his premises, such decree to become operative only when complainant had caused all sewers (*i. e.*, drains connected with water-closets) to be disconnected with said drain.

Inasmuch as the proceedings upon contempt, subsequent to decree, show that nothing but surface water at

that time passed through the drain, a decree will be entered in this court to that effect, with costs of both courts.

BIRD, C. J., and HOOKER and MCALVAY, JJ., concurred with BROOKE, J.

BLAIR, J. Inasmuch as the defendant was not seeking to reasonably improve his property in accordance with the urban rule, I concur in the foregoing opinion.

OSTRANDER, J. (*dissenting*). There are two statements in the opinion of Mr. Justice BROOKE, controlling of the conclusion which he reaches, which I think find no support whatever in the record. Those statements are:

"In what we have to say hereinafter, it will be borne in mind that the complainant village has no sewage system. That it is not claimed by defendant that by reason of urban improvements, raising, grading streets, etc., therein, the natural course of the surface water has been diverted upon his land, or that the volume thereof has been increased by any act of complainant. He specifically admits in his answer that the water in question has flowed across his land from time immemorial."

The land is not in a state of nature. It is in an incorporated village, which, according to the last census, had upwards of 1,200 inhabitants. The block in question is built upon with houses and barns. The village has a system of underground drainage, adopted and constructed by village authority. This is expressly charged in the bill of complaint, which further charges that the water collected in this system is discharged upon the land of defendant by consent of the owner thereof. What is charged in the bill, and what defendant specifically admits, is not that *the water in question* has flowed across his land from time immemorial, but that—I quote from the bill—"from time immemorial the land * * * has been drained *when not interfered with artifically*" across the land of defendant. It is not claimed on the part of the village that it ever acquired the right to discharge upon defend-

ant's land the water collected by its drainage system except by consent of the owner of the land, and it appears from the statement of one of the solicitors for complainant, found in the record, that no question was involved at the hearing "except whether or not this," the alleged consent of the owner, "was a license or whether we had a right to maintain it because we went upon that by consent." The court found, upon abundant and apparently undisputed testimony, that the village had a mere parol license from the owner of the land to so discharge water on the land, and that the license had been revoked. As the bill charged the owner with interfering with the discharge of water on his premises, and prayed for a perpetual injunction to restrain such interference, it would seem that a decree dismissing the bill was properly entered. The revocation of the license terminated the rights of the village in the premises. *Nowlin Lumber Co.* v. *Wilson*, 119 Mich. 406 (78 N. W. 338).

But it was intimated on the argument that complainant did not rely solely upon the alleged license. If we were to assume, in the face of the charge in the bill, that the village expended large sums of money in constructing a system of artificial drainage, in reliance upon an alleged consent of the owner of the property to receive the water so collected, that the village intended also to assert a right to have the waters go as they would have gone if the land was in a state of nature, the complainant has no better case. Whether the rule applicable to rural property and conditions should be applied in this case does not depend upon the simplicity or complexity of the system of drainage established in the village of Trenton. The court may, and should, take judicial notice of the fact that after the building of a village upon land the land is no longer in a state of nature, and there is and can be of necessity no such thing in fact as that natural percolation and flow of surface water which existed before the village was built. It is said by this court in *Boyd* v. *Conklin*, 54 Mich. 583 (20 N. W. 595, 52 Am. Rep. 831):

"A number of the most striking cases cited by plaintiff's counsel in support of his appeal, as laying down the broadest doctrine, and as relied upon in a good share of his other citations, were cases where the lands were in towns and cities, and the erections or acts in litigation referred to the uses of that class of property. And in relying on these it was claimed that there was no substantial foundation for any distinction between urban and rural property. There is no question but that such a distinction is recognized in the civil-law authorities referred to on the argument, as well as in several of the cases cited. The distinction is one of substance and not arbitrary. As already suggested, the adjoining owners owe mutual duties—the one to receive the natural flow, and the other not to injuriously change its conditions. It is obvious that the laying out of town streets and the multiplication of buildings cannot avoid making serious changes in the surface of the ground and in the condition of surface water. Grades must usually be established for streets and sidewalks, and pavements and other surface changes are usual, in addition to the walls of buildings which, with their embankments, must obstruct or change the drainage. It is almost universally expected and provided that sewerage and drainage shall be regulated by some municipal standard. There cannot be towns without changing the face of the land materially. And where the same rule has been applied to towns as to the country, it has, in some cases at least, been done expressly, because in the circumstances of the record the particular land in question had remained under rural conditions. If—as seems to be true—some decisions ignore the distinction, they depart from the old rule, and cannot be maintained as harmonious with the general line of authority, unless on special facts which do not justify their broad *dicta*."

Whether in any case, as between proprietors of adjoining lands in a village, the rule applicable to rural property should be held to apply, we need not determine. Here the village—the municipality—is asserting the right to flow the land of one member of the community with water gathered in underground conduits, for the benefit of the community. This it may not lawfully do.

In so far as the court below held that the village had no right to discharge, by means of its artificial drainage, water

upon the lands of defendant, and therefore dismissed the bill of complaint, the decree is right and should be affirmed. But the decree goes further than this. The purpose of the bill has been stated. The decree requires the village to remove from defendant's property the underground tiling or crocks placed there by the complainant under the license from the owner, and to discontinue the use of the property for the purpose set up in the bill of complaint or for any purpose whatsoever within 90 days from the date of the decree. The village has removed the tiling or crocks from defendant's premises, but it appears by the record in certain contempt proceedings instituted by the defendant, that the village has not ceased to cast the water from its drainage system upon the defendant's land. For this the court held the village to be in contempt. The village then appealed from the original decree. The action of the village authorities has made the requirement that the tile be removed from defendant's land unimportant. As to the other requirement, namely, that the village, in 90 days, discontinue the use of defendant's premises, the decree requires only what the complainant ought to do. If the time allowed was too short, it should have applied for some modification of the decree. Its right to use the premises being denied, it should stop using them. Defendant asked for no affirmative relief in the answer, and did not ask in the court below or in this court to amend the answer. We therefore are constrained to limit the relief by decree to the dismissal of the bill. But, in view of the considerations above stated, we decline to award any costs to appellant.

MOORE and STONE, JJ., concurred with OSTRANDER, J.

TROY *v.* RODGERS.

1. JUDGMENT—CONCLUSIVENESS—COLLATERAL ATTACK—JUSTICES OF THE PEACE.

   A justice's judgment cannot be collaterally attacked by proof that a judgment was entered after the ten-day limit fixed by Act No. 475, Local Acts 1903, as amended by Act No. 660, Local Acts 1907, without the defendant's consent, where the record shows the consent of both parties to the irregular continuance.

2. JUSTICES OF THE PEACE—ADJOURNMENT—JUDGMENT.

   Under the acts applicable to the city of Detroit, the justice who had jurisdiction of the parties and subject-matter had no authority ten days subsequent to the trial for any purpose except to render judgment.

3. SAME—ESTOPPEL.

   Consent to an irregular adjournment, with knowledge of the facts, creates an estoppel to insist on a discontinuance thereby.

Appeal from Wayne; Murphy, J. Submitted February 15, 1910. (Docket No. 153.) Decided July 14, 1910.

Judgment creditor's bill by John F. Troy against Lillian Rodgers. From a decree for complainant, defendant appeals. Affirmed.

Allan P. Cox, for complainant.

Clark, Lockwood & Bryant, for defendant.

MCALVAY, J. Complainant filed a judgment creditor's bill in the Wayne circuit court, in chancery, based upon a judgment rendered by a justice of the peace of the city of Detroit July 3, 1908, a transcript of which had been duly filed. From a decree rendered in said suit in favor of complainant in the usual form in such cases, the defendant has appealed to this court.

Defendant contends that the judgment of the justice's court was void, and therefore formed no basis for a judgment creditor's bill. This is the only question presented in the case. There is no dispute as to what the transcript of the justice's docket shows.

The suit was commenced by a summons which was personally served, and on the return day the parties appeared, and an issue was joined in an action of assumpsit. Several adjournments were had, a deposition was taken and returned into court, and on June 11, 1908, the parties being present in court, the evidence in the case on both sides was taken. Afterwards two further adjournments were had, the last one by consent to June 20, 1908, 9 a. m. Up to this point in these proceedings no dispute arises. To show the record, and to make more clear the contention, the balance of this transcript is given. It reads:

"June 20, 9 a. m. Case called, parties in court. Defendant files brief and decision reserved to June 30, 1908, 9 a. m. June 30. Decision reserved to July 3, 1908, by consent of parties. July 3. I rendered judgment in favor of plaintiff and against defendant for two hundred fifty-five 8/100 dollars damages, and $1.75 costs. [Signed]," etc.

The justice's court act of the city of Detroit (Act No. 475, Local Acts 1903), as amended by Act No. 660, Local Acts 1907, among other things, provides:

"SEC. 5. * * * They shall also have power to hold all cases for final decision not more than ten days: *Provided*, They announce the day upon which they will render final judgment."

It is contended that the extension of the time from June 30th, the date fixed by the justice and being the statutory limit of 10 days, to July 3d, was without authority, and operated to oust the justice of jurisdiction of the case, and that the judgment entered upon the day last named was consequently void. It was claimed on the hearing by complainant that the extension of time was an adjournment by consent of parties. To meet this claim defend-

ant offered evidence tending to show that the transcript of the justice's docket did not correctly state the facts as to the extension of time from June 20th to July 3d being made "by consent of parties." This transcript cannot be attacked collaterally. *Miller* v. *Smith*, 115 Mich. 427 (73 N. W. 418, 69 Am. St. Rep. 583), and cases cited; *Cole* v. *Potter*, 135 Mich. 326 (97 N. W. 774, 106 Am. St. Rep. 398).

The case must be determined by the construction which is put upon the justice's act of Detroit, above quoted. At the time this extension was made the court had jurisdiction of the case under this law for the purpose of rendering final judgment. Of his own motion he had no jurisdiction for any other purpose, and must render his decision at that time. This is admitted to be the law in this State. *Harrison* v. *Sager*, 27 Mich. 476; *Brady* v. *Taber*, 29 Mich. 199. From aught that appears in this record the justice was ready to render judgment on June 30th, but the decision was reserved to July 3d by the action or consent of the parties. May it not be said that, in view of such conduct on the part of the parties, they are estopped to claim a discontinuance? A party who, with knowledge of the facts, applies for, or consents to, an irregular continuance or adjournment, is estopped afterward to insist, to the prejudice of the other party, that the action was thereby discontinued. 24 Cyc. p. 489.

In *Patterson* v. *McRea*, 29 Mich. 258, it was held that a defendant who has requested, or at least consented to, an adjournment of a suit in justice's court on account of the sickness of the justice, will not be heard to complain that such adjournment was on the justice's own motion, and, being for more than six days, worked a discontinuance so as to deprive the justice of jurisdiction to further proceed with the cause. The above case was cited and applied in *Blair* v. *Compton*, 33 Mich. 414.

In *Fischer* v. *Cooley*, 36 Neb. 626 (54 N. W. 960), where adjournment beyond 90 days, under the statute, worked a discontinuance of the cause, and ousted the

court of jurisdiction, it was held that the rule was otherwise where such continuance was granted by consent, or on the agreement of the parties. The party on whose application a cause in justice's court is adjourned beyond the period limited by the statute is estopped to claim a dismissal by reason of such adjournment. To permit him to do so would be to allow him to reap a benefit from his own acts to the prejudice of the other party. *Jennerson* v. *Garvin*, 7 Kan. 136; *West* v. *Berg*, 66 Minn. 287 (68 N. W. 1077).

In *Beam* v. *Reynolds*, 144 Mich. 383 (108 N. W. 83), it was held that a second adjournment by a justice, on motion of the plaintiff, defendant and counsel being present and making no objection until after the departure of plaintiff, was equivalent to an adjournment by consent. In that case Justice HOOKER, who wrote the opinion, said:

"Ordinarily, a second adjournment, in the absence of the defendant, is fatal, unless upon a motion supported by the oath of some one. In this case the return shows that the defendant and counsel were present, and did not object to the granting of the adjournment until after the plaintiff had gone. This was equivalent to an adjournment by consent. Tiffany's Justice's Guide (1905), p. 303; *Dunham* v. *Heyden*, 7 Johns. (N. Y.) 381; *Kilmore* v. *Sudam*, 7 Johns. (N. Y.) 529; see, also, *Patterson* v. *McRea*, 29 Mich. 258."

The ruling in the above case is perfectly consistent with the ruling in the recent case of *Adams & Ford Co.* v. *Cullen*, 159 Mich. 669 (124 N. W. 549), where it was held that a justice loses jurisdiction by adjourning a case, without showing on oath that it is necessary, the adjournment being for the purpose of obtaining a surety, *and against the objection of the defendant.*

The adjournment in this case having been made by and with the agreement of the parties, we think that it better comports with justice to hold the parties to their agreement, and apply the doctrine of estoppel.

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

HOOKER, MOORE, BROOKE, and STONE, JJ., concurred.

WEBER *v.* WAYNE CIRCUIT JUDGE.

1. COSTS—TRIAL FEE—CONSOLIDATION OF CAUSES—MANDAMUS.
   But one trial fee is allowable in two actions of ejectment tried together, under stipulation.

2. SAME—TERM FEES—PRACTICE IN WAYNE COUNTY.
   The practice authorized and adopted in Wayne county under Act No. 31, Pub. Acts 1903, is inconsistent with 3 Comp. Laws, § 11254, so that term fees are not taxable.

Mandamus by Joseph F. Weber to compel Henry A. Mandell, circuit judge of Wayne county, to vacate an order disallowing certain items in a taxed bill of costs. Submitted January 20, 1910. (Calendar No. 23,733.) Writ denied July 14, 1910.

Jasper C. Gates, for relator.

Walter Barlow (*P. J. M. Hally*, of counsel), for respondent.

BLAIR, J. This is an application for a writ of mandamus to require the respondent to restore to relator's proposed bill of costs, and allow, the following items, disallowed by respondent in taxing relator's costs, viz.:

"For trial of issues of fact, $15; for term fees (case on calendar but not reached or postponed), viz.: January term, 1908, $5; April term, 1908, $5; September term, 1908, $5."

Two cases in ejectment were pending in the Wayne circuit, in both of which the city of Detroit was plaintiff. In one of the cases the relator was the sole defendant; in the other, the relator, August Tank, and Mary Grandt were defendants.

The sixth paragraph of the respondent's return shows that both of these cases—

"Involved the same issue, viz.: The validity of a certain tax sale for the collection of special assessments for paving Myrtle street in the city of Detroit, and were tried together before this respondent and a jury as one suit, and that a stipulation was filed in *City of Detroit* v. *Weber*, that said cause should abide by the decision of the Supreme Court in the case of *City of Detroit* v. *Weber*, *Tank*, and *Grandt*, decided by said Supreme Court on November 5, 1909," 158 Mich. 590 (123 N. W. 36).

The seventh paragraph of such return shows—

"That the reason he disallowed the fee of $15 for trial of issue of fact contained in the bill of costs of relator in the case of *Detroit* v. *Weber* * * * was because the attorney for the relator, at the same time the bill of costs" in *Detroit* v. *Weber* "was presented to this respondent for taxation, presented a certain other bill of costs for taxation in the case of *Detroit* v. *Weber*, *Tank*, and *Grandt*, which contained an item of $15 as a fee for trial of issue of fact, which said item was allowed by this respondent in said last-mentioned bill of costs, but this respondent refused to allow such a trial fee of $15 in both of said cases so tried together as one case at the same time and before one jury."

The second paragraph of such return shows that said cause of *Detroit* v. *Weber* "was on the list of cases for trial at the September term, 1907," and on the "January, April, and September terms, 1908," of said Wayne circuit court.

The fourth paragraph of such return shows—

"That according to the practice of the Wayne circuit court under the provisions of Act No. 31, Public Acts 1903, of the legislature, it calls a list of 100 cases monthly from the list of cases noticed under the terms of said act as ready for trial, and sets the same for a day certain for trial as near as may be, and that it is only necessary to once notice any cause pending in said court for trial and file but one note of issue therein after the same shall be at issue and ready for trial to place said cause upon the list of cases so ready for trial; that when any cause is once placed on such list as ready for trial, it remains thereon until finally tried or otherwise disposed of by the court; that said court has a clerk appointed by the judges there-

of whose special duty it is to arrange for the trial of said causes so placed on said list for trial; that said clerk notifies the attorneys for the respective parties when their cases can be heard by the court, and said clerk prepares a list daily from such cases so set for trial as hereinbefore stated, and presents such daily list to the presiding judge of said court, who in turn distributes such cases between himself and the several judges of said court for trial; that this has been found to be the only practical method of dispatching the business of the court owing to the very large number of cases tried and to be tried in said court, and of furnishing the several judges of said court an opportunity to employ their time to the best advantage in the performance of their judicial duties."

The fifth paragraph of such return alleges—

"That said act of the legislature hereinbefore mentioned supersedes, in the county of Wayne, section 11254 of the Compiled Laws of 1897, providing for the taxation of term fees in the bill of costs of the prevailing party to a suit tried in the several circuit courts of the State, and that it has been the practice of the court to allow only one term fee to be taxed under the provisions of said act so regulating the method of procedure and practice of the law in said circuit court for the county of Wayne, as was done by this respondent in the bill of costs attached to relator's petition herein."

The eighth paragraph of such return shows—

"That the circuit court for the county of Wayne is practically in one continuous session the year round, a session thereof being held on each secular day of the year, and that when one term of said court is closed a new term thereof is at once opened on the same day, and that the regular business of the court is practically going on continuously every secular day of the year, and that under the provisions of section 3 of said act of the legislature a fresh panel of citizens, qualified for jury duty, was called every 30 days to sit and act as jurors in said circuit court."

The judgment in favor of defendant Weber contained the usual provision that he recover his costs to be taxed. There was but one "trial of issues of fact," and therefore the respondent properly allowed but one trial fee. Act

No. 31, Pub. Acts 1903, regulates the practice and procedure as to notices of trial and the making up of the docket of cases for trial, so far as the circuit court for the county of Wayne is concerned. *Fornia* v. *Wayne Circuit Judge*, 140 Mich. 631 (104 N. W. 147); *Hoock* v. *Sloman*, 145 Mich. 19 (108 N. W. 447).

In our opinion, the practice authorized and adopted under this statute is inconsistent with the allowance of term fees based upon a widely different practice. The reasons for the provisions as to term fees having ceased to exist in the county of Wayne, the allowance thereof, except as to the first, should also cease.

The writ is denied, with costs.

OSTRANDER, HOOKER, MOORE, and STONE, JJ., concurred.

HARRINGTON *v.* CALHOUN PROBATE JUDGE.

COSTS—JUDGMENT—AMENDMENT—DELAY.

After two years from the date of a judgment awarding costs, the Supreme Court will not exercise its discretion, if it has the authority, to grant an amendment in proceedings by certiorari to review drain proceedings and award the costs against the petitioners for the drain, who are not parties to the record.

Certiorari by George Harrington and others against George W. Hamm, probate judge, and Edward D. Dickinson, drain commissioner of Calhoun county, to review proceedings for the establishment of a drain: On motion of relators to amend a judgment for costs. Submitted

February 23, 1910. (Calendar No. 22,714.) Motion denied July 14, 1910.

Hatch & Page, for the motion.

Winsor & Miller, *contra*.

BLAIR, J. On July 13, 1908, this court handed down a decision quashing certain drain proceedings. *Harrington* v. *Calhoun Probate Judge*, 153 Mich. 660 (117 N. W. 62). On the same day judgment was entered, quashing the proceedings and providing "that the relators recover of and from the respondents their costs of both courts to be taxed."

Plaintiffs in certiorari having presented their taxed bill of costs in accordance with the judgment, the same was allowed, and the costs taxed in their favor by the clerk of this court, October 17, 1908, at the sum of $135.35. In February, 1910, plaintiffs in certiorari filed a motion "to amend the judgment for costs heretofore entered in this cause by entering said judgment for costs against the petitioners for the said drain," etc.

Assuming, but not deciding, that this court might, in the exercise of its discretion, grant the amendment and cause the judgment to be entered against the petitioners, who were not parties to the record and against whom the statute does not in terms authorize the entry of judgment, we are not inclined at this late day to grant the motion.

The motion is denied, with costs.

OSTRANDER, HOOKER, MOORE, and STONE, JJ., concurred.

VAUGHAN *v.* FORD.

1. CONTRACTS—MODIFICATION—MISREPRESENTATION—ESTIMATE.
   After it was found that the plans for constructing a building were impracticable, the architects provided a new method of constructing the foundation by which for caissons of cement resting on bedrock were substituted piers with bells, which the engineer informed the contractor contained approximately an equal amount of concrete. In fact they contained 1,049 feet more of concrete. *Held*, that the contractor who proceeded to carry on the work under similar terms was entitled to extra compensation for the increased cost.

2. SAME—MECHANIC'S LIEN—EXTRAS.
   Pumping water which an independent contractor caused to flood the basement is properly allowed as an extra expense in a suit to enforce a mechanic's lien.

3. SAME—ACCEPTANCE OF WORK.
   In construing a building contract, it is competent evidence that steel beams were not to be encased in concrete, where it appeared that the architects accepted the work without objection.

4. MECHANIC'S LIEN—EFFECT OF FILING EXCESSIVE CLAIM.
   The filing of an excessive claim in entire good faith does not bar the attaching of a mechanic's lien.

5. SAME—NATURE.
   A mechanic's lien under 3 Comp. Laws, §§ 10710–10745, being a direct lien in behalf of the person entitled to it, not one by subrogation, the claimant is not bound by stipulations in the original contract to which they are not parties except as to the contract price.

6. SAME—RECOUPMENT—DAMAGES.
   A damage suit by an adjoining proprietor against the original contractor whose agreement provides indemnity against such claims, does not bar or restrict a subcontractor in the enforcement of a mechanic's lien when the evidence fails to show a breach or failure of performance of the contract.

Appeal from Wayne; Hosmer, J. Submitted April 7, 1910. (Docket No. 7.) Decided July 14, 1910.

Bill by Jay W. Vaughan and Joseph C. Dumont, copartners as Vaughan & Dumont, against Edward Ford and Frank H. Goddard to enforce a mechanic's lien. From a decree for complainants, defendants appeal. Affirmed.

Choate & Webster (*Leo M. Butzel*, of counsel), for complainants.

Gray & Gray, for defendant Ford.

C. K. Latham and *W. C. Stuart*, for defendant Goddard.

BLAIR, J. Complainants filed the bill of complaint in this case to enforce a mechanic's lien against the defendant Ford as owner, and the defendant Goddard as masonry contractor, for the erection of a certain office building known as the "Ford Building," on the northwest corner of Congress and Griswold streets in the city of Detroit.

On the 18th day of September, 1906, Vaughan & Dumont and Goddard entered into a contract, portions of which we quote, as follows:

"Whereas, F. H. Goddard has taken a contract for the erection of a building on the northwest corner of Griswold and Congress streets, in the city of Detroit, Michigan, which contract includes the construction of forty-seven caissons according to plans and specifications of D. H. Burnham & Company, architects of said building; and,

"Whereas, J. C. Dumont and J. W. Vaughan have agreed to construct said caissons as subcontractors under said Goddard.

"Now, therefore, it is agreed between said J. C. Dumont and J. W. Vaughan, as parties of the first part, and said F. H. Goddard, as party of the second part, as follows:

"1. Said J. C. Dumont and J. W. Vaughan shall construct said forty-seven caissons ready to receive the columns according to said plans and specifications within sixty days from the date of delivery of the rings hereinafter mentioned for the sum of sixty-nine thousand, eight hundred and sixty-seven dollars ($69,867). * * *

"10. The foregoing agreement contemplates excavation to depth of one hundred and twenty feet. If the excavation is less than one hundred and twenty feet then there shall be a rebate to Goddard of the amount of such shortage at the rate of 36 $\frac{41}{100}$ cents per cubic foot. If it becomes necessary to excavate below one hundred and twenty feet then for such extra excavation up to one hundred and thirty feet said Dumont and Vaughan shall be paid at the rate of 36 $\frac{41}{100}$ cents per cubic foot. For all work below one hundred and thirty feet the price shall hereafter be agreed upon, which price shall not exceed exact cost."

The specifications for foundations and masonry provided, among other things:

"The caissons are to be excavated to bedrock, for which purpose this contractor shall provide all necessary wood lagging, steel rings, bracings, etc. The bedrock exists on an average one hundred and twenty (120) feet beneath grade line. This contractor shall estimate on a basis of 120 feet below grade, and shall give a price per foot for additions to or deductions from this depth. * * *

"Caisson construction: This contractor shall build caisson foundations as shown on both the engineering and architect's drawings, digging to be thoroughly braced and protected until concrete piers are complete; jacks and drums to be used where necessary. Shafts to be kept straight and plumb and carried down to bedrock. This contractor shall estimate on a basis of depth of 120 feet below grade line to bedrock and shall give a price per foot for additions to or deductions from this depth."

Complainants entered upon and proceeded with the work of excavating the caissons, or wells, for the cement piers until October 20, 1906, when water and gas burst into one of the wells, which had reached a depth of over 120 feet, and the work was stopped by mutual consent. By mutual consent, a new plan was substituted for the original plan. By the new plan, which was satisfactorily executed by complainants, the concrete piers were to go down 95 feet instead of 120 feet, and were to be belled with three or four bells in each well.

October 9, 1908, the owners of the Moffat building com-

menced suit against all of the parties to this suit to recover damages for their alleged removal of lateral support. A lien is claimed in the claim of lien and in the bill for a balance of $39,879.01, with interest from February 18, 1907. The circuit court entered a decree granting a lien for the sum of $19,581.50, with interest, and appeals have been taken by both defendants. Complainants have not appealed.

Defendant Ford appeals upon the grounds:

"(1) Because the amount allowed is excessive; and
"(2) Because the claim as presented was excessive;
"(3) Because with the Moffat block suit pending, the court cannot determine whether or not there is any balance due from the owner to the principal contractor, Goddard."

Defendant Goddard appeals upon the following grounds:

"1. The trial court erred in his findings in disallowing defendant Goddard's claims against complainants.
"2. The court erred in allowing complainants' claims for extras."

With reference to the contract determining the rights of the parties, the court determined that upon the happening of the accident—

"Both architects, contractor and subcontractor at that time felt that some changes under the existing circumstances would be desirable. At the end of the four or five days, the exact time matters not, the architects had brought forth the plans, which were subsequently followed in this case, whereby the support of the building was to rest upon piers in which there were three or more bells, I think, to each pier, or caisson, as it may be called, of concrete, and this plan was adopted in lieu, I think, of the original design which contemplated going through to solid rock. I am very certain that all parties at that time recognized the impossibility for the contract price, or anything like the contract price, of the putting through of the caissons, if you may call them such, to the bedrock, and I am satisfied from the evidence that it was agreed between the parties at that time that the plan of belling, I think, as it is called, should be substituted in place of the original design of going through to bedrock. Now

under these circumstances there can be no question in my mind but what the basis of the payment for this contract should be the contract price. It is testified, I think, on behalf of both parties, of all parties, in fact, that it was represented, I think, to Vaughan and Dumont, at that time, that the contents of the bells and the concrete work to be done under the new plan was substantially the same as under the old, and I think they are entitled for any excess there may exist to claim as an extra the difference between the actual—what would have been required under the original plans—and the actual volume which they put into the piers or caissons and bells as completed."

It is conceded that there was due from Goddard to complainants a balance of $15,685, and the controversy as to the amount of complainants' claim concerns the following items, which defendants contend were either improperly allowed to complainants, or improperly charged against defendant Goddard, viz.:

(a) Extra concrete	$692 45
(b) Pumping water	200 00
(c) Cantilevers	1,010 94
(d) Melchers' salary	969 90
(e) Hughes' salary	44 75
(f) Page's salary	14 95
(g) Alley paving	298 16
(h) Lost sacks	219 85
(i) Office expenses	445 50
Total	$3,896 50

(*a*) Mr. Gavier, chief engineer of construction for D. H. Burnham & Co., of Chicago, the architects of the building, testified that at the time of the substitution of the belling plan he told the parties that there would be approximately the same amount of cubical contents in both schemes. Mr. Dumont testified that Gavier said that the amount of concrete would be the same in both plans.

"And he says: 'I made it so that the amount of concrete which the bells take equals the amount that it will take to go down 120 feet.' It meant that 25 feet cut off would replace the concrete in the bells. And he says, 'I believe that you are about 53 cubic feet to the good.'

'Well,' I says, 'that won't make much difference one way or another, and we will try to go ahead and do it.'"

Mr. Goddard testified:

"*Q.* What, if anything, was said about the substitution of this new plan for the old by you?

"*A.* Why, they said if Mr. Gavier said it was the same thing he was satisfied. That is, we told him that included what was already excavated, just as it stood; the whole thing was practically equal or approximately equal to the new system. * * *

"*Q.* And which of them said what you referred to a moment ago in the testimony, that if the work was the same—something of that kind?

"*A.* Dumont.

"*Q.* And what was that?

"*A.* If the contents were the same, why it was all right with him."

It is apparent from this testimony that Mr. Dumont understood that he would be required to fill practically the same space with concrete under the substituted plan as under the original. Assuming that the understanding was that the cubical contents of the wells would be approximately the same under both plans, we do not think that such representation was sustained by proof that there was only 1,049 cubic feet difference in a total of 170,837 cubic feet. The word "approximately" is to be construed with reference to the subject-matter. An estimate of the cost of constructing a building, where uncertain factors enter into the estimate, might well be held to be approximately correct, although the actual cost exceeded the estimated cost by more than the difference in this case. But where, as in this case, the problem is a mathematical one of figuring the cubical contents of figures of definite dimensions admitting of accurate results, we agree with the circuit judge that the representation cannot be said to be approximately correct.

It is urged, however, that under the substituted plan the amount of excavation would be lessened by 13,331 cubic feet of 2-inch lagging required under the first plan.

Under the original plan, the 2-inch lagging lining the wells was to be left in. Under the substituted plan complainants were required to remove it. This order was complied with by complainants, and, according to Mr. Dumont, increased their work and prevented their working to the best advantage. The new arrangement was with reference to the space which complainants would have to fill with concrete; and the amount which they might gain and the added difficulties they might meet, otherwise than in the amount of concrete, were not considered except as, perhaps, they might be thought to offset each other. Mr. Gavier testified:

"*Q.* Was it not your understanding—I ask you in a fair way—your interpretation of what was said there, that they were to go ahead on the representation of there being the same number of cubic feet of concrete, at the contract price?

"*A.* Why, I certainly had that impression; yes, sir.

"*Q.* Now do you know, and did you prepare any figures—

"*The Court:* Do you mean to say that is, according to your recollection, the substance of your conversation that then took place?

"*A.* Yes, sir."

We, therefore, agree with the circuit judge that complainants were entitled to compensation for the extra concreting at the price adopted from the testimony of Mr. Dumont.

(*b*) The only pumping of water for which complainants were entitled to charge under their contract, in our opinion, relates to the water which Dumont testified flooded the basement through Mr. Goddard's taking up the curbstone and the acts of Hughes', the basement contractors', men digging holes through the clay banked up around the caissons to protect them. It appears from Mr. Goddard's testimony that he gave orders to Mr. Hughes' men with reference to starting the grillage, and, in the absence of evidence to the contrary, we do not think the record justifies a finding that the flooding of the wells arose from

the acts of an independent contractor, even if this would protect Goddard, if he was responsible for flooding the basement. We therefore agree with the conclusion of the circuit judge as to this item.

(*c*) The contract between Ford and Goddard provided:

"Steel in foundations: The steel erecting contractor shall deliver the grillage beams to the building, which the masonry contractor shall set in place. All other steel work in the foundations shall be set in place by the steel erecting contractor, the masonry contractor enclosing and completely encasing same with concrete as shown by the drawings, and herein specified."

The proposal of Dumont of August 29, 1906, to construct the caissons for $71,280 contained the following:

"This figure includes all material and labor for setting iron up to base of columns and cantilevers. Iron to be furnished by other contractor."

His proposal of September 1st, which was accepted, was as follows:

"My revised figure for the caissons, learning the thickness of lumber for lagging, is $69,867. The contents of my previous letter of August 29, '06, are to be the same."

On February 23, 1907, the architects wrote the following letter to complainants:

"*Gentlemen:* The digging of the 47 caissons of the Ford building have been completed, and we wish to say that you have given us a very excellent concrete job. We feel perfectly certain that our foundations are O. K. in every respect. This includes the setting of the grillage."

In view of complainants' proposal and the acceptance of the caissons as completed by the architects, we think the court properly construed the contract between complainants and Goddard as not requiring them to encase certain cantilever beams in concrete. As to the other items, we agree with the findings of the circuit judge, without further discussion.

An examination of the long record has satisfied us of

the correctness of the finding of the circuit judge that, notwithstanding the disparity between the claim as filed and the amount found due, the excessive claim was made and filed in good faith, and therefore should not bar the attaching of the lien.

Does the pendency of the suit for damages prevent a final determination? Goddard, by his contract, assumed the obligation to indemnify Ford against such liability as is involved in the suit by the owners of the Moffat building, but we find no such contractual obligation on the part of complainants to protect Goddard against liability. The facts as disclosed by this record, in the absence of contractual liability, do not indicate any liability on the part of complainants to either Ford or Goddard. The plans and specifications of the original and substituted schemes were prepared for the owner by an engineer of wide experience and unquestioned eminence in his profession, and by their contract complainants were subject to the directions of the architects and executed the work to their satisfaction, as evidenced, among other things, by their final certificate approving the work.

The important question, therefore, for determination, is: Does the contingent liability of Goddard to Ford operate to prevent or postpone the determination of the amount of complainants' lien against the building? We agree with the contention of counsel for complainants that our statute (3 Comp. Laws, §§ 10710–10745) provides for a direct lien in behalf of the persons entitled thereto and not one by subrogation to the rights of the contractors, and that they are therefore not bound by the stipulations of the original contract as to liens or the amounts to be paid thereon, except as to the amount of the contract price. *Smalley* v. *Gearing*, 121 Mich. 190 (79 N. W. 1114, 80 N. W. 797); *Clough* v. *McDonald*, 18 Kan. 114.

The same statute, however, which gives the lien provides:

"The owner, part owner, or lessee shall not be liable to the subcontractor, materialmen or laborers, for any

greater amount than he contracted to pay the original contractor and shall be entitled to recoup any damages which he may sustain by reason of any failure or omission in the performance of such contract." 3 Comp. Laws, § 10710.

This statute limits the amount of the liens of subcontractors, etc., to the amount legally due under the original contract, after deducting from the contract, among other proper items of credit, such damages as may be awarded to the owner "by reason of any failure or omission in the performance of such contract." *J. E. Greilick Co.* v. *Rogers*, 144 Mich. 313 (107 N. W. 885).

The answer of defendant Ford makes no reference to a threatened suit, nor was it amended after the institution of the damage suit to state that fact. The only reference in the answer to complainants' right to a lien is contained in paragraph 12, as follows:

"*Twelfth.* This defendant further answering shows that he is advised that the complainants are not entitled to a lien upon said premises for the work and labor alleged to have been performed by them, and therefore denies that complainants are entitled to the relief prayed for in their bill of complaint, and therefore prays that the bill of complaint may be dismissed, and that this defendant may be awarded his reasonable costs and charges, in this behalf most wrongfully sustained."

The answer of defendant Goddard refers to a threatened suit and by amendment there was added the following:

"That said owners of said Moffat building have, since the answer of defendant Goddard was filed in this cause, begun said threatened suit alleging damages, $200,000, which said suit is now pending in this court; and this defendant asks this court in this cause to stay all proceedings by complainants for the collection of any part of said amount this defendant admits is owing by him to complainants, and from the collection of any of whatever sum of money may be decreed complainants in this suit, until said damage suits against this defendant above referred to have been completed, and until all damages awarded therein have been fully paid."

The brief for defendant Goddard does not discuss the

question presented by his answer only, of the effect of the damage suit. The question is argued at length in the brief for defendant Ford, whose answer presents no such question. The proofs in this record would not have sustained an allegation of a failure or omission in the performance of the contract, so far as the execution of the work was concerned, but, on the contrary, the evidence demonstrates to our satisfaction that, so far as the parties to this suit were concerned, the contract was fully performed.

The decree is affirmed, with costs to complainants.

MOORE, MCALVAY, BROOKE, and STONE, JJ., concurred.

In re CURTIS' ESTATE.

1. EXECUTORS AND ADMINISTRATORS—BANKS AND BANKING—DEPOSIT—ESTATES OF DECEDENTS.

   An administrator, in the matter of selecting a depository for the funds of an estate, is required to use the care which an ordinarily prudent person would use, and to deposit trust funds in his trust capacity, not as an individual.

2. SAME.

   Purchasing a draft by an administrator in his own name and indorsing it to the beneficiary of the estate is not a sufficient designation of the trust to relieve him from liability in case of the failure of the bank before payment.

3. SAME—RECEIPT.

   The fact that a receipt was given by the beneficiary for the amount of the draft before it was dishonored does not warrant a finding that the administrator paid the sum, as a matter of law, where he had acknowledged his liability and re-

ceived back the draft which he filed with a claim for the amount involved in the bankruptcy court administering the estate of the insolvent drawee.

Error to Cass; Des Voignes, J. Submitted April 7, 1910. (Docket No. 30.) Decided July 14, 1910.

Joseph R. Edwards presented his final account as administrator of the estate of Raymond Curtis, deceased. The account was allowed in the probate court, and Henry C. Curtis, sole heir of decedent, appealed to the circuit court. A judgment on a verdict directed by the court affirming the order of the probate court is reviewed by contestant on writ of error. Reversed, and judgment entered for contestant.

Carr & Eby, for appellant.

Charles E. Sweet, for appellee.

MCALVAY, J. The evidence on the part of plaintiff in this case showed that defendant was administrator of plaintiff's brother, who resided and died in Cass county, Mich., and who left a small estate, of which, at the time of the transaction connected with the matter here in dispute, plaintiff was the sole heir. Plaintiff was a farmer living near Carthage in the State of Missouri. On February 7, 1908, the defendant purchased and sent from Dowagiac, Mich., a draft to plaintiff in a letter, for the sum of $301.80, as follows:

"No. 39829.
"City Bank of Dowagiac.
"Lyle, Gage & Co., Bankers.
"Dowagiac, Michigan, Feb. 7, 1908.
"Pay to the order of J. R. Edwards.....$301.80
Three Hundred One & 80/100 Dollars. In current funds.
To the Continental National Bank,
"Chicago, Ill. "I. B. GAGE,
"Cashier."

This draft was indorsed on the back: "Pay to the order

of H. C. Curtis, J. R. Edwards." This draft represented $318 collected on that date by defendant, being part payment on a contract belonging to the estate, after deducting his commission and exchange. The letter of transmission gave an itemized statement to that effect and requested plaintiff to sign an inclosed receipt. Plaintiff received this draft in due course of mail, at his home in Missouri, on February 11, 1908. He immediately took it to the Carthage National Bank, indorsed it on the back under defendant's name, received $301.80, and then signed the receipt and returned it as requested to defendant by letter dated February 14, 1908. In a letter dated February 15th, defendant wrote plaintiff notifying him that the bank which issued the draft had closed its doors February 10th; asking plaintiff what he had done with the draft and saying that if it had been cashed it would go to Chicago, and if there were no funds "It will be protested and come back to me, and I will be in for its payment." This was the first notice that plaintiff had of the failure of the bank, and the statement that the failure occurred on the 10th was false. It had in fact failed on the 8th.

This draft in due course reached Chicago, and on February 18th was presented for payment and payment refused. It was duly protested and notice given to all concerned, including defendant. On February 22d, plaintiff was notified of this protest by the Carthage National Bank, and demand was made of him to refund $301.80, together with protest fees of $3.12 This amount plaintiff paid, and on the same day returned the protested draft to defendant as requested by him. It was duly received by defendant, and on March 5, 1908, filed by him with his sworn proof of claim with the referee in bankruptcy as a claim against Lyle, Gage & Co., bankrupts, and allowed March 9, 1908, at $304.92. Defendant, in his proof of claim, among other things, stated "that the consideration of the draft or debt was money due and owing to this deponent from the said City

Bank of Dowagiac, which money was deposited with said bankrupts," and that the debt was evidenced by a draft (which draft was the draft in question purchased by him of the bankrupts and afterwards protested). Later, plaintiff notified defendant to return the receipt he had given him for this draft, and also that he would hold him for the payment of the $301.80 claimed to have been paid to him by defendant. On February 6, 1909, defendant filed in the probate court his annual account in this estate, showing payments by remittances of $731.14, and among the receipts to make up this amount was the receipt of $301.80 given by plaintiff for the draft in question. Plaintiff filed objections in writing to the allowance as a payment to him of this item of $301.80. After a hearing had, the probate court overruled his objections, and entered an order and decree allowing said account in full, including this amount. From this order and decree plaintiff appealed to the circuit court for Cass county. Upon the hearing of the appeal at the close of plaintiff's case, upon motion of defendant, the court instructed a verdict for defendant, holding that defendant was entitled to a credit for the amount of this draft as a payment to plaintiff; to which holding and instruction plaintiff excepted. From a judgment entered upon such verdict, plaintiff has brought the case to this court for review upon a writ of error.

The sole question in the case is whether the court was in error in directing a verdict. The facts are not in dispute. It is contended by defendant that the case must be treated as if defendant had made a deposit as administrator in the bank which failed, and that there is no evidence that he knew or should have known that it was in a failing condition, and not a responsible depository, claiming that under such circumstances an administrator cannot be charged with negligence; citing *In re Fishbeck's Estate*, 146 Mich. 348 (109 N. W. 666, 117 Am. St. Rep. 646); *In re Grammel's Estate*, 120 Mich. 487 (79 N.

W. 706). That this is the rule cannot be disputed. An administrator, as such, in the matter of selecting a depository for the funds of an estate, is required to use the care of an ordinarily prudent man. Such funds, however, must be deposited by him in his fiduciary capacity, and not in his individual name without any designation of the trust. 18 Cyc. pp. 235, 236, and notes; 11 Am. & Eng. Enc. Law (2d Ed.), p. 949.

If purchasing this draft is to be considered as a deposit, it must be considered as a deposit in his individual name, and would not bring him within the rule invoked. This draft was purchased by him as an individual, and he so indorsed it. Nothing in this transaction, after he received the money until he indorsed the draft, indicates or designates the trust.

Defendant is an attorney, and the letter he wrote February 15th indicates that he believed himself liable for the amount of the draft. His conduct in presenting the draft as a personal claim as administrator against the bankrupt estate shows that he continued in that belief. The question before us is whether the account of defendant should be credited with this draft as a payment to plaintiff. Our conclusion is that, under the authorities, it should not be so credited. There was no payment in fact, and in holding that it was a payment as a matter of law the court was in error.

Other questions are discussed in plaintiff's brief, which primarily relate to the relation of these parties to each other as individuals, and not to relations existing between defendant and this estate. These matters are not material to the question now before the court.

The judgment, for the reasons given, is reversed and set aside, and, as no disputed question of fact is raised, a new trial would avail nothing. A judgment will therefore be entered in this court in favor of plaintiff, and the item of $301.80 as a credit to defendant in his account in said estate appealed from is disallowed and stricken out.

The case will be remanded to the circuit court to be certified to the probate court for the entry of an order and decree striking out from defendant's account appealed from $301.80 as a credit to said defendant on account of a payment to plaintiff.

MOORE, BROOKE, BLAIR, and STONE, JJ., concurred.

FECHT *v.* HENZE.

1. WILLS—ESTATES—CONVEYANCES—HABENDUM CLAUSE.
   A will creating an estate in fee in testator's wife, limiting, in the same paragraph, the estate granted, by charging it with the payment of legacies after the wife's death, effects the intended purpose, and does not create an unqualified estate in fee simple.

2. SAME—CONSTRUCTION.
   A will is to be construed as an entirety, so as to give effect if possible to the whole instrument.

3. SAME.
   The fact that the estate is of less value than the legacies, in no way affects the widow's estate, merely reducing the legacies *pro rata*.

4. SAME—LEGACIES—ABATEMENT.
   Since legacies become a charge upon real estate, either by express direction or by necessary implication, if the language used by the testator indicates that he intended the legacies to be paid, although he knew the personal property to be inadequate for the purpose, they become a charge on the real estate; or, if the real estate and personalty are blended in one mass and legacies bequeathed, they may be charged upon the real estate.

5. SAME.
   Where the estate consisted of real property worth $5,000 and

personal property worth $1,400 and testator bequeathed legacies amounting to $8,000, to be paid from his estate remaining at his wife's death, and blended the entire estate as one mass, it is evidence of his intent to charge the legacies upon the entire estate.

6. SAME.

The court should discover the intent of the testator and if possible give it effect.

Appeal from Wayne; Murfin, J. Submitted April 6, 1910. (Docket No. 12.) Decided July 14, 1910.

Bill by Albert Fecht, administrator with the will annexed of Pauline Ams, deceased, against William E. Henze, administrator *de bonis non* with the will annexed of the estate of Frederick Ams, deceased, and others, for a construction of said last-named will. From a decree for complainant, defendant Henze appeals. Reversed, and decree entered for defendant.

E. W. Mulford, for complainant.

William E. Henze, in pro. per.

The bill of complaint is filed in this cause to obtain a construction of the will of Frederick Ams, deceased. The construction of said will will determine the disposition of a fund now in the hands of the defendant Union Trust Company, and likewise determine whether or not the estate of Pauline Ams is liable to the estate of Frederick Ams for certain sums of money, received by her in her lifetime from said estate.

Frederick Ams died testate August 20, 1878. His estate, at his death, as shown by the inventory, consisted of real estate valued at $5,000, and personal property to the amount of $1,400. His will was as follows:

"I, Frederick Ams of the City of Detroit, county of Wayne, and State of Michigan, being of lawful age, sound mind and memory, do hereby make, publish and declare this to be my last will and testament in the manner following, that is to say:

"I hereby give, grant, bequeath and devise unto my wife, Pauline Ams, formerly Wuerth, of the City of Detroit, county of Wayne and State of Michigan, all my property, real, personal and mixed of every nature whatsoever, of which I shall die seised or possessed, or to which I shall be entitled at the time of my decease. To have and to hold the same unto my said wife Pauline Ams, formerly Wuerth, her heirs and assigns forever, but upon and after the decease of my said wife, Pauline Ams, formerly Wuerth, the child or children of my son Max Ams, now of the city of New York in the State of New York, shall receive the sum of two thousand dollars in equal shares, the child or children of my son, Joseph Ams, of Walkirch of Baden, in Germany, shall receive the sum of two thousand dollars in equal shares. The child or children of my daughter, Frieda Ams, of Walkirch aforesaid, shall receive the sum of two thousand dollars in equal shares, and the child or children of my daughter, Therese Ams, of Walkirch aforesaid, shall receive the sum of two thousand dollars in equal shares.

"In case any of my aforesaid children shall die without leaving issue, the share bequeathed to such issue shall go to the children of my other above-named children according to representation.

"Lastly, I hereby appoint and nominate my said wife, Pauline Ams, formerly Wuerth, of the city of Detroit, county of Wayne and State of Michigan, sole executrix of this my last will and testament, with full power and authority to sell, convey and dispose of any or all of my real estate in fee simple. And I hereby revoke all former wills, heretofore by me made.

"In witness whereof, I have hereunto set my hand and seal at the city of Detroit, county of Wayne and State of Michigan, this twelfth day of September A. D. eighteen hundred and seventy-four.

"[Signed] FREDERICK AMS. [Seal.]"

The estate of Frederick Ams was duly administered by Pauline Ams as executrix, and she was discharged in 1879, no assignment having been made of the estate.

In March, 1895, Pauline Ams conveyed by warranty deed the real estate, which had been owned by her husband, to John P. Schmitt and Mary Schmitt, his wife, for $6,200. This money was deposited with the defendant Union Trust Company under the following agreement:

"Whereas, Pauline Ams, of the city of Detroit, acquired, under the will of Frederick Ams, a copy of which is hereunto attached, certain personal property and also real estate described as follows: Lots No. 21, 22 and 23, situated on the northeast corner of St. Aubin avenue and Jay street, with a frontage on St. Aubin avenue of 115 feet and with a depth along Jay street of 95 feet, valued at $6,200.00; and

"Whereas, said Pauline Ams has sold said real property for said amount to John P. Schmitt and his said wife, Mary Schmitt, and in and by her deed of conveyance has covenanted to and with said John P. Schmitt and his said wife that she is seised of said property in fee simple, that it is free from all incumbrances whatever, and that she will warrant and defend the same against all claims and demands whatsoever:

"Now, therefore, for the purpose of securing said John P. Schmitt, his heirs and assigns, against any damage or loss on account of the warranty contained in said deed, it is hereby agreed between said Pauline Ams, John P. Schmitt and the Union Trust Company, that the said money shall be received by said Union Trust Company in trust for the following purposes, to wit: (1) To pay to said Pauline Ams during her lifetime the interest upon said sum of money at the rate of four per cent. per annum, payable semi-annually at the office of said Union Trust Company. (2) In case it shall be legally established by the judgment of a court of the last resort, that a breach has been made in any of the said covenants of warranty made by said Pauline Ams, to pay to said John P. Schmitt, his heirs or assigns, the damages incurred by him or them by reason of such breach. (3) Upon the death of said Pauline Ams, to pay the said sum of $6,200.00 to the persons entitled thereto upon such persons legally establishing there right thereto.

"It is further agreed that, at any time after the expiration of five years from date hereof, the rate of interest herein provided to be paid to said Pauline Ams may be reduced to such amount as said Union Trust Company and said Pauline Ams may determine upon, and, in case they cannot agree, to such amount as shall be determined by the chancery court of proper jurisdiction. In case at any time after five years from date hereof, both said Pauline Ams and John P. Schmitt shall jointly agree to and with each other in a request in writing to said Union

Trust Company to pay said sum of money to either of them, or to such other person or persons by them jointly designated, said Union Trust Company hereby agrees, upon such joint request of said Pauline Ams and John P. Schmitt to pay said sum to the person or persons by them jointly designated, provided that three months' notice of such request be first given said Trust Company.

"In witness whereof, The parties hereto have executed this agreement in triplicate this 25th day of March, 1895.

[Signed in German] "PAULINE AMS.
[Signed] "JOHN P. SCHMITT.
[Signed] "UNION TRUST COMPANY,
"By ELLWOOD T. HANCE, Secy.

"In presence of:
[Signed] "WM. A. MOORE.
[Signed] "HENRY WUNSCH."

John P. Schmitt died in 1904, and his wife, as survivor, now owns the land. Both she and the defendant Union Trust Company have filed disclaimers to the fund in the hands of the trustee, and ask the court to determine its ownership. Pauline Ams died May 20, 1909, leaving a last will, by the terms of which she gave $1,000 to one Rosa Fecht, $2,000 to one Louis Wuerth, and the balance to be equally divided among her other heirs at law. The inventory in her estate shows personal property to the amount of $3,700, aside from the sum in the hands of the trustee. At the time of the death of Pauline Ams, there were living children of each of the four children of Frederick Ams mentioned in his will. The administrator of the estate of Frederick Ams appeals.

BROOKE, J. (*after stating the facts*). The only question here involved is the character of the estate which passed to Pauline Ams under the will of Frederick Ams.

It is urged by the administrator of her estate, and the circuit judge held, that the will of Frederick Ams created an estate in fee simple, absolute in Pauline Ams, and that the latter part of the clause, which created that estate, in which the testator attempted to make certain specific bequests to his grandchildren, was void for repugnancy.

In reaching this conclusion, the learned circuit judge relied upon the following cases: *Jones* v. *Jones*, 25 Mich. 401; *Dills* v. *La Tour*, 136 Mich. 243 (98 N. W. 1004); *Moran* v. *Moran*, 143 Mich. 322 (106 N. W. 206, 5 L. R. A. [N. S.] 323, 114 Am. St. Rep. 648); and *Killefer* v. *Bassett*, 146 Mich. 1 (109 N. W. 21). An examination of these cases will show that in each case the testator, as in the case at bar, used words sufficient in law to create an estate in fee in the first taker, and in each case the testator then attempted to dispose of such portion of the estate, if any, as might remain at the death of the original devisee and legatee. There is no limitation in the wills considered in any of these cases upon the right of the first taker to dispose of the entire estate during her lifetime, but an attempt is made in each instance to limit an uncertain remainder upon an estate in fee. The case at bar is clearly distinguishable from those relied upon. Here the testator created an estate in fee in his wife, and in the same paragraph charged that estate with the payment of certain specific legacies, upon the happening of a certain future event.

There can be no doubt that language, which, standing alone, would create an estate of inheritance, may be so modified by subsequent language as to limit or qualify the estate originally apparently created. *Forbes* v. *Darling*, 94 Mich. 621 (54 N. W. 385); *In re Owen's Estate*, 138 Mich. 293 (101 N. W. 525).

In the case of *Robinson* v. *Finch*, 116 Mich. 180 (74 N. W. 472), this court quoted with approval the language used in *Smith* v. *Bell*, 6 Pet. (U. S.) 68. It is peculiarly pertinent when applied to the words of the will here considered, and is as follows:

"If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same as if the last member of the sentence were stricken out; yet both clauses are equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will.

We are no more at liberty to disregard the last member of the sentence than the first. No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole. Either the last member of the sentence must be totally rejected, or it must influence the construction of the first so as to restrain the natural meaning of its words; either the bequest to the son must be stricken out, or it must limit the bequest to the wife, and confine it to her life. The limitation in remainder shows that in the opinion of the testator, the previous words had given only an estate for life. This was the sense in which he used them."

See, also, *Chase* v. *Ladd*, 153 Mass. 126 (26 N. E. 429, 25 Am. St. Rep. 614); *Kent* v. *Morrison*, 153 Mass. 137 (26 N. E. 427, 10 L. R. A. 756, 25 Am. St. Rep. 616).

In the case of *Cousino* v. *Cousino*, 86 Mich. 323 (48 N. W. 1084), where the testator, after providing for the payment of his debts, bequeathed the residue of his estate, real and personal, to his wife, and "after her death, or sooner, if she chooses to, to be divided among my children or their heirs, share and share alike," this court held that the widow took only a life estate, upon the ground that to construe the will as creating an estate in fee would render the clause quoted meaningless.

There is no question that as to $8,000 of the estate left by Frederick Ams, it was his intention to give to his wife, Pauline, only the use thereof during her lifetime. It transpired at his death that his entire estate was of less value than the legacies with which he had charged it. This fact, however, can have no bearing upon the character of the estate created in the widow. It would result simply in a reduction of the legacies *pro rata*.

Construing the will as creating a life estate only as to the $8,000, there is no repugnancy in the clause under consideration, but if, as urged by the appellee, the latter part of the clause is repugnant to the earlier, the latter, being clear, definite, and specific, must control. *Barnes* v. *Marshall*, 102 Mich. 248 (60 N. W. 468); *Foster* v. *Stevens*, 146 Mich. 131 (109 N. W. 265), and cases there

cited; *Gilchrist* v. *Corliss*, 155 Mich. 126 (118 N. W. 938, 130 Am. St. Rep. 568); *Hamlin* v. *Express Co.*, 107 Ill. 443; Schouler on Wills (3d Ed.), § 478. Legacies become a charge upon real estate, either by express direction or by necessary implication. If the language used by the testator indicates that he intended the legacies to be paid, although he knew his personal property to be inadequate for that purpose, they will not abate. Or if the real estate and personalty are blended in one mass, and legacies then bequeathed, the legacies become a charge upon the real estate, if the personalty be insufficient. Gardner on Wills, p. 584; *In re Owen's Estate*, *supra*.

We are of opinion that the testator clearly intended to charge his real estate, as well as his personalty, with the payment of the legacies, and that such construction arises from necessary implication. The testator's real estate, which at the time of his death was valued at only $5,000, was sold by his widow 17 years later for $6,200. His personal property amounted to only $1,400. It is obvious that, to provide for the payment of $8,000 of legacies, the testator must have intended to charge them upon the real estate, as well as the personal estate, and the blending of his entire estate in one mass in the earlier part of the clause is persuasive evidence of that intent.

It is unnecessary to cite authorities to the effect that the primary rule of construction is to discover the intent of the testator, and, if possible, give effect to that intent. As before pointed out, the testator clearly intended that his estate, to the amount of $8,000, should, upon the death of his wife, pass to his own grandchildren rather than to her heirs or devisees.

The judgment is reversed, and a decree will be entered in this court upon the footings of this opinion, with costs of both courts.

MOORE, MCALVAY, BLAIR, and STONE, JJ., concurred.

YOUNG *v.* MOORE.

1. CONSTITUTIONAL LAW — STATUTES — SUFFICIENCY OF TITLE — FOREIGN CORPORATIONS.
   Act No. 194, Pub. Acts 1905, amending Act No. 232, Pub. Acts 1903, by including foreign corporations within the provisions imposing a liability on directors for failure to make reports, is unconstitutional for the reason that the amendment is not fairly within the title of the amended statute, which refers to domestic corporations only.

2. STATUTORY CONSTRUCTION—PENALTIES.
   Statutes imposing penalties must be strictly construed.

3. CORPORATIONS—FOREIGN—LIABILITY OF DIRECTORS — REPORTS.
   Act No. 310, Pub. Acts 1907, does not impose a liability on directors of a foreign corporation for failure to make annual reports.

Certiorari to Mecosta; Palmer, J. Submitted April 7, 1910. (Docket No. 20.) Decided July 14, 1910.

Assumpsit by Sylvester A. Young against Henry H. Moore and others upon certain promissory notes. An order overruling a demurrer is reviewed by defendants on writ of certiorari. Reversed, and demurrer sustained.

N. O. Griswold (*Hyde, Earl & Thornton*, of counsel), for appellants.

Cogger & Broomfield, for appellee.

John E. Bird, Attorney General (*Arthur P. Hicks* and *S. A. Kennedy*, of counsel), *amicus curiæ*.

Plaintiff brought suit against defendants, as directors of the Tabard Office Supply Company, a foreign corporation, by which he sought to recover from them the amount of two promissory notes made by said corporation. The defendants, as such directors, had failed to

make the annual report for the year 1907. The action is brought under the provisions of Act No. 232 of the Public Acts of 1903, as amended by Act No. 194 of the Public Acts of 1905. Defendants demurred to the declaration. The demurrer was overruled, and defendants bring the case into this court by writ of certiorari.

BROOKE, J. (*after stating the facts*). The Tabard Office Supply Company was admitted to do business in this State on December 15, 1906, under the provisions of Act No. 206 of the Public Acts of 1901. Section 5 of that act is as follows:

"Any foreign corporation so admitted to carry on business in this State shall be subject to any and all provisions of statute requiring the filing of reports by corporations of this State, organized for the purpose for which such foreign corporation shall have been admitted; and a failure to file such report within the time prescribed shall be sufficient cause for revoking the right of such corporation to carry on business in this State, which revocation may be declared by any court of competent jurisdiction on complaint filed by the attorney general."

This act was amended in 1907 (Act No. 310, Pub. Acts 1907), by providing in section 4 that—

"The secretary of State shall in the certificate which he issues state under what act such corporation is to carry on business in this State, and such corporation shall have all the powers, rights, and privileges, and be subject to all the restrictions, requirements, and duties granted to or imposed upon corporations organized under such act."

The certificate of admission granted by the secretary of State to the Tabard Office Supply Company, authorized it to do business in this State, "with all the rights and privileges, but subject to all the restrictions, requirements, and liabilities of a corporation organized under the provisions of Act No. 232 of the Public Acts of 1903." Section 12 of that act reads in part as follows:

"Every corporation subject to this act shall annually,

in the month of January or February, make duplicate reports for the fiscal year last ending, * * * and for refusal or neglect to make and deposit the reports required by this section before the first day of September in each year, the directors shall be liable for all the debts of such corporation contracted during the period of such neglect or refusal, and shall be immediately subject to all the penalties provided in this section."

This section was amended in 1905 (Act No. 194), by inserting after the words "every corporation subject to this act" the words "including every foreign corporation admitted to carry on business in this State under the provisions of this act." It is the position of the appellants that the amendment to section 12, *supra*, whereby the penalties incurred by directors of domestic corporations for failure to file the annual report are in terms likewise visited upon directors of foreign corporations, is unconstitutional and void.

Act No. 232, Pub. Acts 1903, is entitled:

"An act to revise and consolidate the laws providing for the incorporation of manufacturing and mercantile companies or any union of the two, and for the incorporation of companies for carrying on any other lawful business, except such as are precluded from organization under this act by its express provisions, and to prescribe the powers and fix the duties and liabilities of such corporations."

This title obviously relates to domestic corporations only, and we are of opinion that the amendment by which the legislature attempted to impose penalties upon directors of foreign corporations is not fairly within the title of the act, under our decisions. *Grosvenor* v. *Duffy*, 121 Mich. 220 (80 N. W. 19), and cases cited.

But it is urged by the appellee that the defendants are liable for the penalty, even though this amendment fails. This liability is predicated upon the language above quoted, from section 4, Act No. 310, Pub. Acts 1907, which makes foreign corporations "subject to all the restrictions, requirements, and duties" imposed upon cor-

porations organized under the act, which is designated by the secretary of State as the one under which such foreign corporation shall do business. With some hesitation we have reached the conclusion that this ground is untenable.

It is not to be doubted that the legislature intended, by its amendment to section 12 of Act No. 232, to impose the same penalties upon directors of foreign corporations for failure to make the required reports as are visited upon those of domestic corporations, and it may be that in using the language quoted from section 4 of the so-called "Comity Act" the legislature intended to include in the words "foreign corporations" not only that impersonal and incorporeal thing, the corporation itself, but likewise its directors and stockholders, but nevertheless, statutes imposing penalties must be strictly construed. *Gilbert* v. *Kennedy*, 22 Mich. 5; *Shaw* v. *Clark*, 49 Mich. 384 (13 N. W. 786, 43 Am. Rep. 474); *Crosby* v. *Railroad Co.*, 131 Mich. 288 (91 N. W. 124). We are not disposed to enlarge by intendment the natural meaning of the words used.

This view is strengthened by an examination of the whole of Act No. 310, Pub. Acts 1907, which prescribes "the terms and conditions on which foreign corporations may be admitted to do business in Michigan." It will be observed that that act itself provides specific penalties for the failure to file annual reports, to wit, the revocation of its certificate to do business, and section 5 provides that for a failure to comply with the requirements of that section, the corporation shall be subject to a penalty of not less than $100 nor more than $1,000 for every month it continues to transact business in Michigan without such compliance. These provisions would seem to negative the idea that besides the express penalties prescribed, it was intended by the legislature in using the words "restrictions, requirements, and duties," to impose upon the directors (who are nowhere mentioned in the act) the added pen-

alty of personal liability for the debts of the corporation, in case it made default in filing its annual report.

A very similar question was before the Supreme Court of the United States in the case of *Park Bank* v. *Remsen*, 158 U. S. 337 (15 Sup. Ct. 891). There that court said:

"Section 12 of the act of 1848 is not in terms re-enacted in the charter of the warehouse company. It is, as we have seen, a statutory provision of a penal character, and before any party can be held bound by its provisions, it must satisfactorily appear that the legislation of the State has rendered him subject thereto. The contention is that section 9 of the charter of the warehouse company in effect incorporates said section 12 into such charter, but the provision of section 9 is that the corporation shall possess all the general powers and privileges and be subject to all the liabilities conferred and imposed upon corporations organized under the act of 1848. It is the corporation which is given the powers and privileges and made subject to the liabilities. Does this carry with it an imposition of liability upon the trustee or other officer of the corporation? The officer is not the corporation; his liability is personal, and not that of the corporation, nor can it be counted among the powers and privileges of the corporation. How then can it be contended that a provision in a charter, that the corporation thus chartered shall assume all the liabilities imposed by a general statute upon corporations, carries with it a further provision of such general statute that the officers of corporations also assume, under certain conditions, the liabilities of the corporation? Does one by becoming an officer of a corporation assume all the liabilities resting upon the corporation; is not his liability of a distinct and independent character and dependent upon other principles? * * * In the absence of any controlling decision, we are unwilling to hold, that a provision of a general statute imposing a personal liability on trustees or other officers, is incorporated into a special charter by a clause therein declaring that the corporation shall possess all the general powers and privileges and be subject to all the liabilities conferred and imposed upon corporations organized under such general act. Something more specific and direct is necessary to burden an officer of the corporation with a penalty for omission of duty."

We have examined the cases of *Nelson* v. *Bank of Fergus County*, 157 Fed. 161, 84 C. C. A. 609; *Starkweather & Shepley* v. *Brown*, 25 R. I. 142 (55 Atl. 201), and *Miller* v. *Quincy*, 179 N. Y. 294 (72 N. E. 116), cited for appellees, but find nothing therein, which, in our opinion, tends to cast doubt upon the correctness of the reasoning in *Park Bank* v. *Remsen*, *supra*.

It is a simple matter for the legislature, at its next session, by a suitable amendment to Act No. 310 of the Public Acts of 1907, to impose a personal liability upon directors of foreign corporations for failure to file annual reports, if, as is evidently the case, it intends such liability should attach. As its enactments now stand, we are of opinion that no such liability exists.

The order overruling the demurrer is reversed, and the demurrer sustained.

MOORE, MCALVAY, BLAIR, and STONE, JJ., concurred.

OPSOMERE *v.* OPSOMERE.

1. TRIAL—DIRECTING VERDICT—APPEAL AND ERROR.
   A plaintiff, against whom a verdict is directed, is entitled to have the testimony he presents considered as true in disposing, on appeal, of the question of his right to recover.

2. REPLEVIN—RIGHT OF POSSESSION—LANDLORD AND TENANT—PERSONAL PROPERTY.
   Under an agreement by a son to work the farm belonging to his father for the crops raised, and to care for the father during the current year, in pursuance of which the father purchased a team and tools for use on the place, and to belong to

the father, the right of possession vests in the parent upon a breach of the contract by the other party, and the question of ownership should be submitted to the jury, where the son claims he purchased the property with his own funds.

Error to Bay; Collins, J. Submitted April 7, 1910. (Docket No. 19.) Decided July 14, 1910.

Replevin by Leander Opsomere against Alex Opsomere. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

Gilbert W. Hand, for appellant.

W. A. Collins, for appellee.

MCALVAY, J. This is an action in replevin, brought by plaintiff, aged 86 years, against his son, 40 years of age, to obtain possession of a team of horses, some harness, a wagon, plow, land roller, and a harrow, which the plaintiff claimed to own, and to be entitled to the possession of, at the time the writ issued. The case was tried before the circuit court of Bay county, and a verdict was directed in favor of defendant, on the ground that at the time suit was commenced defendant, under the agreement between the parties, was entitled to the possession of the property. Plaintiff has brought the case here for review by writ of error, and asks a reversal of the judgment, principally upon the ground that the court erred in instructing a verdict for defendant.

The evidence introduced by plaintiff tended to show: That he owned and resided alone upon a small farm in Bay county, which he had rented for cash for the year (1908) next preceding the year when this dispute arose for $150; that he had an opportunity to rent it for $175 cash the following year (1909); that in March of that year his son, the defendant, came to him and desired to work the place, saying that he had no home for his boys; that plaintiff then made the following agreement with defend-

ant: The son was to work the place for one year, to have everything he raised, and was to care for the plaintiff and furnish him a living. Defendant was to leave as much on the place at the end of the year as he found there. He was to have the right to use the tools then on the farm to work with. Plaintiff did not own any team. Defendant asked plaintiff if he had some money, and was told by plaintiff that he had some in the bank at Reese. Defendant then asked him to buy a team of horses with his money, and such new tools as were needed; the team and tools to belong to plaintiff, and to be used for working the farm. Soon after, on March 22, 1909, these parties went to Reese and called upon Mr. Herbst, an implement dealer, requesting him to go with them to the bank to draw out money to buy some horses. The old gentleman is French, and speaks little German or English. Mr. Herbst went with them, and $388.71 was drawn out and at once handed to the son. The canceled check for that amount is produced in evidence; on the same date plaintiff purchased from Herbst, on credit, a harrow, a plow, and a roller for $52. Both plaintiff and Mr. Herbst swear to these facts. A few days after the team was bought by the son and brought to the father, who was asked if he was satisfied with them, and they were afterwards used on the farm. The implements bought of Herbst were brought to the place by the son. In August defendant went away for eight or nine days. He came back intoxicated, and asked his father to drink with him, which he refused to do. He then asked him to deed him the farm, and upon refusal he seized his father and threw him down. Plaintiff then went to his daughter's house, one-half mile distant, and remained until 11 o'clock at night. He returned, accompanied by two neighbors. When they arrived, the defendant had gone away. In the morning plaintiff discovered that the team and the other property, which is claimed in this suit, had been taken away. The father then went to Bay City, where he remained for two weeks. When he returned he went with his daughter and a neighbor to

his farm, and the daughter made demand for this property of defendant for plaintiff. The son ordered them from the place, threatening to shoot her, and refused to surrender the property, claiming that it belonged to him. This property at this time was secreted at a farm three miles away, where defendant had taken it, and where it was afterwards found by the sheriff, and taken under the writ in this case. It was duly appraised, and under the statute, defendant having furnished a bond, the property was returned to him and has been in his possession.

The verdict having been directed against the plaintiff, he is entitled to have the testimony he presented considered as true for the purposes of this case. Taking this view of the case, if no testimony had been introduced on the part of defendant, we are satisfied that an instructed verdict for plaintiff should have been given, if requested. The trial court took the view that under this contract, as recited by plaintiff, the defendant was entitled at the time of the replevin to the possession of this property. In coming to this conclusion he overlooked the fact that, taking the testimony of plaintiff and his witnesses to be true, defendant had repudiated the contract, taken the property from the farm, and secreted it, and, when demand was made for it, denied plaintiff's ownership and asserted his own. If this was true, plaintiff was entitled to bring his action in replevin. *Wattles* v. *Dubois*, 67 Mich. 313, 315 (34 N. W. 672); *Freese* v. *Arnold*, 99 Mich. 13 (57 N. W. 1038). Defendant denied this contract, and claimed that the property was his, purchased with his own money. The issue of fact thus made was a question to be determined by the jury, and not by the court. The case should have been submitted to the jury under proper instructions. The court was in error in directing a verdict for defendant.

Further discussion is unnecessary. The judgment is reversed, and a new trial ordered.

MOORE, BROOKE, BLAIR, and STONE, JJ., concurred.

REIMOLD *v.* FARMERS' MUTUAL FIRE INSURANCE CO.

INSURANCE—FIRE—WAIVER OF FORFEITURE.

In an action on a policy of fire insurance of an intestate brought by a son and administrator, to whom the parties in interest assigned their rights, commenced after the discharge of the administrator and assignment of the real estate by the probate court and by act of the heirs, a waiver of forfeiture for breach of the terms of the policy is established by a showing that, although they had knowledge of the transfer of the property, the officers of the insurer made no objection on that ground, and dealt with him as if they intended to pay the loss, making no tender of assessments paid until after the institution of suit, and that in reliance on their action plaintiff employed attorneys and expended money.

Error to Macomb; Erskine, J. Submitted April 6, 1910. (Docket No. 11.) Decided July 14, 1910.

Assumpsit by Charles J. Reimold against the Farmers' Mutual Fire Insuance Company on a policy of insurance. A judgment for plaintiff on a verdict directed by the court is reviewed by defendant on writ of error. Affirmed.

Henry J. McKay and *William T. Hosner*, for appellant.

William T. Kelly and *John A. Weeks*, for appellee.

MCALVAY, J. This suit is brought by plaintiff against defendant company to recover upon insurance policy No. 3194, issued by it December 6, 1887, to J. J. Reimold, for a loss claimed to have been sustained thereunder.

The facts in the case are not in dispute. It appears from this record that J. J. Reimold died intestate, February 14, 1900, leaving surviving him a widow and eight children. The plaintiff, a son, was appointed adminis-

trator of his estate, March 19, 1900, and entered upon the duties of his office. The estate consisted of personal and real property. On or about February 29, 1904, he filed a final account in the probate court for Macomb county, petitioning for its allowance, and on April 5, 1904, an order was entered in said court allowing said account as presented, assigning the residue of the estate, consisting of real property, to the widow, who was also described as assignee of all of the children, and the administrator was declared discharged and his bond canceled. The petition for this order stated that the children had all joined with him and released all claims to the personal property to their mother. The order makes no disposition or mention of the personal property, and the record shows that it was never divided, or any agreement entered into in regard to it. A quitclaim deed of the real estate was made by all of the children to their mother on or before April 12, 1904.

The loss by fire caused by lightning, for which suit was brought, occurred September 1, 1907, destroying one of the barns and contents covered by the policy. The entire amount of insurance carried by the policy was $5,057, and this loss is agreed to have amounted to $2,175.87. All fees, dues, and assessments, under this policy, from the date of its issue until the fire occurred, were paid in full and receipted for by defendant. After the death of the father they were paid by plaintiff or some member of the family. While acting as administrator, plaintiff, on August 2, 1901, applied for and was granted additional insurance of $1,000 under this policy, receiving a receipt describing him as administrator, and "a member of said corporation for the register and membership fees on additional insurance under policy 3194."

After the fire, plaintiff immediately notified the company of the loss, and the president, secretary, and a director, being the official adjusters of defendant, at once came and looked over the loss. Upon being asked by the president if he was administrator of his father's estate, he replied that he was, and his testimony is that he believed

that he was. Ten days later the full board of directors of defendant examined the loss in a body. Plaintiff met them at the creamery, in Mt. Clemens, where he worked, after they had been to the farm. At this meeting the items of loss as mentioned were discussed, and the officers told plaintiff some of them were too high. They asked him if he would stand a cut, to which he replied that he would not. They offered him about $1,940 or $1,950, which he did not accept. The proofs of loss had been made out by him, and were given to the officers of the company at the time they were at the house. These proofs were sworn to before defendant's secretary, a notary public, September 30, 1907, at an appointed meeting of the board of directors with him, and are signed by plaintiff as administrator. His recollection is that he was requested to sign as administrator by some member of the company. At this meeting the items of loss were discussed without result. On November 1, 1907, an assignment was made by the widow and heirs at law of J. J. Reimold to plaintiff, of all their rights and interest in this policy. In December plaintiff and his attorney, Mr. Weeks, met the secretary of defendant at the hotel in Mt. Clemens, and asked why the company did not pay the loss. He replied that it was because of a transfer. He said that the company would pay when they found out whom to pay it to. The secretary informed them that he would arrange for a meeting and notify the attorney to be present.

A witness testified that on this day the secretary told him plaintiff should have had the policy changed when he was discharged as administrator; that a meeting of the directors would be held soon, and he thought without doubt the claim would be settled; the only question was whom to settle with. This witness on the following day related this conversation to plaintiff, and, relying upon this, he employed counsel to adjust the loss.

Plaintiff did not personally attend any later meetings of the company's directors. On January 14, 1908, the secretary, by order of the president of the company, wrote a

letter to plaintiff's attorney, notifying him to attend a meeting to be held at his office to consider the Reimold matter. Two attorneys appeared at this meeting of the board authorized to act for plaintiff. The matter was fully discussed. The items of the claim were considered, and the fact that plaintiff had signed the proofs as administrator was mentioned. The president stated that they would like to settle the loss; that the estate had been closed, that a deed had been made to the widow, and there was a question whether the board had the power to settle a loss of this kind. They did not say that they would not pay the loss at this meeting or at any meeting. Because defendant's attorney was not present nothing was done. It was understood that another meeting would be held when defendant's attorney would be present. Plaintiff's attorneys were notified of such meeting and attended. At this the same matters were gone over. Defendant's officers stated that they would advise later what their decision would be. At the third meeting plaintiff was represented as before. The president stated that they had pressing business, and it would be impossible to discuss the Reimold matter. Plaintiff incurred an expense of more than $100 after he employed his attorneys before liability was denied by defendant.

No portion of the dues and assessments paid by plaintiff after his father's death were tendered or returned up to the time of the trial of the case. During the trial defendant's attorney tendered into court about $75,—

"Representing all moneys paid to the company after the closing of the estate, or such times as the proofs should show the policy to have been canceled as claimed by the company, and all costs taxable at the time of tender; and, further, that such tender was made without conceding liability in any other manner."

Defendant offered no proofs, and, at the close of plaintiff's case, asked for a directed verdict. This was denied, and a verdict was instructed for plaintiff, upon the ground

that defendant had waived the claimed forfeitures of the insurance policy. A motion for a new trial was made by defendant and denied.

The case is before us on writ of error. But one question of importance is presented, and that is whether the court was in error in holding that defendant had waived the claimed forfeitures of this policy. We are satisfied that the admitted facts above stated warranted the action of the court.

The claimed breaches of the policy upon which defendant relies are (1) that the estate of J. J. Reimold was closed; (2) that there was a change of title by deed from the heirs to the widow. The deed to the widow was duly recorded April 12, 1904. The fire occurred September 1, 1907. Other facts already stated need not be repeated. It is only necessary to state that after full personal knowledge of the closing of the father's estate and the transfer to the widow, the secretary and other officers of the company without repudiating the claim of plaintiff, continued to deal with him as if they intended to pay the loss he claimed. Notice was given to his attorney to meet with the officers. Plaintiff in good faith relied upon what the secretary said, and went to large expense employing attorneys to attend these meetings. It was the duty of defendant's officers when knowledge of these claimed breaches of the policy came to them, to promptly repudiate liability. *Carpenter* v. *Insurance Co.*, 61 Mich. 635 (28 N. W. 749); *Cleaver* v. *Insurance Co.*, 71 Mich. 414 (39 N. W. 571, 15 Am. St. Rep. 275), and cases cited; 13 Am. & Eng. Enc. Law (2d Ed.), p. 257, and cases cited. Defendant, after full knowledge of the facts, did not return or tender any assessments paid after the claimed forfeitures occurred, until after suit was brought. Such retention of these assessments amounted to a waiver even if the insurer at the time when payments were made did not have notice of such forfeitures. 19 Cyc. p. 798*c*, and cases cited.

Upon the question whether there were in fact any forfeitures of this policy, as claimed by defendant, under the circumstances of this case, we express no opinion. Upon the question of waiver we are in accord with the trial court.

The judgment is affirmed.

MOORE, BROOKE, BLAIR, and STONE, JJ., concurred.

CHASE *v.* HART.

CONSTITUTIONAL LAW—DRAIN COMMISSIONER—SALARY.

A drain commissioner, who holds over until the election of his successor under Act No. 118, Pub. Acts 1909, and whose salary is fixed by the board of supervisors before the date named in the act, from which the then acting commissioner shall hold over, is entitled to the compensation as changed, and the action of the board of supervisors does not contravene the constitutional inhibition against the increase or decrease of salary of any officer after election or appointment; since the right to the office was not determined until the date named in the statute.

Certiorari to Calhoun; North, J. Submitted April 5, 1910. (Calendar No. 23,927.) Decided July 14, 1910.

Mandamus by Arthur H. Chase, county drain commissioner, to compel Ray E. Hart, county clerk, to issue an order for the payment of relator's salary. An order granting the writ is reviewed by respondent on writ of certiorari. Affirmed.

Jesse M. Hatch, for relator.

Howard W. Cavanagh, for respondent.

MOORE, J. This is a certiorari proceeding brought for the purpose of reviewing the action of the circuit judge in granting a writ of mandamus directing the respondent to issue an order for the salary of the petitioner.

Counsel for appellant says in his brief:

"About the only question the respondent desires passed upon in this matter is whether or not the drain law as passed by the legislature in the year 1909 affects drain commissioners who were continued in office by virtue of the same act. The circuit judge has determined that the salary as fixed by the board of supervisors is the sum of $800 per annum and the relator is not appealing from that finding. * * *

"Therefore the sole question which the court is asked in this hearing to determine is whether or not the drain commissioner, continued in office by the act of the legislature, is entitled to salary during the year 1910."

The questions presented require a construction of Act No. 118 of the Public Acts of 1909. This act amended the so-called "drain law" of the State. When it took effect in September, 1909, the petitioner was county drain commissioner for Calhoun county. His compensation at that time was by the receipt of fees. Section 1, chap. 2, of the act provides for the election of a drain commissioner on the Tuesday succeeding the first Monday in November, 1910, and each second year thereafter, whose term of office should commence January 1st following the election. Section 2, chap. 2, provides that all county drain commissioners holding such office on December 31, 1909, shall continue to be such commissioners, until their respective successors are elected and qualified in accordance with the provisions of section 1. Section 5, chap. 9, reads:

"SEC. 5. Each county drain commissioner shall receive an annual salary to be paid as other county officers are paid, the amount thereof to be fixed by the board of supervisors at its regular October session in the year nineteen hundred nine, and every two years thereafter, in the same manner as the salaries of other county officers are fixed."

Acting under the provisions of this section, the supervisors, in October, 1909, proceeded to fix the salary of the relator. It is now claimed this action was in violation of the provisions of the Constitution, which does not permit the increase or decrease of the salary of a public officer after election and appointment. As the law stood when Act 118 was enacted, the petitioner's term of office would have expired December 31, 1909. His term of office from January 1, 1910, until January 1, 1911, was by virtue of the provisions of section 2, chap. 2, of said act, coupled with the fact that he was drain commissioner on December 31, 1909. The fact of who should be drain commissioner for 1910 was determined by the fact of who occupied that position on December 31, 1909. This was a date subsequent to the date when the salary was fixed by the board of supervisors.

The case is not within the constitutional inhibition.

The action of the circuit judge is affirmed.

McALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

SCHULTE *v.* MICHIGAN CENTRAL RAILROAD CO.

CARRIERS—NEGLIGENCE—DERAILMENT—DEFECTIVE ROADWAY.

Evidence that the derailment was caused by the spreading of rails, that the ties were rotten and the spikes loose, justifies the submission of the carrier's negligence to the jury.

Error to Wayne; Murfin, J. Submitted April 7, 1910. (Docket No. 29.) Decided July 14, 1910.

Case by Albert Schulte against the Michigan Central

Railroad Company for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

Dohany & Dohany, for appellant.

J. Walter Dohany (*Henry Russel*, of counsel), for appellee.

MOORE, J. The plaintiff was a passenger on one of defendant's trains on the night of December 6, 1906, to be carried from Vassar, Mich., to Detroit, Mich. When the train arrived at a point between Millington and Otter Lake a wreck occurred. The car in which plaintiff was a passenger rolled down an embankment and plaintiff was seriously injured. After plaintiff had put in all his tostimony, the defendant moved the court to direct a verdict, which the court did, on the ground that plaintiff had failed to introduce sufficient evidence of negligence on the defendant's part to require the court to submit the case to the jury. Plaintiff bases his only assignment of error on this action of the court.

Plaintiff testified in part as follows:

"The train consisted of engine, tender, baggage car, smoker, ladies' coach, and parlor car, in the order in which I have mentioned them. Between Millington and Otter Lake, about three and a half or four miles south of Millington, and two or three miles from Otter Lake, we felt the bounding of the cars on the tracks, and I jumped for the hat rack, and the car went over the embankment, and I struck my back to the ceiling. The coach I was in went over down the embankment, which was 12 or 15 feet deep.

"*Q.* You say you grabbed for the hat rack. Then state what occurred.

"*A.* I grabbed for the hat rack, and I hung on, and the car went over the embankment and I struck my back to the ceiling, and I slipped from the hat rack and I came to in the vestibule—the vestibule to the south.

"*Q.* Did the car turn over?

"*A.* Yes, sir. After we got out of the car we walked north to see what had caused the accident.

"*Q.* How far up north did you go?
"*A.* North about the distance of a block and a half here.
"*Q.* That is, towards Millington?
"*A.* Towards Millington.
"*Q.* What, if anything, did you find there as to tracks and the ties?
"*A.* The east track was spread and the spikes were partially pulled out.
"*Q.* What was the condition of the ties?
"*A.* The ties were rotten.
"*Q.* Did you notice the holes where the spikes were pulled out?
"*A.* Yes, sir.
"*Q.* Just describe what condition those ties were in as to spike holes and rails and everything that you saw.
"*A.* The spike holes were grown larger, loosened by spikes, and the rail had spread, oh, probably five to six inches at the place; maybe only four, and the track did not meet at the east side; that is, the east track the plates had broken and they did not meet.
"*Q.* Did you notice the mark of the flange of the wheel on the ties?
"*A.* The flange marks, yes.
"*Q.* Where did that begin?
"*A.* Where the rail was loose.
"*Q.* Did you examine whether the rail was loose or not?
"*A.* I did.
"*Q.* How far from this place that you describe that condition was it to the place where the cars had turned off and gone down the embankment?
"*A.* Probably 30 rods."

There was considerable other testimony to the same effect. We do not think it can be said, as a matter of law, that defendant was free from actionable negligence. See *Hamilton* v. *Railroad Co.*, 135 Mich. 95 (97 N. W. 392); *Whipple* v. *Railroad Co.*, 143 Mich. 41 (106 N. W. 690); *Parker* v. *Station Ass'n*, 155 Mich. 72 (118 N. W. 733).

Judgment is reversed, and new trial ordered.

MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

In re BARNES' ESTATE.

WORLD'S GOSPEL UNION *v.* JOHNSON.

WILLS—ESTATES OF DECEDENTS—ADEMPTION OF LEGACIES.

After the execution of a will by which real estate was devised, it became necessary to sell the property for the support of the testatrix who became incompetent. At her death a portion of the proceeds remained. *Held*, that the devisees should take the residue under the will as if no sale had been made. 3 Comp. Laws, §§ 8719, 9141, 9145.

Error to Benzie; Lamb, J. Submitted April 7, 1910. (Docket No. 16.) Decided July 14, 1910.

William J. Pettitt presented his final account as executor of the last will and testament of Mary P. Barnes, deceased. The account was allowed in the probate court, and an order of distribution entered. Henry N. Johnson, an heir at law, appealed to the circuit court. A judgment holding that said will had been revoked by a sale of the devised property is reviewed by the World's Gospel Union, a devisee under said will, on writ of error. Reversed, and the order of the probate court affirmed.

Parm C. Gilbert, for appellant.

D. G. F. Warner, for appellee.

MOORE, J. Mary P. Barnes made a will by which she devised to the World's Gospel Union certain real estate. Later she made a codicil by which she gave certain of her property to George S. Fisher, in trust for the Gospel Missionary Union. As the terms of the codicil have been met they do not require consideration in this case. Later Mrs. Barnes became incompetent, and the probate court appointed Thomas Pettitt as the guardian of her person and

estate. He sold the lands that were devised to the World's Gospel Union, and used a part of the proceeds for her support. Mary P. Barnes died later, and the will in question was probated, and the money in the hands of her guardian was turned over to the executor and is a part of her estate. The probate court allowed the World's Gospel Union the residue of the proceeds of the sale of the land that had been devised to it. Henry N. Johnson, a brother and an heir at law of deceased, appealed therefrom to the circuit court, and the circuit court found that the World's Gospel Union was not entitled to any of the money; that the sale of the land revoked the will; and from said decision the World's Gospel Union have appealed.

Defendant and appellee contends:

(1) That by the terms of the will of Mary P. Barnes the devise to the World's Gospel Union is a specific devise.

(2) That by the transfer of the property specifically devised to the said the World's Gospel Union prior to the death of the said Mary P. Barnes and the conversion of the same into money, it would be an ademption of the same.

(3) That the acts of the guardian of Mary P. Barnes were her acts in law.

We cannot agree with these contentions or with the conclusion reached by the trial judge, because of certain statutory provisions. When the will was made Mrs. Barnes was the owner of the land described in the will. The will was never in fact revoked. It was afterwards probated. The sale of the lands was brought about because Mrs. Barnes became insane, and it was deemed necessary to appoint a guardian and sell the land for her maintenance. Section 8719, 3 Comp. Laws, provides for the management of estates of wards and for the sale of real estate when the conditions stated in the statute arise. Section 9141, 3 Comp. Laws, provides that when the income of the estate of any person under guardianship is not sufficient to maintain the ward the guardian may sell his

real estate upon obtaining a license to do so. Section 9143, 3 Comp. Laws, provides for the application of the proceeds of the sale for the support of the ward, etc.

Section 9145 reads as follows:

"SEC. 5. In every case of the sale of real estate, as provided in this chapter, the residue of the proceeds, if any, remaining upon the final settlement of the accounts of the guardianship, shall be considered as real estate of the ward, and shall be disposed of among the same persons, and in the same proportions as the real estate would have been, if it had not been sold."

It is clear that, if the real estate described in the will had not been sold, the terms of the will would have governed. We think it equally clear that, as it was sold, but the proceeds were not all used, the residue should be considered as real estate and be disposed of the same as though no sale had been made.

Judgment is reversed, and the division of the residue as made by the probate court may stand.

MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

McDONALD *v.* MILLER.

TAXATION—SALE FOR UNPAID TAXES—STATUTES.

That an application to purchase State tax lands was received at the auditor general's office, during the progress of a tax sale at the county treasurer's office, does not avoid the sale, which was consummated by the auditor general after the conclusion of the public sale and the report thereof by the county treasurer, showing that no individual had purchased the land. 1 Comp. Laws, §§ 3960-3962.

Appeal from Bay; Collins, J. Submitted April 22, 1910. (Docket No. 72.) Decided July 14, 1910.

Bill by Mary McDonald against Archie T. Miller and James B. Bradley, auditor general, to set aside a sale of land delinquent for taxes. From a decree dismissing the bill but reserving the right to obtain a reconveyance under sections 3960–3962, 1 Comp. Laws, defendants appeal. Affirmed.

James Donnelly (*Gilbert W. Hand*, of counsel), for complainant.

John E. Bird, Attorney General, and *J. Shurly Kennary*, Assistant Attorney General (*George L. Hauser*, of counsel), for defendant Auditor General.

Brown & Farley, for defendant Miller.

OSTRANDER, J. The court below dismissed the bill of complaint, reserving in the decree the right of the complainant to obtain a reconveyance of the land under the provisions of sections 141–143 of the general tax law (1 Comp. Laws, §§ 3960–3962) within 30 days after the final determination of the cause.

The complainant is the owner of certain premises which were returned delinquent for the taxes for the years 1904, 1905, and 1906, and in due course decrees passed to the auditor general for the sale of the land for the taxes of the years 1904 and 1905, and it was offered for sale in May, 1907, for the taxes of 1904. There being no purchaser, it was bid to the State. It was not redeemed, and in May, 1908, was again offered for sale for the taxes of 1905, and again bid to the State. The annual tax sale in the year 1908 was begun at the county treasurer's office on May 5th and was continued to and including May 21st, on which day the county treasurer prepared and filed his report of the said annual tax sale. May 15, 1908, the defendant Miller applied to the auditor general to purchase the State's interest in the property, and he deposited with

the auditor general the amount of money necessary to purchase from the State for the taxes of 1904 and 1905, and also sufficient money to pay the taxes which had been assessed against the property for the year 1906. Interest was computed upon the taxes to and including the said month of May. Later the auditor general issued his deed to defendant Miller, who, in July, 1908, gave the required notice to complainant, who claims that the service of the notice upon her was the first information she had that the land had been delinquent for taxes and had been sold. On the 17th of August, 1908, she applied to the auditor general for a cancellation of the sale to Miller and asked to be permitted to pay all the taxes unpaid against the land, with interest and charges thereon up to and including the month of August, 1908, and she tendered to the auditor general a sufficient sum of money. Among the reasons asserted for such cancellation is the one now relied upon, which is that the application of Miller was received during the progress of the annual tax sale in the county and was made void by the provisions of sections 70 and 84 (1 Comp. Laws, §§ 3893, 3907) of the general tax law. The auditor general refused her demand, stating that he did not sell the land during the continuance of the county treasurer's sale, but held the application of defendant Miller and his money until the county treasurer reported the land unsold at said tax sales, after receiving which report he consummated the sale to Miller and issued his deed. She thereupon filed her bill in this cause, in which she charges that the sale to defendant Miller is void because made contrary to the provisions of sections 70 and 84 of the general tax law, and prays for a decree canceling and setting aside the sale and the tax deed issued pursuant thereto, and permitting her to pay and discharge the said delinquent taxes. The defendants answered, but at the hearing produced no testimony.

While counsel for the defendants have discussed the right of the complainant to maintain this suit, we consider only the question whether the mere fact that the defend-

ant applied to purchase this land and deposited his money with the auditor general, during the time the tax sales were in progress in the county of Bay, rendered the sale to defendant Miller void. It is true that the answer of the auditor general in which he alleges that the sale was not consummated until he had received the report of the county treasurer, which showed that no person had bid for this land at the sale conducted by the county treasurer, is not evidence of the fact. It is also true that the deed issued to defendant Miller was not in evidence, and the exact date thereof is not proven. It is also true that the complainant has not shown that the sale was consummated before the 21st of May. It is charged in the bill of complaint, upon information and belief, that the State deed to Miller was issued on June 10, 1908. This is admitted by the answers of the auditor general and Miller. There is no reason to doubt the proper performance of official duty by the auditor general, and if we assume, as his answer states, and as we think we should do, that he merely delayed or held in abeyance the application of defendant Miller until such time as it appeared that there had been no bidder at the county treasurer's sale, and then treated the application as a continuing and valid one, no reason is perceived for holding that the sale was void, or even irregular. We are not required to say that the auditor general is bound to return all applications and all money made at his office during the progress of the various tax sales in the county. As between two persons applying to purchase the same land, one of whom made a bid at the county treasurer's sale and the other at the auditor general's office, there seems to be no question that the bid made at the county treasurer's office would be accepted and the bidder awarded the land. No question of priority is involved here.

Counsel for complainant have called attention to various decisions of this court, in which it is held that the duties of the auditor general in issuing deeds are ministerial, and that the rights of an intending purchaser attach

at the time he makes his application and deposits the proper amount of money. Those decisions have no application. They are cases where either the right of priority between individuals was in question, or the effect of a statute or amendment to a statute taking effect later than the date of the application was considered.

The decree is affirmed, with costs.

HOOKER, MOORE, BLAIR, and STONE, JJ., concurred.

GAULT v. GAULT.

1. LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR—STATUTE OF FRAUDS.

   By letting into possession tenants who agreed to execute a written lease for three years, and who, after obtaining possession, refused to surrender the premises; and by afterwards notifying them that they might remain for a year, if they paid rent in accordance with their agreement, the landlord gave them no right to remain more than the year.

2. SAME—EFFECT OF NOTICE.

   Acceptance of rent after the expiration of the year, although ineffective proceedings for dispossession were pending, and a subsequent notice to quit or to pay rent due, while inconsistent with the theory that the tenancy had been terminated, did not create a tenancy at will, terminable by a three months' notice to quit, or a tenancy from year to year.

3. SAME—TERMINATION—LEASE.

   At the end of the second year of occupancy, the landlord had the right to terminate the tenancy without notice, and repossess himself of the premises, and did not, by delaying nearly a month, estop himself from proceeding to oust the occupants, in the absence of evidence of his express or implied consent to the continued possession.

Error to Wayne; Donovan, J. Submitted April 13, 1910. (Docket No. 83.) Decided July 14, 1910.

Summary proceedings by James Gault and another against Frank Gault and another for the possession of certain real estate. A judgment for complainants is reviewed by defendants on writ of error. Affirmed.

Ari E. Woodruff and *Frank W. Atkinson*, for appellants.

James H. Pound, for appellees.

OSTRANDER, J. There were negotiations between the parties for a lease of 77½ acres of land for a term beginning April 1, 1907, and ending April 1, 1910, at a rental of $3 per acre per annum, payable $6.25 each month and the balance at the end of the year. It was agreed that a written lease, with these terms, should be executed. Defendants were at the time in possession. Plaintiffs and defendants each prepared a form of lease. The one prepared by defendants permitted them, at their option, to remain five years, and contained a provision that the landlord was to make certain repairs. No lease was executed. Plaintiff James Gault took away the form of lease which he had submitted and had left with defendants, saying, in substance, that defendants were on the farm without right. A notice to defendants, or to one of them, was served on August 25, 1907, stating that defendants were required to vacate the premises on April 1, 1908, to put in no fall crops, with the further statement that the extension of time to April 1, 1908, was made upon the express condition that the rent due should be paid, and that defendants "comply with all the terms of the agreement under which you rented said farm and personal property." Another notice was given in September, 1907, requiring defendants to quit and surrender possession of the premises "or pay us the rent now due for said premises." In September, 1907, a suit in chancery was

begun by plaintiffs, and from the decree entered in the cause an appeal was taken to this court, where the decree was reversed and the bill dismissed. *Gault* v. *Gault*, 158 Mich. 303 (122 N. W. 639). A notice to quit or pay rent was served June 6, 1908, proceedings pursuant thereto were begun before a circuit court commissioner to recover possession, and were ended by the payment of $243.50 on June 24, 1908, for which money plaintiff receipted as for rent to June 1, 1908. Thereafter rent at the rate of $6.25 per month was paid to February 1, 1909. No rent has since been paid.

The present proceeding was begun in April, 1909, without the serving of any other written notice, the complaint setting out, generally, that plaintiffs are landlords of the said premises and defendants tenants under them, who hold the premises unlawfully and against the rights of complainants. The commissioner on May 11, 1909, rendered a judgment of restitution. It does not appear from his return that he found any rent to be due or that he found the complainants entitled to the possession on account of the nonpayment of rent. In the affidavits for leave to appeal is to be found the statement that the commissioner entered a judgment against defendants for $162.25 rent, and a like statement is incorporated in the motion for leave to appeal. In the circuit court the jury was instructed to return a verdict of guilty, or not guilty, as they found certain facts to be. The judgment of the circuit court is one for restitution of the premises. We assume, therefore, that the proceeding was brought, not because rent was due and unpaid, but upon the theory that the tenancy, whatever its nature, had been determined, for which reason defendants were unlawfully in possession.

Appellants argue two propositions, stated in the brief as follows:

"*First.* That the circuit judge should have directed a verdict for the defendants for the reason that, under the agreement entered into between the parties, a tenancy

from year to year was created, which tenancy was not terminated by the statutory notice of one year.

"*Second.* That if there was a question of fact to be submitted to the jury, the conduct of the trial judge during the trial was such that defendants were deprived of a fair and impartial trial."

1. It was a part of the agreement of the parties that a written lease was to be executed. This appears both by the testimony given in the case at bar, and by the pleadings in the chancery suit which has been referred to. It therefore is not the case of leasing land, by parol, for a period longer than a year. It is the case of a parol agreement to make a written lease for a term which could not be created by parol. The parties contemplated no such thing as an arrangement out of which would arise what is known to the law as a tenancy from year to year. Of the legal effect of letting defendants into possession under the circumstances stated, two things may be said. One is, that, upon the refusal of the defendants, if they did refuse, to execute a lease as agreed, the landlord might have immediately repossessed the premises. It would be a singular rule of right, and therefore a singular rule of law, which would permit defendants to build any right of continued occupancy upon their refusal to execute the contract agreed upon, to create a relation different from the one agreed to be created. And, whoever is responsible for the nonexecution of the lease, it is clear that defendants are not holding under any agreement, whether enforceable or not, for a term. The other is, that, the landlord, without taking proceedings to dispossess them or to compel them to execute the lease agreed upon, notified them they might remain in possession for the period of one year, provided they paid rent, etc., in accordance with the oral agreement. It cannot be said there was a contract for leasing for a year. There was possession by the tenants and acquiescence therein by the landlord, upon terms mutually understood.

If it can be said that the landlord was by his action

precluded from terminating the tenancy during the year, it gave defendants no right to remain longer than a year. The landlord, at the expiration of the year, took no action to dispossess defendants except by proceedings in which restitution could not be awarded if defendants paid the rent found to be due. Defendants paid and he accepted the rent due for the first year and thereafter to February, 1909. After the first notice, he gave no other written notice except such as demanded possession or rent, in the alternative. This conduct is inconsistent with the theory that the tenancy had been terminated by any notice, oral or written. It is consistent with the theory that defendants were holding over, by acquiescence of the landlord, after the first year. What, then, was the nature of the tenancy? Unless the facts distinguish this case from *Huyser* v. *Chase*, 13 Mich. 98, it was a tenancy at will, determinable by a three months' notice to quit. See, also, *Schneider* v. *Lord*, 62 Mich. 141, 142 (28 N. W. 773). The facts do distinguish the cases. There the premises were a house and lot on Woodward avenue, in Detroit; here a farm. In that case, it is true, an annual rent was reserved, but it was payable in equal monthly installments. Here an annual rent is reserved, but the greater part of it is payable at the end of the year. What the parties did during the first year, considered with what they had agreed the rent should be, was equivalent to a verbal stipulation for rent at an annual rate, payable, the most of it, at the termination of an annual period. The reasonable presumption is, in such a case, that if the tenant is permitted to hold over, he holds for the annual period. We are of opinion that the tenancy was not strictly a tenancy at will. Nor was it a tenancy from year to year. There was never a lease, parol or other, for a term of years. The rights of the parties rested upon conduct of the parties after the neglect or refusal to execute the written lease. The most that defendants can claim is that, if they held over after the expiration of an annual period, they were in for another annual period. They were liable

to be dispossessed at the end of any year, without notice.

Plaintiffs expressly permitted defendants to occupy for one year. They acquiesced, as we have seen, in the occupancy for the second year. The third year began April 1, 1909, and on the 30th day of that month complaint was made. Ought the elapsing of this time to be held to entitle defendants to remain in possession for the period from April 1, 1909, to April 1, 1910? As we have seen, the question must be decided without reference to the original agreement for a term of three years. There was no consent of the landlord, express or implied, for continued occupancy, unless consent may be implied from the lapse of time. Often mere lapse of time may estop the landlord, as well as the tenant, to deny the further relation of landlord and tenant. In some cases, it may be a question of fact for the determination of a jury. In this case no one claims that plaintiffs consented, in fact, or could be induced to consent, to allow the defendants to remain any longer on the land. There was much feeling between the parties. In the chancery suit it had been determined and decreed in the court below that defendants' rights expired March 31, 1909. It is the testimony of one of the defendants that in April, 1909, he "was thrown off the farm." We are of opinion that the undisputed evidence negatives consent, and that the court below should have directed a verdict of guilty to be returned. Being of this opinion, it is unnecessary to consider the second proposition of the appellants.

The judgment is affirmed.

HOOKER, MOORE, MCALVAY, and BLAIR, JJ., concurred.

MACOMBER *v.* COTTRELL.

COMPROMISE AND SETTLEMENT — RESCISSION FOR FRAUD — EXECUTORS AND ADMINISTRATORS.

Complainant filed a bill in equity to vacate a compromise agreement made with the executor of his deceased sister's husband, by which complainant released all claim to his sister's estate as her heir at law, for the payment of a certain sum of money. The bill averred that the executor suppressed a certain account book, having entries showing the amount of money in the hands of deceased belonging to the sister. By the terms of the compromise it appeared that during the life of testator, complainant had made claim to his share of the sister's estate, that the testator claimed the same by gift from his deceased wife, and finally conveyed certain real estate and canceled a certain note in settlement of the claim. The bill contained no averment that complainant was misled by misrepresentations of the facts. *Held*, that no case was made for the interposition of equity.

Appeal from Macomb; Erskine, J. Submitted April 12, 1910. (Docket No. 64.) Decided July 14, 1910.

Bill by Allen E. Macomber against George Cottrell and others, heirs at law of William Cottrell, deceased, to set aside an assignment of a claim, and for an accounting. From an order overruling a demurrer, defendants appeal. Reversed, and bill dismissed.

Fred A. Baker (*William S. Jenney* and *Harrison W. Geer*, of counsel), for complainant.

Stevenson, Carpenter & Butzel and *James G. Tucker*, for defendants.

HOOKER, J. The bill in this case is filed by the complainant to establish his claim as heir of one Georgia Macomber Cottrell to a share of her estate, which he alleges to have gone into the hands of William Cottrell, her hus-

band, who survived her, and for which, it is claimed, he never accounted. A demurrer to the bill was overruled, and defendants have appealed.

We must, of course, look at the bill and determine whether it states a case entitling complainant to relief. Briefly stated, the allegations are:

(1) Georgia Macomber Cottrell was the sister of the complainant, and wife of William Cottrell, who survived her. She died August 28, 1900.

(2) George Macomber gave large sums of money to his daughter, Georgia, which went into the hands of her husband, who had little money of his own when he married her. He suppressed the fact that he was handling her money and complainant was only recently informed of it.

(3) In 1877 George Macomber divided his property; that Georgia then received between $75,000 and $100,000; that complainant knew of this at the time, but he did not know until recently that it passed into the control of William Cottrell, or of the increase thereof, facts carefully suppressed by Cottrell.

(4) March 28, 1901, the Detroit Trust Company was appointed administrator of Georgia Cottrell, at the instance of William Cottrell. The inventory amounted to $137.15. William Cottrell at that time suppressed the facts that he held in his own name and control a large estate belonging to Georgia, amounting to $312,000 and upwards.

(6) On July 3d, William Cottrell, still suppressing said facts and concealing them from complainant, obtained from him and his wife an assignment of all their right, title, and interest in and to any and all of the estate and property of which Georgia Cottrell died seised, which assignment recited that it was the design to convey to him all interest of the assignors in the estate of Georgia Cottrell, and for this William Cottrell paid the sum of $55,000.

(7) William Cottrell thereafter caused the Trust Company to turn over to him the estate of $137.15, and to report that he was the owner as heir and assignee, and an order was made discharging the administrator and canceling its bonds.

(8) William Cottrell continued to suppress said facts until he died, August 11, 1907, at which time Georgia's estate had increased to $700,000, and William Cottrell's

own books showed that on January 1, 1907, the estate of Georgia in his hands was of the value of $445,000.

(9) Joseph Wolford was appointed executor of William Cottrell, and the appraised value of the estate was $858,855.59.

(10) Wolford, as executor, came into possession of the books and papers of Cottrell, and among them was an account book, containing an account wholly in Cottrell's handwriting, of which the following is a copy:

GREENVILLE, MICH., January 1, 1878. Mortg. Securities Inventory.

Jan. 1, 1878, I find in good securities	$87,728 00
That my wife, Georgia, has	78,000 00
	$165,728 00
Jan. 18, 1879, I find our joint property increased to	184,188 00
Increase $23,429.	
Jan. 1, 1880, I find an increase of $10,000, the past year having been a poor one in my business	194,000 00
Jan. 1, 1881, I find, besides all expenses	219,026 00
Jan. 1, 1882, I find, being now in Lansing	241,642 00
Jan. 1, 1883, I find two hundred fifty-seven thousand seven hundred and twenty-eight dollars	257,728 00
Jan. 1, 1884, I find two hundred and sixty-nine thousand four hundred and forty dollars, also house and lot	269,440 00
Horses and buggies worth	5,000 00
	$274,440 00
Jan. 1, 1885, I find two hundred and ninety-two thousand one hundred and forty-one dollars	292,141 00
Jan. 1, 1886, I find three hundred and three thousand two hundred and thirty-five	303,235 00
Also house and lot, horses and buggies $10,000	10,000 00
	$313,235 00
Jan. 1, 1887, I find three hundred and twenty-two thousand seven hundred and eleven dollars	322,711 09
Also house and lot, horses and buggies worth	10,000 00
	$332,711 00
Jan. 1, 1888, I find three hundred and thirty-two thousand nine hundred and thirty-nine dollars	332,939 00

Also Belvedere farm	$8,000 00	
House and lot, horses and buggies	9,000 00	$17,000 00
		$349,939 00
Jan. 1, 1889, I find three hundred and fifty-five thousand eight hundred and ninety-one dollars		355,891 00
Also Belvedere farm	$7,000 00	
House and lot	3,000 00	
Black mare	2,500 00	
		12,500 00
		$368,391 00
Jan. 1, 1890, I find three hundred and ninety-one thousand nine hundred and fifty-five dollars		$391,955 00
Jan. 1, 1891, I find mortgages	$362,613 00	
Notes	23,638 00	
Contracts	16,859 00	
Belvidere	8,000 00	
House and lot	4,000 00	
Lot, Greenville	1,200 00	
Black	3,000 00	
Roan mare	2,000 00	
		$421,310 00

Securities.

Jan. 1, 1892, I find mortgages	$372,784 33	
Contracts	16,825 84	
Notes and bank stock	29,538 68	
Belvidere farm	12,000 00	
House and lot	4,000 00	
Cash	8,099 57	
Black mare	3,000 00	
Roan mare	2,000 00	
		$448.248 42
Jan. 1, 1893, I find mortgages	$372,014 49	
Certificates	26,265 00	
Contracts	15,966 18	
Notes	27,544 42	
Cash	5,000 00	
Belvidere	12,000 00	
Campbell house and lot	6,000 00	
Phelps house	1,200 00	
Residence, Sear	10,000 00	
House	1,000 00	

Switzer mortgage	$805 33	
Goetz lot	3,700 00	
		$481,495 42
Jan. 1, 1894, mortgages	$399,176 36	
Notes and certificates	60,950 26	
Belvidere farms	12,000 00	
Campbell house and lot	6,000 00	
Goetz lot	3,700 00	
Phelps lot	1,200 00	
Home	15,000 00	
Cash	1,000 00	
		$499,026 62
Jan. 1, 1895, mortgages	$414,776 00	
Contracts	9,985 00	
Farms and rented houses	30,200 00	
Bank stock	2,500 00	
Certificates	9,284 00	
Deposits	1,800 00	
Moran farm	4,500 00	
Dayton farm	4,000 00	
Notes, $24,264; residence, $15,000	39,864 00	
		$515,909 00
Jan. 1, 1898, mortgages	$425,930 00	
Real estate	97,209 00	
Notes	36,533 00	
Bank stock and notes	9,000 00	
Contracts	42,980 00	
Chattel mortgages	3,516 00	
		$615,168 00
Jan. 1, 1899, mortgages	$434,754 00	
Real estate	99,500 00	
Certificates deposit	31,447 00	
Notes and bonds	26,211 00	
Contracts	38,960 00	
Deposits	5,372 00	
New Haven farm	2,500 00	
		$638,744 00
Jan. 1, 1900, mortgages	$489,971 00	
Real estate	106,600 00	
Notes	24,265 00	
Contracts	40,710 00	
Certificate deposit	16,300 00	
Bank stock	5,000 00	
School bond	300 00	
Deposit, Mt. Clemens	1,000 00	
Deposit, Lansing	3,000 00	
		$687,146 00

Jan. 1, 1896, mortgages	$425,111 00	
Contracts	26,900 00	
Farms and rented houses	32,500 00	
Notes	25,853 00	
Harrison note	7,000 00	
Residence	15,000 00	
Mortgages foreclosed, Wm. Jenney	2,000 00	
Mortgages foreclosed, C. Schutt	2,500 00	
Mortgages foreclosed, B. B. Crawford	5,800 00	
Mortgages foreclosed, F. S. Spencer	1,300 00	
Lansing cash	2,000 00	
Jenney decree	3,000 00	
		$548,964 00
Jan. 1, 1897, mortgages	$414,004 00	
Property acquired by purchase and foreclosure	60,000 00	
Phelps contract	700 00	
Bank certificate	9,049 00	
Notes	22,766 00	
Bank stock	2,000 00	
Goetz house	3,000 00	
Campbell house	4,000 00	
New Haven farm	2,500 00	
Residence	15,000 00	
Belvidere	12,000 00	
Barron block	21,000 00	
		$566,019 00

Mortgages January 1, 1901, and Other Securities.

Mortgages	$508,100 00
Real estate	57,800 00
Notes	24,926 00
Contracts	38,605 00
Certificates deposits	10,660 00
Bank stock	5,000 00
Deposit, Clemens	6,476 00
Deposit, Lansing	4,000 00
School bond	250 00
Deposit Lakeview	500 00
Geo. Ferris mortgage	2,100 00
Joe Wilson mortgage, other notes	5,160 00
	$665,077 00

Dec. 25, gave to Richard Cottrell farm at New Haven, Mich., of 55 acres, worth $3,500 00

July 1, 1901, gave to George Macomber, Lake-

view, Mich., in good real estate and cheap at valuation	$25,000 00
July 1, 1901, gave to Nora Macomber Miller of Greenville, Mich., in good real estate at low valuation, farms	25,000 00
July 1, 1901, gave to Allen Macomber, in his own note, $5,000 and int. on same $35	5,035 00
July 1, 1901, to Joe Clark and Allor attorneys, paid	1,000 00
Sept. 13, 1905, gave to Brother John Cottrell, 200 acres of farming land, Belvidere, Mich., worth (with good buildings and fences, well ditched)	12,000 00
	$71,535 00
Dec. 20, 1900, deeded to Elmer L. Allor lots in Greenfield township, city of Detroit, being lots 42 to 50, both inclusive, of Ivanhoe, Smith, and Mathews' subdivision of lot 3 of Dickison's subdivision of part of the east half of the S. W. quarter of section 2, township 1, range 11 East, worth at least $150 per lot	$1,350 00
Jan. 30, 1902, to E. L. Allor, wedding present, assignment of Mulvey mortgage, on Detroit property, assignment to him and wife jointly, mortgage of Mary and Martha Mulvey	661 00
To Allor	$2,011 00
Brought down from above	71,535 00
	$73,546 00
Jan. 8, 1903, to Brother John Cottrell, discharge of mortgage on his farm, mortgage of date Jan. 8, 1883, $1,000, 7 per cent. interest annually, nothing paid figures	$3,700 00
Gave Jack his notes in 1887	400 00
Gave Dick his notes in 1902 and 1904	450 00
	$78,096 00
Find Securities Jan. 1, 1902.	
Jan. 1, 1902, find mortgs.	$542,624 00
Bank deposit	47,999 00
Real estate	56,100 00
Contracts	22,550 00
Notes	18,859 00
New Baltimore contract	4,500 00
Bank stock	5,000 00
	$697,632 00

Jan. 1, 1903, find mortgs.	$591,128 00
Land contracts	16,791 00
Real estate	55,900 00
Notes	16,863 00
Bank stock	5,000 00
Deposit Lakeview	800 00
Deposit Lansing	5,000 00
Deposit Mt. Clemens	31,000 00
Duncan mortg.	5,500 00
Lydia Mosher note	1,500 00
Richard Loose mortg.	1,000 00
Anna Parker mortg.	2,000 00
Geo. Lovely mortg.	945 00
Davenport House, Lansing	1,700 00
	$735,127 00
Jan. 1, 1904, find in mortgs.	$639,675 00
In notes	21,684 00
Land contracts	20,225 00
Real Estate	50,200 00
Frederick farm	2,000 00
Smith House, Three Rivers, Mich.	4,500 00
Foreclosed mortgs.	3,183 00
Deposit Lansing	3,487 00
Deposit Mt. Clemens	24,000 00
Bank stock	5,000 00
	$773,954 00
Jan. 1, 1905, find in mortgs.	$716,886 00
Notes	19,295 00
Land contracts	14,985 00
Real estate	52,062 00
Foreclosed mortgs. subject to redemption	8,900 00
Deposit Lansing	1,750 00
Deposit Lakeview	800 00
Deposit Mt. Clemens	7,590 00
Bank stock	5,000 00
Note E. A. Alvord, Detroit	225 00
	$826,493 00
	Jan. 1, 1905.
Jan. 1, 1906, find in mortgs.	$764,310 00
Land contracts	22,026 00
Real estate	26,000 00
Notes	17,056 00

Mortgs. foreclosed, subject to redemption	$11,710 00
J. R. Trufant, mortg. foreclosed	8,042 00
Loans in transit to Lansing	2,200 00
J. W. Wolford	3,500 00
Bank stock	5,000 00
Deposit Mt. Clemens	8,500 00
Deposit Greenville	300 00
Lakeview	240 00
Notes and dividends and int. on deposit	2,515 00
	$861,399 00

Jan. 1, 1906.

Inventory List, Jan. 1, 1907.

Jan. 1, 1907, mortgs.	$811,630 00
3 Sheahan mortgs. foreclosed	4,010 00
Lonsby mortg. foreclosed	18,000 00
Real estate	22,100 00
Land contracts	16,207 00
Notes	15,976 00
Deposit Clemens	28,041 00
Mortg. in transit to Lansing	8,800 00
	$924,764 00

Find Jan. 1, '07.

We have thought best to print this entire account, as it appears to be the foundation of this proceeding. Complainant claims in the bill that Georgia owned something over one-half of the same.

(11) Complainant filed a claim in probate court for the allowance of $250,000, which he claimed as heir of Georgia. This claim was disallowed by the commissioners, and complainant took and perfected an appeal; that pending such appeal a compromise agreement was made in writing and this was approved by the probate judge, and an order entered authorizing the executor to pay complainant, and he did pay him the sum of $30,000, in full settlement of the claim, under such order. The probate proceedings and the settlement agreement are set out in the bill at length.

(12) While the claim was pending before the commissioners on claims, complainant repeatedly applied to and requested Wolford for information within his knowledge

concerning the interest of Georgia in the estate of William Cottrell and the validity of complainant's claim as her heir, and particularly requested him to disclose any facts within his knowledge or information which would support said claim, but "said Wolford misapprehending and being unmindful of his duties and obligations" as executor refused to give any information whatever, and Wolford withheld and suppressed all information concerning said account book, and that complainant signed the compromise agreement "without any knowledge or information concerning the disposition the said Georgia Macomber Cottrell had made of the securities, money, and property she had received from her father, and without any knowledge or information of the fact that she had placed, or permitted her husband to place, her estate in his name and control to be held by him commingled with his own property as the joint property of her, the said Georgia Macomber Cottrell, and said William Cottrell, as husband and wife, as is fully disclosed by said book account in the handwriting of said William Cottrell, so fraudulently and wrongfully suppressed from your orator by said Joseph W. Wolford; that he also withheld and suppressed from your orator the fact that the accumulations and increase of the estate of said Georgia Macomber Cottrell from January 1, 1878, to January 1, 1907, had been very large, and that on the basis fixed by the account of said William Cottrell of the joint property of himself and wife, her estate or interest January 1, 1907, was of the value of $445,240 and upwards; that by this fraudulent suppression of the facts your orator was induced to sign and deliver said compromise agreement; that if your orator had had any knowledge of said book account in the handwriting of said William Cottrell, he never would have entered into said compromise agreement."

(13) That after the payment of said $30,000 to complainant, Wolford disclosed said book account by producing it at the hearing of a petition filed by him regarding the payment of legacies. This petition is also set forth in the bill.

(14) On the hearing of said petition complainant first saw said account book.

(15) A petition for an administrator *de bonis non*, with a view to the filing of a bill in chancery for an accounting, was made and dismissed upon motion; the probate

court declining to hear evidence. An appeal has been taken from the order of dismissal and it is now pending in the circuit court.

(17) Complainant offers to pay the sum received in settlements into court, to abide its order.

The bill prays:

(1) The appointment of an administrator *de bonis non*, who shall be permitted to become complainant in this case.

(2) That the executors and heirs of William Cottrell be required to account, and the amount due from the estate of William to the estate of Georgia be determined and payment enforced.

(3, 4) That the assignment of July 3, 1901, and agreement of January 18, 1909, be set aside and complainant restored to all his rights as heir of Georgia Cottrell.

(5, 6) That the court take control and possession of the estates of William Cottrell and Georgia Cottrell by a receiver and administer and distribute both estates.

(7) General relief.

It is manifest from the foregoing that the only claim made in the bill as a ground for reopening this controversy is the alleged fraudulent suppression of the book account, but for which the assignment and compromise would preclude relief. The gist of the claim is that the two settlements should be reopened, because Wolford, administrator of Cottrell, did not disclose to a claimant evidence which claimant now asserts would have established his claim, had he known of and been able to produce it. It goes without saying that if the administrator of Cottrell had possession of a fund belonging to Georgia, justice demanded that he account, and pay over such sum as should be allowed. Such a claim was made by the complainant while Cottrell was alive, and suit was begun or threatened, and the matter was adjusted and settled upon the claim that Georgia had, prior to her death, transferred her property to William Cottrell by way of gift, and $55,000 was the price at which William Cottrell bought his peace, in July, 1901, and obtained a broad and comprehensive assignment of all complainant's interest in

Georgia Cottrell's estate. If this claim was untrue, and was believed by complainant, and was the inducement by which he was led to compromise his claim, it might perhaps be renewed and a bill might lie for rescission and to cancel his assignment in a proper case.

Cottrell died in August, 1907. Complainant thereupon filed a claim for a share of Cottrell's estate, upon the ground that it comprised a portion of property that belonged to Georgia at the time of her death, notwithstanding the fact that he had compromised the claim and assigned all of his interest to Cottrell. The petition does not appear to have been dated, signed by complainant, or sworn to by any one. It was made by his "attorney in fact" and sets up the assignment, and states—

"That about this time your petitioner made a claim upon the said William Cottrell for one-half of said estate as the heir at law of the said Georgiana Cottrell, but the said William Cottrell represented to your petitioner that she had practically no estate; that the negotiations with the said Cottrell continued over several weeks, Mr. Cottrell contending that his wife left no estate, but finally stated to your petitioner that he desired to present to each of the daughters of your petitioner, namely, Nora Miller and Georgia Macomber, certain property valued, as he claimed, at about $50,000, and stated that if your petitioner would make and execute an assignment to him of all his right, title, and interest to any and all estate and property of which the said Georgiana Cottrell died seised, that he would convey to your said petitioner's two daughters the property aforementioned, and your petitioner thereupon did make and execute and deliver to the said William Cottrell an assignment in due form of all the right, title, and interest in said estate, and the said Cottrell thereupon did convey and transfer to the said Nora Miller and Georgia Macomber certain real estate claimed by said Cottrell to be worth $50,000, but as your petitioner is informed and believes and charges the truth to be, was worth much less than that.

"Your petitioner further shows that he is informed and believes and charges the truth to be that the statements of the said William Cottrell, to the effect that the said Georgiana Cottrell died without any estate, were false

and were made for the purpose of defrauding and defeating your petitioner from recovering his proportion of said estate and for the purpose of obtaining from your petitioner an assignment of all your petitioner's right and interest in and to said estate, but that, on the contrary, the said estate did amount to some $400,000 and upwards, all of which was unknown to your petitioner."

It is noticeable that this petition made by his attorney, and set up in the bill, does not contain the allegation that complainant ever believed Cottrell's statements, and made the compromise in the bona fide belief that they were true. We have no means of knowing how much proof was taken or what trial of the real merits was had before the commissioners, and it does not matter, as this question before us must turn on the allegations of the bill. The claimant was defeated, and appealed. In January, 1909, an agreement was made which appears in the bill. We incorporate it entire in this opinion.

"Agreement entered into this 18th day of January, A. D. 1909, between Allen E. Macomber, Lake View, Montcalm county, Michigan, party of the first part, and Richard Cottrell, George Cottrell, John Cottrell, Copley Cottrell, Mary Watt, David Boyd, and John Boyd, heirs at law and distributees of William Cottrell, deceased, of the second part, and Joseph W. Wolford, as executor of the will of said William Cottrell, of the third part; Mary L. Cottrell, widow of said deceased, consenting thereto.

"Witnesseth:

"Whereas, George Macomber died in the year 1880, leaving surviving him two children as his sole heirs at law, namely, Allen E. Macomber, party of the first part, and Georgiana Macomber Cottrell, then wife of said William Cottrell, now also deceased, and

"Whereas, prior to the decease of said George Macomber he transferred and conveyed to each of his said children by way of distributing his estate, a large amount of property consisting of money, mortgages, and real estate, and

"Whereas, the portion so transferred and conveyed by the said George Macomber to his daughter, Georgiana Macomber Cottrell, amounted in value to $100,000, or upwards, and became and was received by her as her sole and separate property and estate; and

"Whereas, the said Georgiana Macomber Cottrell, upon receiving such property, committed the care, management, and investment of the same to her husband, William Cottrell, now deceased, and he took upon himself the care, management, and investment of the same for her benefit; and

"Whereas, for a time after the receipt of said property by the said Georgiana Cottrell, it was invested in her name, but later intermingled by the said William Cottrell with his own moneys, and with the profits and proceeds thereof was invested and from time to time reinvested in his own name, and so remained at the death of said Georgiana Cottrell on the 28th day of August, 1900, and still so remained at the time of his death on the 7th day of August, 1907, and yet remains as a part of his estate; and

"Whereas, administration of the estate of said Georgiana Cottrell was had in the county of Macomb, in this State, upon a petition of her husband, William Cottrell, wherein such estate was given as of the value of $100 and upwards, and in which procedings the said estate was appraised at the sum of $127, or thereabouts; and

"Whereas, during the pendency of such administration in consideration of certain real estate conveyed by said William Cottrell to the daughters of said Macomber, and in further consideration of a certain note for five thousand ($5,000) dollars made by Macomber and Bale, surrendered by said Cottrell to said Macomber, the said Allen Macomber, by an instrument in writing, bearing date July 3, 1901, sold, assigned, transferred, set over, released and conveyed to the said William Cottrell all his right, title, and interest in and to any and all of the estate, real and personal, of every kind and character, wherever situated of the said Georgiana Cottrell, deceased, which assignment or a true copy thereof was filed in the office of the judge of probate of Macomb county, as a file and record in the estate of said Georgiana Cottrell; and

"Whereas, afterwards and during the year last aforesaid an order based upon said assignment was made and entered in the matter of said estate of Georgiana Cottrell by said probate court, declaring the said William Cottrell sole heir at law and distributee of said Georgiana Cottrell, and assigning all of her said estate to the said William Cottrell; and

"Whereas, the said William Cottrell at the time of his

death on August 7, 1907, remained and was in possession and control of the property so received by his late wife, the said Georgiana Cottrell, from her father and of the proceeds and profits thereof, claiming the same as his own property; and

"Whereas, the said Allen Macomber now claims that the said William Cottrell, so obtained and received from him the assignment by falsely and fraudulently representing to him, the said Allen Macomber, that the said Georgiana Cottrell had, prior to her death, transferred her said property to him, the said Cottrell, by way of gift, and that she had no property or estate at the time of her death, and that he, the said Macomber, made and delivered the said assignment to the said Cottrell, relying upon and believing such false and fraudulent settlement; and

"Whereas, the said Macomber now asserts and alleges that the said William Cottrell always held, managed, and controlled said property, as the property of said Georgiana Cottrell and in trust for her, and that the same remained and was her property at the time of her death, and that his said representations as to gift were false and untrue; and that such property amounted in value at the time of her death to the sum of $400,000 and upwards, and at the time of his death to $500,000 and upwards; and

"Whereas, inasmuch as the said Georgiana Cottrell died intestate and without issue, the said Allen Macomber now asserts that he, as her sole heir and next of kin, was at the time of her death and is now, entitled to one-half of her estate and property so held in the possession of William Cottrell; and that said assignment so made by him ought to be set aside and held for naught; and

"Whereas, he also claims that he is legally entitled to damage from the estate of said William Cottrell for the fraud and deceit so alleged by him to have been practiced by the said William Cottrell; and

"Whereas, the said Allen Macomber asserts and alleges that in his judgment and belief he has, and is, in possession of and can produce before the proper tribunals, ample and sufficient legal evidence to maintain all of his claims and assertions aforesaid, and to procure said assignment to be set aside, and to prove the amount and value of the estate of said Georgiana Cottrell as aforesaid, and to establish said trust, and to obtain and maintain a judgment or decree awarding him the one-half of her said

estate, and to procure a judgment, decree, or award in his favor and against the estate of said William Cottrell for the aforesaid fraud and deceit; and

"Whereas, the said Allen Macomber filed before the commissioners on claims, in the matter of the estate of said William Cottrell, a claim for his alleged share of the said estate of said Georgiana Cottrell, or for damages for said fraud and deceit, or both, which claim was rejected by said commissioners, and is now pending on appeal in the circuit court for Macomb county; but

"Whereas, there exists a question of law as to whether the said Allen Macomber, party of the first part hereto, can prosecute his claim against the estate of William Cottrell in the manner now attempted, as aforesaid, or whether it may be necessary to file a bill in equity to set aside said assignment and for an accounting; or to procure the reopening of the estate of Georgiana Cottrell and the filing of such bill by her personal representative; and

"Whereas, there is in prospect long litigation before the party of the first part can recover what he claims to be equitably entitled to as heir at law and distributee of his sister, said Georgiana Cottrell, deceased, or damages for such alleged fraud and deceit; and

"Whereas, other difficulties and uncertainties may inconvenience, delay, or prevent recovery by the party of the first part of what he claims to be equitably or legally entitled to from or against the estate of said William Cottrell, deceased, he has, in consideration of such facts and situation, made a proposal to the parties of the second part to compromise and settle for the sum of thirty thousand ($30,000) dollars any and all claims which he has asserted, or may, or might assert against the estate of said William Cottrell, deceased, either directly or through the estate of Georgiana Cottrell, and all claim that he has, or might assert to or against the estate of Georgiana Cottrell or any part thereof, and to ratify and confirm in all respects the assignment heretofore made by him to the said William Cottrell.

"Wherefore the parties hereto have and do hereby agree as follows:

"'*First:* The party of the first part hereto, in consideration of the premises and the promises of the parties of the second part, hereinafter set forth, has promised and agreed, and does hereby promise and agree to and with other parties hereto, that he will accept and receive the

said sum of thirty thousand ($30,000) dollars, of and from said parties or either or any of them, if paid or tendered to him, or to his attorney or attorneys, within 30 days from the date hereof, in full payment, satisfaction, and discharge of any, all, and every claim which he has asserted or can, could, or might assert, against the estate of said William Cottrell, deceased, either personally or directly, or indirectly, through the estate of Georgiana Cottrell, or her personal representative; and in full payment for all his interest or asserted interest in or to the estate of said Georgiana Cottrell, deceased; and that upon such payment to him, or his attorney, or attorneys, of the sum of thirty thousand ($30,000) dollars within said 30 days from the date hereof, he will fully release and discharge the estate of said William Cottrell, and the executor thereof, of and from every claim and demand which he has or might assert against them, or either of them, either directly or indirectly, as heir and distributee of said Georgiana Cottrell, and that he will ratify and confirm the aforesaid assignment of July 3, 1901, to William Cottrell in all respects and will discontinue his aforesaid claim now pending on appeal in said circuit court without costs, and will execute and deliver to said parties and each of them, such further assurance in the premises as they or either of them may reasonably demand.

"'*Second:* The parties of the second part, in consideration of the premises and the promises of the party of the first part, hereinbefore set forth, promise and agree that by and with the consent of Mary L. Cottrell, the widow of said William Cottrell, deceased, and of his executor and of the probate court of Macomb county, to be obtained, the said sum of thirty thousand ($30,000) dollars, shall be paid to said first party out of the intestate portion of the estate of said William Cottrell, within 30 days from the date hereof and they unite in a request to said executor that he make application to said probate court for leave to effect such compromise, and if permission is granted by said court, that he make such payment as aforesaid.

"'*Third:* And the said Joseph W. Wolford, not having advised or requested such settlement, but consenting to the request of the parties of the first and second part, and in consideration of the premises herein set forth, and of the benefits accruing to the estate for such a settlement and adjustment, does hereby as such executor, promise and agree to petition said probate court for leave to make the

settlement aforesaid, on the terms aforesaid, and if he shall be authorized so to do by said court, and if said Mary L. Cottrell, widow as aforesaid, shall consent thereto in writing, that he will pay on or before said 30 days from the date hereof, to said party of the first part, the said sum of thirty thousand ($30,000) dollars out of the intestate portion of said estate for the purposes and to the ends aforesaid.'

"It being understood by all parties that this agreement is made and entered into for the purpose of securing relief from prosecution or defense of existing litigation, and from the prosecution and defense of any and all litigation of any and every kind that might possibly be instituted by the party of the first part, directly or indirectly, against the estate of said William Cottrell, or to recover any portion of or interest in the estate of said Georgiana Cottrell.

"In witness whereof, the parties hereto have hereunto set their hands and seals and executed this agreement in triplicate, the day and year first above written."

The fraud now alleged consists of the failure of Wolford to divulge to complainant the account hereinbefore set forth, and nothing else. This account is at most evidence that at the time of Cottrell's death he had in his possession certain property of his deceased wife, and the amount, and that Cottrell had falsified and fraudulently obtained a compromise. It is doubtful if even this can be properly said. It is contended that the first item indicates that he then had her property and that the presumption is that it continued hers, as the account does not expressly state the contrary. We do not feel so sure of this. Never afterward was the property mentioned in the statement, separated. This is at most an admission of Cottrell. He might have separated the securities in the way he did, and yet have had the right to claim them as a gift, but grant that he did not, the whole admission must be taken together. The parties were childless and it is not so very unnatural that at some time later the wife should have given this property to her husband, who was clearly competent to preserve property. But, aside from these considerations, we have stated all that can be claimed for this

testimony, viz., that Cottrell had it; that it was Georgia's when she died; the amount thereof; and that he falsified about it when the first settlement was made, thereby inducing its acceptance.

Now, that complainant knew all of these things (except perhaps the amount) when he settled the second time, is placed beyond dispute by the agreement made. It states the fact that Cottrell had his wife's property; that it was hers when she died (and consequently it had not been given to him); that he obtained the assignment by falsehood and fraud. Knowing all of these things, and stating that he believed he could prove them, and desiring to avoid a question of law as to procedure, and contemplating the possibility of a necessity for the filing of a bill in equity, and the prospect of long litigation which he desired to avoid, the complainant agreed to and did take $30,000 more to settle the controversy. All of this appears in the bill, and if ever a claim in litigation can be called settled, it would seem that the facts as stated in this bill accomplish it. We are of the opinion that the bill is without equity. It fails to state a case.

The decree is reversed and the demurrer sustained, and the bill dismissed with costs of both courts.

OSTRANDER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

In re VETTER'S ESTATE.

APPEAL AND ERROR—PROBATE APPEALS—RECORD—CONTENTS.

The record of an appeal to circuit from probate court, uncertified by the circuit judge, showing no entry of judgment, is not in condition for hearing in the Supreme Court.

Error to Berrien; Coolidge, J. Submitted April 13, 1910. (Docket No. 78.) Decided July 14, 1910.

Nellie M. Roesing filed a petition as guardian of the estate of William A. Vetter, a minor, to require the executors of the estate of George Covell, a deceased guardian of the infant, to pay over funds to the petitioner. The petition was denied in the probate court, and she appealed to the circuit court, where an opinion was filed denying the petition, but no judgment entered.

Alfred J. Parker, for appellant.

William H. Andrews, for appellee.

PER CURIAM. This proceeding is brought here by writ of error. We have before us what purports to be a record. It has never been certified to this court in any form by the trial judge, nor has a judgment ever been entered.

The case is not in a condition to be heard

PRIEBE *v.* TOWNSHIP OF MOORLAND.

1. BRIDGES — CONTRIBUTORY NEGLIGENCE — KNOWLEDGE OF DANGER—INSUFFICIENT RAILING.

   The question of contributory negligence in failing to take another road, or to lead his team, is one of fact, where, in crossing a bridge which plaintiff knew had no sufficient railing, one of his companions, who was driving, guided the horses off the edge, in the darkness.

2. DAMAGES—SUFFICIENCY OF EVIDENCE—MEDICAL SERVICES.

   The damages for physicians' services and for the value of groceries lost in driving off the bridge were properly left to the jury, under evidence showing approximately the respective amounts.

Error to Muskegon; Sessions, J. Submitted April 12, 1910. (Docket No. 67.) Decided July 14, 1910.

Case by Ferdinand A. Priebe against the township of Moorland for personal injuries. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Stephen H. Clink, for appellant.

James E. Sullivan and *R. J. Macdonald*, for appellee.

MCALVAY, J. This case is before this court upon writ of error to review a judgment obtained by plaintiff for personal injuries received, and property lost, by driving off from a certain bridge in a public highway over a ditch in said township, on a very dark night, through the failure of defendant township to maintain such bridge in a reasonably safe and fit condition for travel, and particularly because no railing or guards were maintained on the bridge.

Early in the morning of the day he was injured, plaintiff, who was 38 years of age, started from his farm in company with his brother-in-law, aged 25 years, and Charles Erickson, of the same age, with his team and wagon to drive a long distance for the purpose of attending an auction sale three miles east of Ravenna village. It was a gentle team, 9 and 10 years old. The near (left-hand) horse was blind. Ravenna was the village where plaintiff did his trading and was a distance of 6½ miles beyond the bridge in question. In going to this sale that morning he had taken this highway and crossed over this bridge. The day was cold and rainy. He remained at the sale until 3 o'clock in the afternoon, when, in company with the two young men mentioned, he started to return. He had purchased 25 chickens at the sale which were in a box in the wagon. He stopped at Ravenna and purchased some groceries to the amount of about $20, and then went to a saloon where the coats of the party were dried by the

stove. The weather was cold and it was, part of the time, raining hard. They remained there about an hour and the record indicates that they each had two or three drinks. The testimony is that they did not drink on the way home afterwards. They started from Ravenna about 5 o'clock with the chickens, groceries, a jug of whisky and some beer in the wagon. On account of the cold and rain they from time to time changed drivers during the 6½ miles to the bridge; each of them driving part of the way. At the time they came to the bridge Erickson was driving. His statement is that he was a careful driver; that it was dark; that he kept the road all right until he heard the horses' feet strike the bridge.

"As I struck the bridge Mr. Priebe says to me: 'Look out, you are right on the edge of the bridge,' he says. 'Haw over' (turn to the left). He had no more than said that before we were over on the left-hand side in the ditch."

The record shows that they could not see the road or the bridge, but could sometimes see the water alongside of the road. The approaches and the bridge are altogether 49 feet in length. The ditch under the bridge is about 18 feet wide with the water 3 feet deep. Side ditches at the north end of the bridge opened into the main ditch. The team fell into the smaller ditch. The wagon was bottom-side up in the main ditch with plaintiff under it; his head just above water. Erickson, by jumping, when they were going over, caught the bank of the ditch and climbed out. He then helped the other man and together they got plaintiff out from under the wagon. Erickson then ran for help to the next house, and when he returned the horses were gotten out. In the accident plaintiff's arm was broken at the elbow and is stiff. The testimony of the physician who treated him shows that the injury is permanent. Plaintiff had lived in the locality but one month. He testified that he knew the condition of the bridge.

Two errors are assigned and relied upon, as follows:

(1) That the court should have directed a verdict for defendant on the ground of contributory negligence.

(2) That the court should not have permitted the jury to find damages on account of groceries lost, and for doctor's bill paid because the proofs were too indefinite.

The first proposition is based upon the knowledge of plaintiff of the condition of the bridge for some time before the accident, and the claim that his conduct as shown by his testimony was negligent. It is urged that he did not use even ordinary care, when the law required him with his knowledge of the danger to use extraordinary care. Defendant insists that, because plaintiff did not take some other road home, or, having taken this road, did not get out and go ahead of his team, he was guilty of contributory negligence as a matter of law. We are not prepared to say that there was no question of fact for the jury upon the contributory negligence of plaintiff. In the case of *Benedict* v. *City of Port Huron*, 124 Mich. 600 (83 N. W. 614), the latest case cited and relied on by defendant, this court approved the submission of the question of contributory negligence of plaintiff to the jury, in what would appear to be a stronger case in support of the defendant's contention than the case at bar, where plaintiff's decedent on his wheel rode into the open draw of a bridge, with which he was perfectly familiar.

The charge of the learned circuit judge in the case at bar was at least as conservative as in the case last cited. He said, among other things, upon the matter of contributory negligence:

"He must satisfy you that he was exercising due care at the time of the alleged injury, and if want of due care on his part or on the part of the driver contributed in any degree to the injury he cannot recover, though it would not have occurred except for the neglect of the township in performing its duty in keeping the bridge reasonably safe and fit for travel. No matter how negligent you may find the township to have been, and no matter how defective you may find the bridge in question to have been, yet if the plaintiff was himself guilty of any negli-

gence which contributed in any degree to his injury he cannot recover.

"It is the claim of defendant that this plaintiff had knowledge of the defective condition of this bridge, and if you find that he did have knowledge of its defective condition, then the duty devolved upon him to exercise a greater degree of care than he would have been called upon to exercise had he known nothing about the defective condition of the bridge. In other words, no man has a right to put himself in jeopardy, and if he does, he must exercise an amount of care and caution corresponding to the danger which he incurs. And in all cases before a plaintiff is entitled to recover in a case of this character he must have satisfied the jury by a fair preponderance of the evidence in the case that upon the occasion when he received his injury he was exercising due care, and such care as a reasonably prudent and cautious person would have exercised under the same or like circumstances."

The court then proceeded to instruct the jury what it might consider in determining the case, giving at length and with great care each and every specific item of evidence in the case bearing upon the question, and covering the entire case. No other portion of this charge is questioned. We think that the question was properly submitted to the jury.

The second proposition is of a minor importance. It relates to the groceries lost, and doctor's services paid. There was evidence in the case that the doctor's bill was paid; that it was about $50; that plaintiff was treated by the doctor for about six weeks. The account was in the doctor's books, but he had been called to testify without time to get it. The testimony of plaintiff was that he paid about $20 for these groceries. Both witnesses were cross-examined. Both of these items were properly submitted to the jury. We find no error in the case.

The judgment is affirmed.

OSTRANDER, HOOKER, MOORE, and BROOKE, JJ., concurred.

SCHATTLER *v.* DAILY HERALD CO.

1. LIBEL AND SLANDER—BURDEN OF PROOF.
   It is error, in an action of libel for publishing a charge that plaintiff stole a purse, to instruct the jury that the burden of proof was on the plaintiff to show the false and defamatory character of the words.

2. SAME—WORDS ACTIONABLE PER SE.
   Words charging a person with larceny are libelous *per se*.

3. SAME—DAMAGES.
   Without proof of injury from the words, the plaintiff was entitled to recover the actual damages to his reputation and feelings which the law presumes will flow from the commission of the act.

4. SAME—TRIAL—INSTRUCTIONS TO JURY.
   Error committed in charging the jury was not corrected by recalling them after they had deliberated two and a half hours, reading the detached paragraphs in question and rereading them in modified form.

5. SAME—EVIDENCE—VERBAL ACT.
   Testimony of a conversation between the plaintiff and his wife concerning the purse, which was found by her on a train; the talk occurring after he met her and they were going from the station to the post office, was competent as a verbal act to show his intent.

6. SAME—EVIDENCE—CRIMINAL LAW.
   That the prosecutor dropped the criminal case against plaintiff because of the latter's ill health was not competent evidence.

7. SAME—INTENT.
   Conversations of plaintiff and his wife with third persons, tending to show their intent, should have been received in evidence.

8. SAME—REPUTATION—JOINT LIBELS.
Articles published in another local paper, having a similar slanderous effect, could not be received in evidence to mitigate the damages, or for any other purpose.

9. SAME—GOOD FAITH AS DEFENSE.
Good faith in the publication of a libelous charge in no way affects the defendant's liability to compensate the plaintiff for his actual damages to reputation or feelings.

10. SAME—MALICE—DAMAGES.
Actual damages may be increased by reason of malice of the defendant, on the theory that the injury to the feelings is greater from a wrong wantonly inflicted than from a wrong done in good faith.

11. SAME—CONSPIRACY—LARCENY.
Plaintiff could only be guilty of larceny if he himself formed an intent to feloniously appropriate the purse, or aided and abetted his wife in so appropriating it, after she had communicated to him her intent to do so, and a secret resolve on her part, inferable from conduct or words, would have no tendency to establish his guilt.

12. TRIAL—CHARGE—REQUESTS FOR INSTRUCTIONS TO JURY.
Error assigned on the refusal of requests to charge the jury, which are covered by the general charge of the court, does not warrant a reversal.

Error to St. Clair; Tappan, J. Submitted April 12, 1910. (Docket No. 68.) Decided July 14, 1910.

Case by John Schattler against the Daily Herald Company for libel. A judgment for defendant is reviewed by plaintiff on writ of error. Reversed.

Elmer E. Stockwell and *Frank R. Schell*, for appellant.

S. A. Graham and *Walsh & Walsh*, for appellee.

This is an action of libel. On May 8, 1907, defendant published an article concerning plaintiff as follows:

"DIAMOND THIEF IS NABBED THROUGH THE MEDIUM OF A DAILY HERALD LINER AD.

"For the Munificent Sum of Thirty-Four Cents, Port Huron Woman Recovers $300 Worth of Jewelry.

"She Left Her Purse on the Train, Woman in Rear Seat Found It, and Gave It to Her Husband to Get the Reward.

"'Lock me up. I am guilty of the theft and not my husband. Release him and I'll take the blame.' Statement made to the officers this morning by Mrs. John Schuttle.

"The merits of the Daily Herald liner ads. have been heralded throughout the city and country, but never before has this well-known column played in the role of a detective, landing his prisoner and placing him safely behind prison bars. However, it did this Tuesday and today John Schuttle, who fell into the hands of the Herald's sleuth, is posing in a cell at the county jail.

"How It Came About.

"Last Friday Mr. and Mrs. Timothy O'Brien, Erie St., this city, were returning home on a Pere Marquette train. Mrs. Schuttle and child, wife of the prisoner, were seated directly behind Mr. and Mrs. O'Brien. When the train arrived in Port Huron, Mrs. O'Brien got up and left the train. Upon her arrival home, she discovered that her pocketbook, containing six gold rings, three of them set with diamonds, had been left behind. It dawned upon Mr. O'Brien that a liner in the Daily Herald might bring back the lost articles, and he inserted an ad. a day later. He was right. Tuesday morning, a man, well-dressed, and of medium build, appeared at the Herald office with the purse, inquiring for the reward offered for its return.

"He Was Foxy.

"It was necessary for Mr. O'Brien to identify the pocketbook, and the office girl immediately telephoned him. The stranger became suspicious and left, saying that he would return later—but, he didn't intend to, evidently, for he had started for the railway station. Capt. Kerwin of the police department was called, and from a

description of the person, furnished by the office staff of the Herald, the alleged thief was rounded up shortly after noon.

"He Denied All.

"Schuttle, when taken to the police station, denied having any connection with the theft, but when the question of a reward being offered for the return of the property was advanced by the officer, Schuttle willingly turned over the pocketbook and waited patiently for his share. He was locked up and a warrant for grand larceny issued.

"Tip to Others.

"Such is the story of the detective secretly hidden in the sanctum of the Daily Herald liner columns, which cleared up a mystery, was the medium of returning several articles of jewelry, which in the least were valued at $400, and landed a thief in jail. The ad. cost Mrs. O'Brien 34 cents."

Which said libel means and charges the plaintiff herein with being a diamond thief, and being a thief; with having committed a felony by stealing a pocketbook containing $300 worth of jewelry, and also means and charges and insinuates that plaintiff stole said pocketbook and its contents for the purpose of getting a reward for returning it to its owner, and that he kept it and attempted by subterfuge, evasion, artifice, and deception to retain possession of the said pocketbook and its contents, until he should receive his "share" of the reward offered for its return, and that he only surrendered possession of said pocketbook when the officer intimated that he should receive his "share" of the reward.

It appears that plaintiff is a farmer, 27 years of age, and his wife, 23. They lived with the wife's mother, who was Pere Marquette railroad station agent and postmistress at Abbotsford. On May 3, 1907, plaintiff was visiting in Port Huron. His wife on that day went from Abbotsford to Port Huron, arriving on the 11 o'clock a. m. train. The seat in front of her upon the train was occupied by a man, woman, and child, strangers to Mrs.

Schattler. On leaving the train at Port Huron, Mrs. Schattler noticed a pocketbook lying in the seat in front of her, and took possession of it. On the platform she met her husband, the plaintiff, and together they claim to have made a search upon the platform, in the depot, and on the street to the post office for the owner of the purse. They did not find the owner, and then went to the home of Mrs. Shannon, plaintiff's sister. There the purse was examined by plaintiff's wife in his presence, and was found to contain some rings, and some change. The wife there told Mrs. Shannon about the pocketbook, but was not permitted to testify to what she said, nor to the conversation between herself and the plaintiff about the purse, upon the street, on the way from the station to the post office.

The next day plaintiff and his wife returned to Abbotsford. At the depot in Port Huron a police officer named Kerwin, in plain clothes, interrogated Mrs. Schattler about the purse, at which time she denied having found it, for the reason, she claims, that she did not know the man, or whether he had any more right to it than she had. Arrived at Abbotsford, she delivered the purse to her mother, who put it away. This occurred on Saturday. On the following Monday evening, plaintiff, his wife, and Mrs. Westbrook learned to whom the purse belonged, by reading the advertisement in the defendant's newspaper. The next morning, May 7, Mrs. Schattler delivered the purse with its contents intact to the plaintiff, who immediately took the same to the office of defendant, and delivered it to a young lady in charge of the office. She told him she thought there was a reward offered, whereupon plaintiff said he would return in a little while. He left the office, went to a barber shop to be shaved, and then went out on Military street and watched the driving of some spiles. While standing there, Officer Kerwin approached him, and inquired if he had left a purse at the Daily Herald office. Plaintiff answered, "Yes." Kerwin then asked him where he got it, and he replied that he

found it at the Pere Marquette depot. Plaintiff claims to have made this statement to the officer, because he then knew him to be an officer, and recognized him as the same man who had questioned his wife the preceding Saturday, and he did not want to have her caught in a lie. Thereupon Kerwin arrested plaintiff, and a warrant was issued charging him with larceny. The next morning, the 8th, bail was fixed at $200, which was furnished, and the examination set for May 10th; on May 10th the examination was adjourned to May 17th, upon which day the case was nolle prossed on motion of the assistant prosecuting attorney. On May 18th, plaintiff demanded that a retraction of the article complained of be published. This defendant refused. Suit having been brought by plaintiff, defendant, under its plea of the general issue, gave notice of justification.

A verdict was rendered in favor of defendant, and judgment entered thereon. Plaintiff has removed the case to this court by writ of error.

BROOKE, J. (*after stating the facts*). Plaintiff assigns error upon the charge of the court, which was in part as follows:

"With reference to the claims of the parties, you are instructed that the burden is upon the plaintiff to convince you by a fair preponderance of evidence that the words complained of were false, in fact, and defamatory in character.

"To recover actual damages he must also convince you by a fair preponderance of the evidence that the plaintiff has suffered injury to his good name, health, feelings, and that those injuries resulted directly from the publication of the article in the Herald of May 8th, 1907. * * *

"You are instructed that libel is a malicious defamation expressed in writing or printing, tending to impeach the honesty, integrity, or reputation of another.

"You are also instructed that printed words, falsely charging another with the commission of larceny, are actionable *per se*. That is, if it appears from the whole record that the words complained of charge plaintiff with being a thief or with committing larceny of the purse and

property in question, and that such charge is false in fact and wholly unjustified by the defendant, then the law presumes that he has suffered at least nominal damages, that is to say, at least six cents damages.

"As I have explained to you, to determine whether larceny was in fact committed by Schattler and wife in securing possession of the pocketbook and contents, * * * Mrs. Schattler had a right to take possession of the property to return it to Mrs. O'Brien, if she found her, and if she did not find her, then she had a right to turn it over to the conductor in charge of the train or the station agent.

"It is shown by undisputed evidence, that the conductor was present, and aided in the search for the property within five minutes from the time it had been left. Mrs. Schattler knew where he was.

"If she made search for Mrs. O'Brien, and could not find her, it was her duty to turn the property over to the conductor or the agent.

"She would not be a trespasser in taking charge of the property and turning it over to either of these, but when she failed to do this, and took the property away from the place where Mrs. O'Brien would have recovered it, taking it entirely away from the train and away from the conductor or agent, she then became a trespasser.

"Now, gentlemen, this is all-important as bearing upon the question as to when the intent to appropriate the property was formed. Under such circumstances as shown by the evidence, if you find that Mrs. Schattler took the property off the seat and off the train with an honest intention to find the owner, and took it away with that purpose and without any intention to commit larceny at the time when she took it away to convert it to her own use, but at some subsequent time formed the intention to keep the property as her own, she would become guilty of larceny at the time she formed the intention to appropriate the property, if she did so, whenever that time might have been.

"You are further instructed, that by virtue of the statutes in this State, there is no distinction between principals and accessories in the commission of crime. That is to say, if one aids, abets, or in any manner directly takes part in the commission of the offense of larceny, even though he does not actually take the goods into custody himself, he becomes equally guilty with the principal.

"If in this case you are convinced by a fair preponderance of the evidence, that Mrs. Schattler committed the crime of larceny, and you also find by a fair preponderance of evidence that her husband, the plaintiff, aided and abetted the commission of the crime, and aided in the concealment of the facts in keeping the property away from the owner when she was asked to return it, then you should find that he was an accessory and equally guilty with his wife, whether he ever took the property into his possession at all or not.

"Of course you will understand that it is for you to determine the facts as to the conduct of the parties, and whether their conduct amounts to larceny under all the facts. In doing this you will determine the facts in accordance with these principles of law which I give you.

"As an essential element of the crime of larceny, and the aiding and abetting thereof, an intent on the part of Mrs. Schattler and her husband to commit these acts must appear.

"What their actual intent was, you are to determine from the facts and circumstances, and what they did and said in connection with the property.

"You are also instructed, that if you believe from all the proofs, that Mrs. Schattler took possession of the property with an honest intention, and continued to hold it with honest intent to return it to the owner, and that her husband never formed an intent to aid her and keep the property away from the owner by concealing their possession of it, then neither would be guilty of larceny. But it is impossible to reach the recesses of the human mind to ascertain the true intent; you can only determine what it is by conduct.

"You are to consider what these people did in their attempts to find Mrs. O'Brien, or their failure to attempt to find her. Take into consideration their statements to the officers and others, their attempts in returning the property, and if from all of these, you determine that at any time Mrs. Schattler conceived the intent to retain this property as her own, and that Schattler aided and abetted her, as I have explained, then the truth of the defendant's charge, that Schattler was a thief, is established. * * *

"If, as a matter of fact, you shall find the defendant has not shown that it was justified in using false and defamatory language, the effect of the request to retract, the other articles in the Daily Herald and the language in

the article itself pertaining to the reward are to be considered to determine the degree of malice accompanying the publication of the false and defamatory statements, if they were such. Of course, if you determine as a fact that defendant under the circumstances, as they appear from the proofs, had a right to use the language complained of, all questions of malice and the effect of the notice to retract, and the other publications are wholly eliminated from the case. If the defendant was justified in printing what was printed, it is immaterial what the motives were which prompted the publication. * * *

"As I have explained, if the charges in substance, that the defendant was a thief, were not justified and were in fact false, then the law presumes that damages have resulted.

"General damages will follow in such a case, and they are those damages which the law will presume to be natural and probable consequences of the defamatory words as are shown in the proof connected with the effect that they may have had, if any, upon the plaintiff's character, health and feelings. * * * And in connection with the question of actual damages, you are to consider whether or not the charges made in the language were maliciously used, and if so, you may consider this fact as an element in awarding the actual damages.

"In connection with this question of damages, you are also instructed, that if the defendant has failed to fully justify the publication of the language complained of, yet you may take defendant's good faith into consideration in mitigation of damages.

"That is to say, if the circumstances attending the loss of the pocketbook, and the conduct of Schattler and his wife, and the arrest of the plaintiff by the officers, all furnished such information as to give a reasonably prudent man a reason for actually concluding that the parties were guilty as charged in the article of May 8th, then this is to be regarded by you as evidence of good faith on the part of the defendant.

"If you find the defendant acted in good faith in applying the word 'thief' and like allegations of that character, and under the circumstances, honestly believing that he was in fact a thief, then you should consider these facts in the matter of mitigating or lessening or diminishing the actual damages.

"It is a matter for your determination as to what ex-

tent mitigation may extend, even to the extent of diminishing damages to a mere nominal sum.

"Further in this connection with this question of damages, you are to take into consideration what effect, if any, the reading of the article of the Times had upon the plaintiff.

"Proof has been introduced to show that an article referring to the arrest and so forth contained in the Times was read to him before the article in the Daily Herald of May 8th had reached him. Evidence has also been given as to the effect that the article in the Daily Herald had upon the plaintiff's feelings and health.

"You are to take into consideration whether the facts set up in the article contained in the Times was a cause for such injuries as he complained of. If you find this to be a fact, that the article in the Times had a natural and probable effect upon his feelings and health as he now complains of, then this should be considered as a fact in determining whether the injuries complained of were actually traceable to the Daily Herald. * * *

"Now, as to your verdict. *First*, if you find that no justification has been shown by the defendant, then your verdict should be for the plaintiff, for at least nominal damages of six cents, or in such actual damages as the proofs and these instructions warrant. *Second*, if you find that defendant has justified the publication of the words complained of, as I have explained, then your verdict should be not guilty.

"If the intent to commit the larceny was once formed while the property was in the possession of the plaintiff or his wife, as I have explained, then the mere fact of the return of the property does not remove the fact that larceny was then committed; it would not cure it.

"*Mr. Schell:* It is my memory that our declaration does not aver injury to health as special damages in connection with what the court has said in regard to health. I think you should instruct the jury that they should take into consideration, that if this article had any injury or ill effect upon his health that the only damage they could award therefor would be such as could be awarded because of the injury, or the additional injury to his feelings on account of loss of his health.

"*The Court:* Well, strike out all reference to the health then, that is all there is to that.

"*Mr. Walsh:* I take an exception to this because of the

fact that the charge has been given before plaintiff's counsel wants it withdrawn.

"*The Court:* Counsel calls my attention to the claim that there is no claim of damages for direct injury to health; it is on their request I withdraw from your consideration all question of damages on account of injuries to health, leaving the rest of the charge as to the injury to feelings and reputation standing."

At 7:15, after being out 2½ hours, the jury returned into court by direction of the court, when the following took place:

"*The Court:* Gentlemen, I have recalled you for the purpose of correcting a statement I have inadvertently made to you in connection with the burden of proof. This is the section as I gave it to you·

"'With respect to the claims of the parties, you are instructed that the burden is upon the plaintiff to convince you by a fair preponderance of evidence that the words complained of were false in fact and defamatory in character.'

"You notice that I said that the plaintiff must show the defamatory words were false in fact and defamatory in character.

"I now say to you, that the words being actionable *per se*, they are presumed to be false. This has only to do with the question of the proof of those words.

"I correctly stated the rule in other portions of the charge.

"I also call your attention to another section of the charge, in which the same inadvertence appears. That is the section of the charge:

"'That is to say, if it appears from the whole record that the words complained of charges plaintiff with being a thief or with committing larceny of the purse and property in question, and that such charge is false in fact and wholly unjustified by the defendant, then the law presumes that he has suffered at least nominal damages, that is, at least six cents.'

"I intended that this should read as follows:

"'That is to say, that if it appears from the whole record that the words complained of charges plaintiff with being a thief or committing larceny of the purse and property in question, and that such charge is not justified by the defendant by proof of the truth

thereof by a fair preponderance of the evidence, then the law presumes that the plaintiff has suffered nominal damages, that is, at least six cents.'

"As I have explained, this change has solely to do with the burden of proof as to the truth or falsity of the words. It in no manner changes or affects the rules as to the defendant's justification or as to the rules and question of damages exactly as I have given them to you. All of the remaining rules and instructions I have given are to remain intact."

It will be noted that at the outset the jury were instructed that the burden of proof was upon the plaintiff to show that the words complained of were false in fact and defamatory in character, and that to recover actual damages for injury to reputation and feelings, such damages must be proven by plaintiff by a fair preponderance of the evidence. This statement is not the law in any particular. The words complained of charged the plaintiff with larceny. They were plainly libelous *per se*. They carried with them the presumption of their falsity, and unless proven true in substance and in fact by defendant, the plaintiff, without proof of injury, had a right to recover the actual damages to his reputation and feelings, which the law presumes will flow from the commission of the act. This erroneous impression of the rights and liabilities of the parties found lodgment in the minds of the jurors, and was not corrected during the entire charge. Two and one-half hours after retirement, the jurors were called into court, and an attempt made to cure the error by reading two detached paragraphs of the charge, and there rereading them in a modified form. We are of opinion that, so far from correcting the error made, the action of the court, in thus reading these two sections without the context, may well be supposed to have confused, rather than to have clarified, the minds of the jurors as to the plaintiff's rights.

The plaintiff offered to show the conversation between himself and his wife about the purse, on the way from the station to the post office, as a verbal act, bearing upon the

question of intent, and part of the *res gestæ*. We think this testimony was admissible. *Dunbar* v. *McGill*, 69 Mich. 297 (37 N. W. 285); *Wright* v. *State*, 10 Tex. App. 476; 3 Wigmore on Evidence, § 1772 *et seq.*

Testimony of the prosecuting attorney was admitted as to why the case against plaintiff was dropped; the plaintiff's ill health being assigned by him as the reason. This testimony was incompetent, and, in our opinion, prejudicial to plaintiff's rights, as it may well have caused the jury to believe that the officer had discontinued the case on account of the plaintiff's sickness, while still believing him to be guilty.

The important question for the determination of the jury, under the pleadings, was whether or not the plaintiff, at any time while the purse was in the possession of himself or his wife, had formed the *intent* to feloniously appropriate it to his own use, or to aid and abet his wife to so appropriate it. The jury were instructed to determine this intent "from the facts and circumstances, and what they did and said in connection with the property;" yet the court excluded testimony of what they said, not alone to each other, but to Mrs. Shannon. This testimony, likewise, should have been admitted.

The court admitted, over plaintiff's objection, evidence of the publication in the "Daily Times" of two articles concerning the arrest of plaintiff. The publications were made by the "Times" either contemporaneously with, or later than, the libel complained of. They were inadmissible for any purpose. See 25 Cyc. p. 506, and authorities there collected.

Particular attention is directed to the case of *Palmer* v. *Publishing Co.*, 31 App. Div. (N. Y.) 210 (52 N. Y. Supp. 539), and cases cited. There that court said:

"When several persons unite in the publication of one libel, a tort is committed by each one of them, for which he severally is liable to the plaintiff, and the plaintiff is entitled to a judgment against each one for all the damages which he suffers, by reason of the libel. 13 Am. &

Eng. Enc. Law (1st Ed.), p. 372. It is quite true, that he is entitled to but one satisfaction, and when one of the judgments has been paid, the collection of the others will be restrained. *Breslin* v. *Peck*, 38 Hun (N. Y.), 623. But until he has had one satisfaction, he is entitled to maintain as many actions for the same libel as there are defendants who have been engaged in publishing it. *A fortiori*, where a libel had been published against the plaintiff by different persons at different times, he is entitled, not only to pursue each publisher, but to recover whatever damages the jury may think that each publication may have caused him. Each libel is a separate and distinct tort, and each person who sees fit to publish it is separately liable to the plaintiff for whatever damages may be fairly said to accrue. If 100 persons at 100 different places make 100 separate publications of a libel in 100 different newspapers, the fact that this simultaneous action of all of them has ruined the plaintiff's character is no reason why one of them, when sued for it, should shelter himself behind the acts of the other 99, and say that 99/100 of the plaintiff's character was ruined by the others, and, therefore, he is liable for only 1/100 part of the damage. The true rule is, and must be, that whoever publishes a libel, publishes it at his peril, and he cannot mitigate his damages, because some other reckless or evil-disposed person has incurred the same liability that he has for the same story."

The charge of the court, to the effect that the good faith of defendant in using the word "thief" in the libel complained of, should, if found by the jury, be considered as mitigating the actual damages, is clearly erroneous. If defendant, under its plea of justification, failed to prove that plaintiff was a thief, then its good or bad faith in publishing the libel could have no possible bearing upon plaintiff's right to collect actual damages. *Whittemore* v. *Weiss*, 33 Mich. 348; *Austin* v. *Hyndman*, 119 Mich. 615 (78 N. W. 663); *Smurthwaite* v. *Publishing Co.*, 124 Mich. 377 (83 N. W. 116); 25 Cyc. pp. 372 and 420. Actual damages may be increased by reason of the malice of the defendant, because plaintiff's injury to feelings is greater when he suffers from a wrong wantonly inflicted, than when he suffers from one inflicted in good faith, but

in no case can defendant's good faith mitigate or lessen the damages to reputation or feelings, which plaintiff actually does suffer, as a result of the libelous publication. Obviously, plaintiff could only be guilty of larceny, if he himself formed the intent to feloniously appropriate the purse, or aided and abetted his wife in so appropriating it, after she had communicated to him her intent to do so. Her *secret* resolve to steal the purse and its contents, if inferable from her conduct and words, would have no tendency to prove guilt on the part of the plaintiff.

Voluminous requests to charge were tendered on behalf of the plaintiff. These were disregarded by the court, but covered in part by the general charge. So far as they correctly stated the law, and were so covered, there is no error. *In re Morse's Estate*, 146 Mich. 463 (109 N. W. 858). We are, however, clearly of the opinion, that, taken as a whole, the charge failed to clearly and fairly present to the jury the conflicting claims of the parties and the legal principles applicable thereto.

For the errors pointed out the judgment is reversed, and a new trial ordered.

OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

HOOKER, J. I concur in the reversal of this cause on all grounds but one. I am not certain that the testimony of the prosecuting attorney was not properly admitted.

HORNING *v.* HORNING.

1. DIVORCE — SEPARATE MAINTENANCE — HUSBAND AND WIFE — STATUTES.

   A bill of complaint in the form of a bill for divorce, not referring to any other statute, with a prayer for separate maintenance and general relief merely, is not a proceeding to provide the wife with property and maintenance under 3 Comp. Laws, § 8686.

2. SAME — APPEAL AND ERROR — TRIAL COURT — WORDS AND PHRASES—STATUTES.

   Act No. 324, Pub. Acts 1907, permitting the entry of a decree for divorce in a suit for separate maintenance, by the court hearing the evidence, authorizes the Supreme Court, on appeal, to enter the decree of divorce, since such appeals are heard *de novo*.

3. SAME—SUPREME COURT.

   On grounds of public policy, a divorce absolute is granted to the complainant, on appeal by defendant, from a decree providing for separate maintenance.

4. SAME—ALIMONY—AMOUNT.

   Out of real property in which defendant has an equity of about $1,000, an award of alimony of $700, payable $50 per month, is *held* to be sufficient.

Appeal from Kent; Chester, J., presiding. Submitted April 14, 1910. (Docket No. 24.) Decided July 14, 1910.

Bill by Anna M. Horning against Edwin T. Horning for a decree of separate maintenance. From a decree for complainant, defendant appeals. Reversed, and decree of absolute divorce granted.

Francis A. Stace (*Thomas P. Bradfield*, of counsel), for complainant.

William E. Grove, for defendant.

MCALVAY, J. From a decree granted to complainant against defendant decreeing a separation for life and ordering separate maintenance by him, defendant has appealed to this court. It appears from defendant's answer that complainant first filed a bill of complaint against him in the Kent circuit court, in chancery, praying for a divorce from the bonds of matrimony, on March 14, 1907, which bill defendant answered, and an issue was joined. During the pendency of that suit, and before any hearing, negotiations were had between the parties relative to settling the property interests. No satisfactory settlement could be reached, and complainant then voluntarily dismissed her bill of complaint, and on or about January 11, 1908, filed the bill of complaint in this suit in the same court.

The bills and answers in both suits are printed in the record, and may be said to be identical, except as to the relief prayed for in this bill of complaint, and a statement in this answer showing the former suit, and alleging that it was voluntarily dismissed after a failure to induce him to transfer nearly all of his property to her, free from incumbrances.

Complainant, on the hearing below, insisted and still contends in this court that the case before us was not a suit for divorce, but a proceeding under section 8686, 3 Comp. Laws, "to provide wives with property and maintenance, etc.," being Act No. 243, Pub. Acts 1889. The question was properly disposed of by the trial court against the contention of complainant, as follows:

> "The bill of complaint in this case is in form and substantially in every particular a bill for absolute divorce, except the prayer which is for an allowance for separate maintenance, coupled with a prayer for general relief."

Nothing in this bill of complaint indicates that the pleader at the time it was drawn had in contemplation the act of 1889. In form and substance it conforms with all the statutory requirements for a bill for divorce, and not

with the petition required by the act of 1889. The prayer for separate maintenance is not different from such a prayer in ordinary cases of bills filed for separation, which, in fact, is a prayer for divorce from bed and board. In the instant case the decree is for separate maintenance for life. It is a decree of separation formerly called "*a mensa et thoro*." Such a decree is recognized as a decree of divorce. 9 Am. & Eng. Enc. Law (2d Ed.), p. 851.

The parties to this suit lived happily together for about 12 years. She charges that he then began to treat her with extreme cruelty, went away from her, and was unfaithful. Defendant denies these charges, and claims that the change in their relations was in fact caused by a drug habit which complainant acquired by using a preparation of cocaine and morphine, and continued without his knowledge for a long time, and which he with her consent took steps to cure; but during the time of her treatment it was necessary to watch her closely and care for her, which he claims embittered her against him. The proofs tend to show that from the use of these drugs she had become mentally and physically weakened. Upon this claim of defendant there is a disagreement between these parties. There is, however, no dispute but that up to the time that the relations between them became strained, defendant furnished support to his family to the extent of his ability and earning capacity. He acquired a homestead and some other property, against which there are incumbrances, which must be taken care of in order to save anything. It appears that the equity in all the property amounts to about $1,000. It would be of no benefit to present and discuss the evidence in the case. It has all been examined and considered. We are not inclined to disturb the conclusion of the court in finding that the charge of cruelty against defendant was sustained by the proofs. There is also abundant proof to show that these parties have become so estranged that it will be impossible for them to resume their relations as husband and

wife. Both of them testify that such a thing is impossible,

Two questions remain to be considered, namely:

(1) Whether the court, in its discretion, should grant a decree from the bonds of matrimony; and
(2) The allowance which should be granted to complainant.

Complainant has not appealed from the decree which was granted upon the theory that the bill of complaint was one for a divorce, and not a proceeding under the statute of 1889, of which holding we have indicated our approval. Complainant, however, does contend that, under the statute, this court cannot grant a decree from the bonds of matrimony.

It is insisted that the amendment of 1907 (Act No. 324, Pub. Acts 1907) confers such power only upon the trial court, by the words:

"Unless the court hearing the evidence shall deem it for the best interests of the parties to grant a divorce from the bonds of matrimony, and in that event the court may grant such divorce."

All chancery causes are heard *de novo* in this court, upon the same evidence presented in the court below: This court, then, is "the court hearing the evidence" in cases of this kind, with jurisdiction to exercise its judicial discretion upon the question under discussion. The construction claimed would be one of implication, and contrary to the well-settled policy of this State, as to the authority vested in this court upon chancery appeals.

This section, 8623, 3 Comp. Laws, has been amended twice. Originally it provided that a divorce from the bonds of matrimony might be decreed for either of the causes mentioned in the preceding section (for extreme cruelty, utter desertion for two years, and for wanton and cruel neglect and refusal to support, by the husband, when of sufficient ability to do so), "whenever, in the opinion of the court, the circumstances of the case shall be such that

it will be discreet and proper so to do). The amendment of 1905 (Act No. 135, Pub. Acts 1905), added:

"But no divorce from the bonds of matrimony for either of the causes mentioned in the preceding section shall be entered in any case where the same is not asked for by the complainant in the bill of complaint filed therein, or by the defendant on a cross-bill."

The addition to this by the amendment of 1907 is already quoted above. In relying upon this section in support of the decree granted, complainant has abandoned the independent charge of the unfaithfulness of defendant. Such cause for divorce is not included in the preceding section, but only those above enumerated.

We consider that this record presents a case for the exercise of the discretion conferred by the statute to grant complainant a divorce from the bonds of matrimony, and deem it for the best interests of the parties so to do "on grounds of public policy, to prevent the mischiefs arising from turning out into the world in enforced celibacy persons who are neither married nor unmarried." *Burlage* v. *Burlage*, 65 Mich., at page 627 (32 N. W. 867). Also upon the ground, that by so doing a more satisfactory and certain provision may be made for complainant, in making an allowance to her of her proportionate share of the property of defendant. We will therefore so change the decree as to make the divorce an absolute one from the bonds of matrimony.

It appears that this property is incumbered; that interest, taxes, and repairs must be met by defendant. The equity appears to be worth not more than $800 to $1,000. Complainant will be allowed the sum of $700 as permanent alimony, being $100 less than defendant's brief indicates as satisfactory, to be paid in monthly intallments of not less than $50 each, provided that she will release to defendant, from time to time, all of her claim, title, and interest in and to each parcel of the real estate, if he has opportunity to sell and dispose of the same, whenever he so requests, and will pay to her the proportionate part

which the equity in such parcel bears to the unpaid amount of the alimony at that time, when considered with the value of the entire equity in all the parcels then remaining unsold. She will also be awarded all of the household furniture in her possession.

The decree of the circuit court will be reversed and set aside, with costs of both courts to complainant, and a decree will be entered in this court in accordance with this opinion.

OSTRANDER, HOOKER, MOORE, and BROOKE, JJ., concurred.

AINSWORTH v. HOVER.

1. NEGLIGENCE — EVIDENCE — SUBSEQUENT ACCIDENTS — FIRES — TRACTION ENGINE.

   In an action for damages for negligently driving a traction engine on the highway in dry, windy weather, without a sufficient spark arrester, testimony that the engine set another fire on the same morning under similar weather conditions, although it appeared that a different fuel was in use and the drafts were differently arranged, was competent.

2. SAME — NEGLIGENCE — HIGHWAYS.

   No error was committed in receiving evidence of a fire set on the following day by the same engine under similar conditions of weather.

3. SAME — PRECAUTIONS AFTER ACCIDENT — SPARK ARRESTER.

   It was competent to show that the engineer subsequently, on the same day, took the spark arrester from a barrel on the water tank of the engine and used a screen which was offered to him by a witness, because it was finer than the one belonging to the engine, since the evidence has some tendency to show, not that repairs were made, but that no spark arrester was in use at the time of the fire.

4. SAME—PROXIMATE CAUSE—BURDEN OF PROOF.

Instructions to the jury referring to evidence that plaintiff was in the habit of smoking about the place of the fire, charging that if they found it more probable that the fire was thereby caused, plaintiff could not recover, but that they must find, as a matter of fact, the inference that the fire originated in that way, when read in connection with instructions that plaintiff had the burden of proof, are not open to the objection that they impose the burden of proof on the defendant.

Error to Tuscola; Beach, J. Submitted April 14, 1910. (Docket No. 105.) Decided July 14, 1910.

Case by Edwin O. Ainsworth against Edwin Hover for negligently setting fire to plaintiff's property. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Seth Q. Pulver (*Brooker & Corkins*, of counsel), for appellant.

Brennan & Cook, for appellee.

MCALVAY, J. Plaintiff recovered a judgment against defendant for the loss of certain personal property contained in a rented barn caused by fire, which was claimed to have been brought about by defendant's negligence in carelessly propelling a steam traction engine along the highway in close proximity to this barn, during a high wind blowing towards the barn.

The negligence relied on consisted in driving the engine along the highway under the conditions mentioned without having it equipped with a spark arrester, or a proper spark arrester, and that the engine was broken in certain parts which increased the draft. No question is raised as to the sufficiency of the declaration.

The errors relied upon by appellant who, upon writ of error, brings the case here for review, may be grouped together and stated as:

(*a*) Those committed by the court relative to evidence.
(*b*) In refusing to give certain requests to charge.
(*c*) In charging the jury.

The fire which caused the damage claimed was discovered immediately after the passage of defendant's engine by the barn; it having caught on the south side next to the highway, near which it was located, in the stable litter which had been thrown out, and which was very dry. The defendant and his helper saw the fire before they had driven the engine more than 20 rods from the barn.

Testimony was admitted relative to subsequent fires claimed to have been set that morning by this engine after it passed the barn above mentioned. Defendant was at the time taking the engine, with tank attached, from his farm to that of a Mr. Brady, who met the engine on the road after the fire, and rode home on it. The man in charge of the engine and Mr. Brady both testified that while on the way a fire was set to a post in the fence along the road. Such testimony was admitted over defendant's objection and exception; defendant claiming that subsequent fires must be shown to have been set under similar conditions as existed at the time of the first fire. The difference in conditions claimed was that at the time this fire in the fence was set, dry wood and broken rails were used as fuel and the dampers were open, and when the engine passed the barn green wood was used and dampers were closed. We think this testimony was admissible. The same engine, immediately following the first fire, on the same trip, under the same weather conditions, set another fire. The fuel and the drafts were not the same, but the evidence of the escape of sparks was material as bearing upon the fact as to whether there was any spark arrester on the stack, or one that was suitable.

The witness Russell was allowed to testify concerning another fire set by this engine on the following day, when it was moved from Brady's to another farm, under similar weather conditions. The fuel was the same as used when

the first fire occurred after the barn burned. Another witness testified to this last fire, and as to putting out fire as he went back along the road over which the engine had just traveled after leaving Brady's. The witness who had put some screening over the stack at Brady's testified that at that time there was no spark arrester in it, and that he took the screen off after leaving that farm. While it does appear that dry pine and old rails will give off more sparks, and that the opening of dampers gives greater draught, these are matters of common knowledge, and show a greater facility for setting fires in a windy, dry time. The testimony was, however, admissible, as was the testimony relative to the first fire subsequent to the burning of the barn, as tending to show whether there was any spark arrester, or a suitable one, on this engine. The record shows testimony giving a complete history of this engine while it was on the highway, from the time it passed the barn which was burned, until it arrived at the Cobine farm beyond Brady's on the afternoon of the next day, which testimony tended to show that the engine was, during all that time, practically in the same condition as when the particular fire which destroyed plaintiff's property occurred. *Hoyt* v. *Jeffers*, 30 Mich. 181. Our conclusion upon the materiality of this class of testimony disposes of other errors claimed to have been committed by the court in refusing to strike out all such testimony.

Appellant contends that the court erred in admitting testimony as to what was claimed to have been repairs made to this engine by defendant subsequent to the fire, to show negligence at the time of or previous to the fire, and in refusing to strike it out. The record shows that this testimony was not offered by plaintiff, or received by the court for the purpose claimed. This question first arose when witness Brady was testifying. Soon after the barn burned the engine was met by Brady on the road to his farm, and he was asked what was done about searching for a spark arrester. This was objected to on the

ground that proof of subsequent repairs is inadmissible to show negligence preceding it. The court said:

"I think it may be answered on the general question of whether there was a spark arrester."

Witness then testified:

"The engineer asked Hover about a spark catcher and he said there was one in a barrel on the water tank, which he went and pulled out, and threw alongside the fence near my toolhouse."

He later said:

"When I came out with the screen Mr. Hover and Mr. Cook drove up, and Mr. Russell asked Mr. Hover for a screen; I told him I wouldn't let them in there, unless there was a screen on. There was a screen in the barrel, and he pulled it out and says: 'Your screen is finer than mine,' and threw his alongside the fence."

Defendant moved to strike this out, but was refused; the court holding it was "competent as to whether there was a screen in the engine at that time," and, in the charge to the jury, confined the testimony to that question. The witness Russell was allowed, subject to the same objection, to testify relative to what occurred at Brady's, saying that defendant brought with him a cone spark arrester which witness put in the top of the smokestack, and in putting it in he was not required to take another one out, and did not see any other there, and that on the way from Brady's to Cobine's there was no spark arrester on. All of this testimony on the part of plaintiff tended to show, not subsequent repairs, but that while on the highway defendant's engine traveled without a spark arrester. This testimony was also admissible for the purpose for which it was received. Of the requests presented by defendant which were refused, the substance of those which were proper is included in the general charge of the court.

During the trial defendant offered testimony to show that plaintiff was in the habit of smoking in and about this barn, and presented a request to charge which the

court gave, in substance, with a modification added in the last two lines as follows:

"Testimony as to Ainsworth's smoking has been received, and is entitled to your consideration as to the probability of the origin of the fire. If you find it more probable that the fire originated in that way than by the engine, plaintiff cannot recover; but you must find as a matter of fact the inference that the fire originated that way."

The contention is that by this charge the court instructed the jury that the defendant had the burden of proof on this issue.

The charge of the court in no other respect is questioned by defendant. The court, as to the burden of proof in the case being upon plaintiff, and what plaintiff must prove in order to recover, clearly and correctly instructed the jury. In the record no suggestion is made of the probability of the fire having originated from any cause other than from the engine or plaintiff smoking about the barn, and in calling the attention to the claimed smoking of plaintiff, the jury was instructed that the inference that the fire probably originated in that way must be found as a matter of fact. By this language no reference was intended as to the burden of the proof. Our construction of this portion of the charge is that the inference could only be drawn from established facts in the case. There was a sharp dispute as to whether plaintiff ever smoked in the barn, and no evidence whatever that he had done so that morning. This charge was given with reference to this testimony. The modification of the request as given by the court was not erroneous. Other questions need not be discussed.

The judgment is affirmed.

OSTRANDER, HOOKER, MOORE, and BROOKE, JJ., concurred.

McPHARLIN *v.* FIDELITY & DEPOSIT CO. OF MARYLAND.

1. JUDGMENT—PRINCIPAL AND SURETY—NEW TRIAL—EFFECT ON JUDGMENT AGAINST JOINT DEFENDANTS.
   Granting a new trial to a surety, against whom a judgment was rendered jointly with the principal on an indemnity bond creating a joint and several liability, vacates the prior judgment only as to the surety.

2. SAME—INDEMNITY BOND—EVIDENCE.
   As against the surety, such judgment against the principal is admissible in evidence on the new trial as *prima facie* proof of liability.

3. SAME—BAR—SATISFACTION.
   An unsatisfied judgment against the principal of a joint and several obligation is not a bar to recovery against the surety.

4. PRINCIPAL AND SURETY—NOTICE OF DEFAULT—DELAY.
   Notice of the principal's default, given promptly to the general agents of the surety corporation for whom they signed as attorneys, and subsequently acted as agents, complies with the requirement of notice.

5. SAME—DELAY IN INSTITUTING SUIT—WAIVER.
   Although a delay of more than the period limited in the bond for instituting action took place, it was waived by the vice president of the company notifying plaintiff after the expiration of that period, to complete the building which the principal failed to construct.

Error to Wayne; Rohnert, J. Submitted April 14, 1910. (Docket No. 116.) Decided July 14, 1910.

Assumpsit by William H. J. McPharlin and another against William H. Hibbler, principal, and the Fidelity & Deposit Company of Maryland, surety, upon a building contractor's bond. A judgment for plaintiff on a verdict directed by the court is reviewed by defendant surety on writ of error. Affirmed.

Brennan, Donnelly & Van De Mark, for appellant.

Devine & Snyder, for appellees.

MCALVAY, J. This was a suit brought against defendants upon an indemnity bond given by William H. Hibbler as principal, and defendant company as surety, to recover damages by reason of the failure of defendant Hibbler to build and complete according to contract a certain house for $3,795; such bond having been given by defendant company to guarantee the faithful performance of such contract. On the first trial plaintiffs recovered a judgment for $1,362.04. A motion for a new trial was made on the part of defendant company upon the grounds, among others:

"That the bond sued upon provided that suit must be commenced within six months from the date of the first breach, and that the suit was not so commenced; that plaintiffs relied upon a waiver made by the local agents of the company; that no evidence was offered showing that the local agents had any authority to waive this provision of the bond; and that they could not be presumed to have such authority."

The above quotation is taken from plaintiffs' brief. It is not contradicted by defendant, although this brief was filed about 30 days before appellant filed either of its briefs. Upon this motion the court granted a new trial to the defendant surety company. This new trial was had, and resulted in a verdict instructed for plaintiffs, for the amount of the judgment recovered on the former trial, which the record shows then stood against Hibbler unsatisfied. Defendant Hibbler took no part in the motion for a new trial or in the trial which followed. The cause, after a judgment duly entered upon the directed verdict, has been removed to this court for review upon writ of error.

Appellant contends that the judgment should be set aside for the reason that the court erred:

(1) In admitting the judgment recovered upon the first trial in evidence against defendant upon this trial.

(2) In refusing to hold that defendant surety company was discharged from liability, because of failure of plaintiffs to notify it of Hibbler's default, as required by the terms of the bond; and also because suit was not instituted within six months after the first breach of the contract.

The bond upon which recovery was sought was a joint and several bond. The undertaking of defendant company, the surety, was the faithful performance of the contract by Hibbler, the principal. Appellant urges under its first assignment of error that granting its motion for a new trial vacated and set aside the entire judgment in the case. The declaration in the case contained two counts, one of which counted upon the bond, claiming a joint and several liability, and the other contained the common counts, under which appellant urges the liability was joint, and it is claimed that the recovery obtained on the first trial, as far as the present record shows, could have been under either count.

It is true that this record does not give the testimony given on that trial, the motion for a new trial by appellant, or the reasons of the trial judge in granting it. This question that anything other than the matter of the default of Hibbler on his contract, and the liability of appellant as surety upon this bond, was litigated on the first trial, as far as we are able to discover from the case before us, appears for the first time in appellant's brief. We find that counsel for appellant, who was present and participated on both trials, appears to have held a contrary opinion from that expressed in the brief. The record returned to this court shows that the order made upon granting appellant's motion for a new trial was "for a new trial for defendant the Fidelity & Deposit Company." This was also the statement made by appellant's counsel upon this trial. No claim is made in the record that such was not the fact. The record shows that upon this status of the defendants, accepted by appellant, its counsel moved for an instructed verdict, after the opening

statement by plaintiffs' counsel, in the following language:

"It appears from the opening statement of counsel that this case was tried upon a bond, and that a verdict was had against both defendants. As to one of those defendants, the judgment was practically set aside by an order for a new trial. I submit that judgment is still valid as against the other defendant, * * * and it stands as a valid judgment against the defendant Hibbler. * * *"

Again, at the close of plaintiffs' case, appellant, having no testimony to introduce, moved for a directed verdict because—

"There has been no proof adduced that the judgment against Hibbler has not been satisfied. They cannot recover a judgment against the surety if the judgment against the principal has been satisfied."

This last motion was made after the court had admitted the judgment against Hibbler in evidence, which is the principal error claimed to have been committed upon which appellant relies. The record shows that when the Hibbler judgment was first offered appellant's counsel objected, saying:

"This is a new trial. I do not propose to be foreclosed by any testimony in the former trial."

The judgment entry was admitted but not read in evidence. No exception was taken. The record shows that later the judgment was offered in evidence—

"To which offer objection was made by the defendant on the ground that in that case a joint verdict was rendered upon which judgment was entered. Upon application of the defendant, Fidelity Company, a new trial was granted to it."

This objection was overruled, and the judgment admitted as *prima facie* evidence of the amount of damages, and an exception was taken. This is all that appears in this record relative to the judgment against Hibbler and its introduction in evidence. It appeared upon proof in

the case that the judgment against Hibbler was unsatisfied.

It cannot be said from this record that at any time during the trial did appellant question a valid and subsisting judgment in the case against defendant Hibbler. The theory of appellant was, not that granting it a new trial vacated the judgment against Hibbler, nor was the introduction of the judgment objected to on that ground, but under the theory that, having been granted a new trial, it was entitled to have all of the testimony necessary to establish a case against Hibbler, the principal in the surety bond, presented anew in this case. The issue upon the two trials was identical, as appears from this record and the admissions of appellant contained in it. The case was tried upon the first count of the declaration.

Under the circumstances of this case, in an action upon a bond where the liability is joint and several, brought against both defendants, and a judgment rendered against both, must the court hold as a matter of law that granting a new trial to the surety, where the default of the principal is not questioned, operates to vacate the judgment against the principal?

It seems clear that plaintiffs at any time might have discontinued as to the surety and recovered against the principal. The court might have instructed the jury to find for defendant surety, provided the evidence so warranted, and allowed a recovery against the principal, and in either case in a later suit against the surety the judgment against the principal would have been admissible. An unsatisfied judgment against the principal of a joint and several obligation is not a bar to recovery against a surety. 2 Black on Judgments (2d Ed.), § 774; 1 Freeman on Judgments (4th Ed.), § 234. The general rule is that a judgment against a principal is *prima facie* evidence against the surety with notice of the proceeding. *Norris* v. *Mersereau*, 74 Mich. 690 (42 N. W. 153), and cases cited; *Moses* v. *U. S.*, 166 U. S. 571 (17 Sup. Ct.

682); *United States Fidelity & Guaranty Co.* v. *Haggart*, 163 Fed. 801, 91 C. C. A. 289, and cases cited.

What different relations existed between these parties than in case of a judgment against a principal introduced as *prima facie* evidence against a surety in a separate proceeding?

The case is unique, in that judgment against the principal was rendered on a former trial of the identical case. Appellant cannot complain. It has made the situation possible, and had notice of the proceeding and participated in the trial in which the judgment was rendered against Hibbler. It secured for itself a new trial, and now objects that the Hibbler judgment is of any force against it. Its liability is no greater or less than if two suits had been instituted, or the judgment first rendered in the case against both had not been disturbed. Our conclusion is that the court was not in error in admitting the judgment against Hibbler, as *prima facie* evidence against the surety upon this trial.

The remaining error discussed relates to the claim that appellant was discharged from liability, because of the failure of plaintiffs to notify it at once of Hibbler's first default, and because suit was not brought within six months after the first breach of the contract.

The uncontradicted proof in the case shows that notice of Hibbler's default was promptly given to the general agents of appellant, who, from the time of seeing the bond, acted for defendant company; one of the firm signing the bond for it as attorney. In fact, they were actively engaged with the plaintiffs in all that occurred after Hibbler's default. *Crystal Ice Co.* v. *United Surety Co.*, 159 Mich. 102 (123 N. W. 619).

It also appears that through these agents, and from plaintiffs' letters relative to Hibbler's default sent direct to appellant, no claim was made that notice had not been properly given. To digest this evidence would be of no benefit. As to the delay in bringing suit within six months, the record shows the negotiations in regard to the

matter of the Hibbler bond were pending for some time, and that more than six months after the first notice given appellant instructions were given by its vice president to plaintiffs to complete the building at the least possible expense, thereby recognizing its liability and waiving any forfeitures by plaintiffs if any had occurred.

The evidence presented by this record justified the court in directing a verdict for plaintiffs.

The judgment is affirmed.

OSTRANDER, HOOKER, MOORE, and BROOKE, JJ., concurred.

BRINK *v.* PURNELL.

ASSAULT AND BATTERY—JOINT TORT-FEASORS—TRESPASS.

It was not error to instruct the jury, in an action for assault and battery, that defendant, who did not strike plaintiff, could not be held liable unless he counseled and abetted the alleged wrong, and the utterance of the words, "Kill him," etc., would render him liable if they were uttered during the progress of the affray with the intention of instigating and encouraging the assault.

Error to Berrien; Coolidge, J. Submitted April 14, 1910. (Docket No. 91.) Decided July 14, 1910.

Trespass *vi et armis* by Ethlyn Brink against Benjamin Purnell and others. A judgment for plaintiff is reviewed by defendant Purnell on writ of error. Affirmed.

H. S. Gray and *James O'Hara*, for appellant.

John J. Sterling and *I. W. Riford*, for appellee.

HOOKER, J. The plaintiff received a judgment against several defendants, among whom was Benjamin Purnell, who alone has appealed. Purnell is the head of a sect called the "House of David," which has grounds called "The Park Springs of Eden," near Benton Harbor, where it at times invites the public. On the occasion of the injury of which the plaintiff complains, the public had been invited, by the distribution of handbills, and a steamer from Chicago had brought over quite a large crowd who went to the park. The plaintiff went there with one Harry Williams and her sister and brother-in-law. Williams had at one time been a member of the sect, and afterwards had trouble with the members, and one witness swore that on the day in question he had told him not to go upon the premises. This is disputed by Williams. Wolmar and Bell, both large men and members of the sect, the first named being their private watchman, and both being defendants in this case, are alleged to have gotten into a fight with Williams and his party, and there was testimony that both Wolmar and Bell made an unprovoked assault upon both Williams and plaintiff. This is denied by other testimony, and it is claimed that Wolmar and Bell were first assaulted by both Williams and plaintiff. It is claimed on behalf of the appellant that there was no testimony whatever tending to show his participation or complicity in the alleged assault upon the plaintiff.

All of the testimony which can be claimed to have a tendency to prove his complicity is the following:

(1) Williams had made a bitter attack upon the sect, and by conversation, preaching, and publication of a book had denounced it, claiming that it had defrauded him. His claim was finally adjusted and settled. It is manifest that there was a strong feeling against him among the members.

(2) On entering the place, he had met some of the members, among whom was Bulley, and greeted them in a friendly way, and all agree that he had made no disturbance.

(3) A short time later these two men and Bulley approached him and his party and began an attack upon him, and followed the party up and made two other attacks, and upon the second and possibly the third Purnell was a few feet distant, while Williams and the plaintiff were being assaulted and shouted repeatedly: "Kill him! Kill him! We have got him now! Kill him!"

(4) There was testimony that Bulley, after meeting Williams, immediately went to "headquarters," returning with Wolmar and Bell, when they approached and attacked Williams; that Purnell was near by at the second and third assaults, if not at the first, and was using the language stated, and was within six feet of plaintiff when she was struck. Although present at the trial, Purnell did not testify.

From the circumstances, counsel asked the jury to infer that Purnell participated in the attack if he did not direct it. The court instructed the jury that:

"There is no evidence in this case that Benjamin Purnell assaulted the plaintiff. He cannot be held liable in this case unless you find that he counseled, instigated, aided, and abetted in the assault upon the plaintiff. Some of the witnesses testified that Purnell uttered the words: 'Kill him,' or, 'We have got him, kill him,' during the encounter. If the assault upon the plaintiff was unlawful, and Purnell addressed those words to the assaulters while they were assaulting Williams and the plaintiff, with the design of instigating and encouraging the assault, then he is liable jointly with the other defendants. Even if these words were uttered, if they were uttered when no assault was being committed upon the plaintiff, then Benjamin Purnell is not liable; but, as I say, if these words were uttered while this affray was going on, and the plaintiff was in the mêlée, then, gentlemen, Benjamin Purnell is equally liable with the defendants, if an unlawful assault was committed."

This instruction and the refusal to direct a verdict in favor of Purnell raise the important question in the case.

We are of the opinion that the charge was a proper one, and that the refusal of the request was not error.

Counsel state that they rely on three other points. We have examined them, and think they are not cause for a reversal.

Judgment affirmed.

OSTRANDER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

BARTHEL *v.* CRIPPEN.

1. SPECIFIC PERFORMANCE—CONTRACTS—EQUITY.
   In a suit for the specific performance of a contract to convey to complainant a half interest in a patent, it is *held* that the evidence supports the claim of complainant as to the making of the contract and the bad faith of a transfer of defendant's invention.

2. SAME—CONTRACTS—BREACH, EXCUSES FOR.
   Mere suspicion of intended wrongful action, unconfirmed by facts, does not excuse a breach of contract relations.

Appeal from Wayne; Donovan, J. Submitted April 14, 1910. (Docket No. 109.) Decided July 14, 1910.

Bill by Otto F. Barthel against George F. Crippen and Lewis Crippen for the specific performance of a contract. From a decree for complainant, defendants appeal. Affirmed.

Henry C. L. Forler, for complainant.

Lee N. Brown (*John P. Kirk*, of counsel), for defendants.

OSTRANDER, J. At a former hearing the application of defendants for leave to remand the case to permit the taking of further testimony was granted. *Barthel* v. *Crippen*, 156 Mich. 20 (120 N. W. 15). The additional testimony has been introduced and the court below, upon a consideration of the whole record, entered a decree which, in effect, grants to complainant the relief given by the decree first entered and prayed for in the bill. Defendants have again appealed. The issues made by the pleadings are briefly but sufficiently stated in the former opinion of this court. Still more briefly, they may be restated. They are, *first*, Did defendant George F. Crippen agree to assign to the complainant a one-half interest in and to a certain invention for bean-picking machines, the letters patent and all improvements; and *second*, If such a contract was made, is defendant Lewis Crippen, to whom his brother assigned said invention, etc., a few days before the bill in the cause was filed, a purchaser with rights superior to those of complainant?

As to the issue last stated, I am not in doubt. The answer of defendant Lewis Crippen does not meet the allegations of the complainant's amended bill. It denies, it is true, the charge that the transfer to himself was fraudulent and without consideration, and denies the conspiracy and confederation of the defendants, which is charged. But it does not set out the circumstances of any transaction by which this defendant became possessed, as against complainant, of any right to or interest in the said invention and patents. The answer of George F. Crippen to the original bill, in which Lewis Crippen is not made a party defendant, contains the following:

"But the said defendant, seeing the said complainant's foul design, on the 5th of November, 1906, transferred the said invention and all matters and patents relating or connected with it, and now the only reason that the said complainant is mad, is because he has lost his opportunity to beat, cheat, and defraud defendant out of his invention."

And in his answer to the amended bill he contents him-

self with denying that such transfer was made to defraud and without consideration, and alleging that it was a good-faith transaction, based upon a good and sufficient consideration. The testimony does not convince me that the said transfer was made in good faith or for a consideration which indicates a bona fide sale of property, especially in view of defendant's representations concerning the real value of the invention. The contract with complainant being established, I should find in the transfer to Lewis Crippen no obstacle to granting relief.

In considering whether the testimony supports the fact of a contract such as is charged to have been made, the additional testimony which was taken does not materially add to the case made for defendant in the record first presented. But it makes more clear the fact that complainant, after defendant had repudiated all relations with him, after a machine had been constructed embodying improvements to the original invention, represented his brother in the patent office in an application to secure a patent covering those improvements, with respect to which improvements defendant George F. Crippen was also seeking to secure a patent. By the terms of the alleged contract, complainant and defendant were to be owners each of a one-half interest in the original invention and in all improvements, and they were jointly engaged to perfect the invention, construct and market the improved machine. Complainant's brother was the designer and draughtsman employed, as complainant contends, in the common enterprise. The improvements for which the brother sought a patent were made in the performance of the contract. It is undoubtedly true, as complainant contends, that the testimony in the interference proceedings in the patent office relates to the question of priority and originality of invention of these alleged improvements.

But it is also true that the position assumed by complainant in the interference proceedings is not wholly explained by the suggestion that whether his brother or Crippen was held to be the inventor, the improvements

must nevertheless, under the contract, inure to the benefit of both complainant and Crippen. It is said in the brief for complainant that—

"If Crippen had not repudiated the contract, if Crippen had not taken the drawings and gone to another patent attorney for the purpose of patenting these improvements, Oliver Barthel would have had no reason to file an application in order to determine the question of inventorship. It was because Mr. Crippen had repudiated the contract and had sought to reap the benefit of the labors of Oliver E. Barthel and of the time and money expended by Otto Barthel, the complainant, that this application was filed. It might be said that it was unnecessary for Oliver E. Barthel to file an application covering the improvements, because, under the contract, whatever patent might be procured by Crippen upon these improvements would belong to the partnership. But at that time, Barthel had no way of knowing that this contract would be enforced. There was nothing in writing, and he felt pretty well assured that Crippen, after acting as he did, would deny the existence of the contract."

If complainant had not, immediately after defendant had taken away the drawings, filed his bill of complaint in this cause, the proceedings instituted by him in behalf of his brother in the patent office would have a more sinister aspect. As it was, he set up his claim in his bill, a pleading which was at once available to defendants as evidence in the interference proceedings. The interference proceedings were as well available to defendants in this cause. The complainant and defendant George F. Crippen were acting in accordance with some arrangement. I do not believe the arrangement was the one stated by defendant. I think it incredible that at the point to which Crippen had proceeded with his idea of a bean-picking machine the parties entered into a contract which involved the building of 10 machines at an estimated cost of $250 each. Defendant immediately proposed an improvement to his invention. Clearly the matter was in an experimental state, with the new idea to be accommodated to the original invention, drawings to be made, pat-

terns made, an experimental machine constructed to demonstrate the value of the machine. It is more probable, since it is agreed there was some arrangement, that it was the one testified to by complainant. His testimony is better corroborated than is that of defendant. I am satisfied, too, that defendant George F. Crippen did not propose to abide by whatever bargain he had made with complainant, and did propose to secure for himself the valuable improvements to his invention, the benefit of the money and time expended by complainant and his brother, and deprive complainant of all benefit and all remedy. There is no excuse made out for his conduct. He asserts the belief that complainant meant to steal his ideas or to render his invention valueless. Mere suspicion can always be asserted as a ground for the breach of contract relations. It must be confirmed by facts before the requirements of the law are met. In this case, defendant's apprehensions appear to have heen unwarranted.

The form of the decree is not criticised. It gives to complainant the relief prayed for and is affirmed, with costs.

HOOKER, MOORE, MCALVAY, and STONE, JJ., concurred.

In re REIDY'S ESTATE.

DUDECK *v.* WATSON.

1. WITNESSES — STATUTES — ESTATES OF DECEDENTS — MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.

   On the trial of an action against the estate of a decedent for services rendered by the wife of claimant, it was error to admit testimony of the claimant that he knew of the services rendered and looked to deceased for payment. Act No. 30, Pub. Acts 1903.

2. SAME—AGENT OF CLAIMANT.

As agent of her husband in making the alleged contract for services, testimony of the wife tending to show the making thereof was incompetent under the statute.

3. HUSBAND AND WIFE — ESTATES OF DECEDENTS — CONTRACTS — DISABILITY OF WIFE.

A wife is not liable for services rendered to her husband in nursing either member of the family during his lifetime, since the contract does not concern her separate estate and the husband alone is liable.

Error to Shiawassee; Miner, J. Submitted April 15, 1910. (Docket No. 150.) Decided July 14, 1910.

John Dudeck presented a claim against the estate of Emma Reidy, deceased, for services rendered. The claim was allowed in the probate court, and John A. Watson, administrator, appealed to the circuit court. A judgment for claimant is reviewed by contestant on writ of error. Reversed.

John E. Bird, Attorney General, and *J. Shurly Kennary*, Assistant Attorney General, for appellant.

Austin E. Richards and *Joseph H. Collins*, for appellee.

MCALVAY, J. The claim in dispute in this case is for services rendered by claimant and his wife for Mrs. Reidy, amounting to $730, $355 of which is for services by plaintiff's wife before the death of Mr. Reidy, and the balance, $375, for services by claimant and his wife for Mrs. Reidy after Mr. Reidy's death. The larger part of the charges is for the claimed services of claimant's wife in the nature of domestic services and nursing; the latter rendered both to Mr. and Mrs. Reidy.

Michael Reidy and his wife, Emma, owned and occupied a two-story brick building in the village of Corunna. The ground floor was used for a drug store and the second story as a residence by them. Mr. Reidy died March 20,

1907. Mrs. Reidy died December 26, 1908. The claim in dispute was presented to the commissioners on claims in said estate, and allowed but with slight deduction. The administrator appealed from such allowance to the circuit court. The case was tried before a jury in the circuit court and a judgment recovered by claimant for $622.68, which includes some interest. On account of errors claimed to have been committed upon this trial, the administrator has brought the case here by writ of error.

The facts necessary to be stated are: That Mr. and Mrs. Reidy lived at the place mentioned, and for many years an intimate friendship existed between them and plaintiff's wife. From her earliest childhood she spent much of her time with them. They had no children and the girl was at their home daily, staying frequently all night, and always doing little services about the house and store up to the time of her marriage. This was known to her parents and permitted by them, and no charge was ever made or expected as payment for what she did. The two families lived near each other and there was a path across lots between their homes. No demand was ever made of Mrs. Reidy for the services set forth in the claim in suit, and no charge was ever made by claimant at the time services were rendered.

The argument of contestant and appellant considers the claim under two divisions.

(1) Claims for services rendered before Mr. Reidy's death.

(2) Claims for services rendered after his death.

He urges that in each case it was necessary to show an express contract. A motion was made by contestant to take both classes of claims from the jury for the reason that no express contracts were shown.

Whatever contracts or agreements were entered into with Mrs. Reidy, relative to the nursing and domestic services charged for, were made with his wife acting for him, and were proved by her testimony alone. Claimant also testified in the case stating that he knew of these

services rendered by his wife, and looked to and relied upon Mrs. Reidy to pay him, and to no one else. The testimony of both these witnesses was admitted over the objection and exception of appellant, on the ground that both were incompetent witnesses under the statute (section 10212, 3 Comp. Laws, as amended by Act No. 30, Pub. Acts 1903); the claimant, because such matters were equally within the knowledge of the deceased; and his wife, because she acted as his agent in making the contracts involved in this suit.

The court not only overruled the objections made and refused later to strike out the wife's testimony, but directly charged the jury that they must find an express contract from the evidence in the case between Mrs. Reidy and claimant's wife, relative to charges for nursing Mr. Reidy, to charge her individual estate for such services or claimant could not recover; thereby recognizing the agency of claimant's wife. The court was in error. The wife was not a competent witness to testify as to these contracts. *Gustafson* v. *Eger*, 132 Mich. 390 (93 N. W. 893); *Finn* v. *Sowder's Estate*, 139 Mich. 623 (103 N. W. 177); *Locklund* v. *Burman's Estate*, 146 Mich. 233 (109 N. W. 255), and cases cited.

The court was also in error in allowing claimant to testify relative to his knowledge that his wife performed the services for deceased as set forth in his claim, which must have been equally within the knowledge of the deceased; and also to answer the question, "To whom did you look and rely for pay for those services," and all other testimony of like character given by him. This rule is so well established by the numerous decisions of this court in construing this statute that citations are unnecessary.

The claim for services rendered during the lifetime of Mr. Reidy was, under the circumstances of this case, not a valid claim against the estate of Mrs. Reidy. There is no evidence in the case to make it such. She was at the time a married woman, and the claimed contract was not relative to her separate estate. It was a debt of the hus-

band. *Buck* v. *Haynes' Estate*, 75 Mich. 397 (42 N. W. 949). The proof of claims accruing after the husband's death against this decedent's estate depended entirely upon the testimony of the claimant's wife. The question of her competency covers all of her testimony, and left such claims not proved. Some other questions are presented, but do not require discussion.

For the errors pointed out, the judgment of the circuit court is reversed, and a new trial ordered.

OSTRANDER, HOOKER, MOORE, and BROOKE, JJ., concurred.

PORTER *v.* GOUDZWAARD.

1. FRAUDULENT CONVEYANCES — BULK SALES ACT — CREDITORS — ESTOPPEL.

   A creditor is not estopped from enforcing his remedy under the "Bulk Sales Act" (Act No. 223, Pub. Acts 1905) by the fact that he was present when the consideration for a transfer of his debtor's stock was paid, without knowing the details of the transaction, which failed to comply with the provisions of statute; the purchaser taking no different or prejudicial course because of any conduct of the creditor.

2. ESTOPPEL—ELEMENTS—EQUITY.

   Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights, which might otherwise have existed, as against another person who has in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who acquires some corresponding right, either of property, of contract, or of remedy.

Error to Kent; McDonald, J. Submitted April 15, 1910. (Docket No. 128.) Decided July 14, 1910.

Replevin by Edwin F. Porter against Louis Goudzwaard. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Dunham & Phelps, for appellant.

William Wisner Taylor, for appellee.

MOORE, J. Albert H. Vohlers, for some time prior to December 27, 1907, kept a liquor saloon in Grand Rapids, and owned and had therein a stock of liquors and other things, the ordinary outfit of a liquor saloon, except the bar fixtures and certain furniture, which belonged to the Schlitz Brewing Company and which are not involved in this cause. On September 30, 1907, Mr. McGann became the accommodation indorser for Mr. Vohlers on a promissory note for $150, payable to and at the National City Bank of Grand Rapids, due in 90 days. On December 27, 1907, Mr. Vohlers sold to Mr. Porter for a consideration, stated to be $750, all the goods and chattels in the saloon, except the bar fixtures and furniture belonging to the Schlitz Brewing Company. Mr. Vohlers did not pay the note, and Mr. McGann paid it within a day or two after it was due. On April 18, 1908, by writ of attachment from the superior court of Grand Rapids, duly issued, Mr. McGann attached the goods and chattels in question. Mr. Porter immediately replevined them from the deputy sheriff, Goudzwaard, before they were removed under the attachment. Upon the trial a verdict was directed in favor of the defendant.

The case involves a construction of Act No. 223 of the Public Acts of 1905, known as the "Sales in Bulk Act." It is conceded that the provisions of the act were not followed. The only question involved is the matter of an alleged estoppel as against Mr. McGann, the actual, but not the nominal, defendant.

The claim of estoppel is based upon the testimony of Mr. Porter, the material parts of which are as follows:

"At the time this sale was made and the money paid, Dave McGann was present and I showed him the money; he saw me pay the money to Mr. Vohlers. He sat right in a chair by the table, about 20 or 30 feet from where I paid it.

"*Q.* When you paid the money to Vohlers what did McGann say to you about Vohlers owing him, and about Vohlers coming down there to settle, if anything?

"*A.* He said,—he asked Vohlers for the money, and he (Vohlers) said he would be down and settle with him at two o'clock, and he said 'all right,' and went away.

"*Q.* Was that the first time you knew he owed Mr. Vohlers?

"*A.* That was the first time I knew that he owed him a cent; I made a satisfactory arrangement with all the persons named in the affidavit. I didn't owe Mr. McGann anything at the time the attachment was issued."

On the cross-examination he testified:

"I paid the money to Mr. Vohlers on the 27th day of December. I don't know that I did—not positively. The bill of sale is dated on the 27th day of December. I think that was about the time I paid the money.

"*Q.* You paid him the same day?

"*A.* I think that is correct. * * * After the 27th day of December I conducted the business there. I didn't change the sign, nor the license. I didn't pay the State, county or city tax for the year 1907, and up to May, 1908; I just took out a government license. I didn't take out any State or city license as a retail liquor dealer. This transaction was completed—closed between Mr. Vohlers and myself—on the 27th or 28th day of December, 1907, and the next day I did business there for myself under Mr. Vohlers' license, State and city. * * * I paid the money to him about 12 o'clock at the saloon—12 or 1 o'clock. None of the parties named in Vohlers' affidavit were present at the saloon at that time.

"*Q.* Mr. McGann was there?

"*A.* Yes, and he saw me pay Mr. Vohlers a lot of money.

"*Q.* You didn't show Mr. McGann that paper, did you, that afternoon, when he was there?

"*A.* No; I didn't show it to him. I didn't know that Vohlers owed Mr. McGann. I didn't show him the paper, neither did I show him the bill of sale."

Redirect examination:

"The price that was put down on those things was put down by Vohlers about a week before the money was paid, or a week and a half.

"*Q.* How long before you paid the money, how long before the bill of sale was made out had you agreed with Vohlers to take the place?

"*A.* Well, now, I cannot just tell you, for sure. I had the inventory a week or ten days before. Mr. McGann didn't say to me why he came up there at that time. I think Mr. McGann was there probably half an hour."

McGann's version of what occurred is quite different from this. It is evident from the testimony of Mr. Porter, giving it full credence, that either when the talk was had with Mr. McGann the sale had been made, or that Mr. Porter had knowledge of the existence of this debt before he completed the transaction by making the final payment. In either event it is difficult to see how Mr. McGann, who knew nothing of the details of the transaction, is estopped. Mr. Porter saw fit to make the purchase without complying with the terms of the statute, and without taking any precaution to see that the note upon which Mr. McGann was an indorser was paid. There are various definitions of estoppel to be found in 2 Herman on Estoppel, pages 883 and 884, but they do not justify the contention of appellant.

In 2 Pomeroy's Equity Jurisprudence (3d Ed.), §§ 804, 812, the following appears:

"SEC. 804. Definition. From the foregoing general description it will appear, I think, that the following definition is accurate, and covers all phases and applications of the doctrine: Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another

person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy."

"SEC. 812. Same. The conduct must be relied upon, and be an inducement for the other party to act. Whatever may be the real intention of the party making the representation, it is absolutely essential that this representation, whether consisting of words, acts, or silence, should be believed and relied upon as the inducement for action by the party who claims the benefit of the estoppel, and that, so relying upon it, and induced by it, he should take some action."

See, also, *Rust* v. *Bennett*, 39 Mich. 521; *Maxwell* v. *Bay City Bridge Co.*, 46 Mich. 278 (9 N. W. 410); *Bond* v. *Markstrum*, 102 Mich. 11, 19 (60 N. W. 282).

There is nothing in the record to show that the conduct or words of Mr. McGann affected the conduct of the plaintiff in any way.

Judgment is affirmed.

OSTRANDER, HOOKER, MCALVAY, and BROOKE, JJ., concurred.

HARSTAD *v.* H. A. BAUMAN CO.

SALES—PAYMENT—ACCOUNT STATED.

Plaintiffs sold their output of poles and posts to the Michigan Cedar & Lumber Co., which paid for them by notes and directed plaintiffs to ship the timber to defendant. After the maturity of one of the notes, defendant paid it and sent a statement crediting themselves with that amount on their account with plaintiffs. In response, plaintiffs mailed a statement to defendant adopting the balance so shown and adding other

items which defendant subsequently paid according to the invoices. The Michigan Cedar & Lumber Co. gave its notes for the amount then claimed by plaintiffs to be due on the original contract, and, becoming subsequently bankrupt, defaulted in paying them. Plaintiffs brought action against the consignees of the lumber and sought to recover the amount credited for the payment of the first note. *Held*, that the payment was properly credited on defendant's account and the striking of balances and settlement by the several notes constituted an account stated.

Error to Delta; Stone, J. Submitted April 18, 1910. (Docket No. 58.) Decided July 14, 1910.

Assumpsit by Ole Harstad and Phil Labre, copartners as Harstad & Labre, against the H. A. Bauman Company for goods sold and delivered. A judgment for plaintiffs is reviewed by defendant on writ of error. Reversed.

L. D. Eastman (*Eastman & Martineau*, of counsel), for appellant.

A. H. Ryall and *Clyde Hayden*, for appellee.

BLAIR, J. This is an action of assumpsit to recover from the defendant as successor of Lindsley Bros. a balance of the purchase price of certain cedar posts and poles claimed to be due to plaintiffs. Several days prior to May 8, 1903, plaintiffs entered into an executory contract with the Michigan Cedar & Lumber Company of Menominee, Mich., to sell to it their entire output of posts and poles. The contract, among other provisions specifying prices, etc., contained the following:

"Terms of payment to be as follows: A payment of $2,500.00 to be made on or before May 6th in negotiable paper, which is backed by the Lindsley Bros. Co., of Menominee, Mich. The balance of the purchase price to be paid upon receipt of invoices for each car, in the sum of 75 per cent. for each invoice or car when loaded, in cash less 2 per cent., and the balance of 25 per cent. to be paid 60 days from same date, the payments of cash not to begin until said Michigan Cedar & Lbr. Co. have re-

ceived enough material to cover the first payment above mentioned of $2,500.00, which payment at this date or writing has been paid and accepted by yourselves. The poles are to be inspected on grounds at once by the Michigan Cedar & Lbr. Co., according to the N. W. W. Cedar Men's Association inspection rules."

The Michigan Cedar & Lumber Company was under the control and management of A. L. Lindsley, a brother of George L. Lindsley. George L. Lindsley was president, and his brother E. A. Lindsley was secretary and treasurer, of the Lindsley Bros. Co., but neither of them, so far as this record shows, was connected with the Cedar Company. On or about May 8, 1903, two notes for $1,250 each, due, respectively, in 60 and 90 days, were executed and delivered to plaintiffs by the Cedar Company. These notes were indorsed before delivery by Lindsley Bros. Co., were at once discounted at a bank, the cash paid to plaintiffs and the amount credited upon their books to the Cedar Company. After the making of the contract the Cedar Company directed the plaintiffs by letter to ship the poles to the Lindsley Bros. Co. On May 14, 1903, plaintiffs shipped to Lindsley Bros. Co. poles to the amount of $3,606.60, on June 9, 1903, poles to the amount of $398.05, and on July 11, 1903, poles to the amount of $134.30. With the exception of a later invoice of $27, the above items comprise the shipments to Lindsley Bros. Co. of the poles covered by the contract. The posts covered by the contract were shipped to the Cedar Company, and plaintiffs kept separate accounts of the poles and posts. Up to and including May 14, 1903, plaintiffs had shipped to the Cedar Company posts to the amount of $513.12. September 1, 1903, the Cedar Company wrote the following letter, which was received by plaintiffs:

"Enclosed please find check for $446.32 to apply on our account; also an acceptance for 60 days amounting to $526.83 which we trust you will find acceptable, as you desired good payment the first of this month. We also hope that you have written the Lindsley Bros. Co. and they have helped you out in some manner. When you

first began shipping this material, we wrote you to invoice all poles to the Lindsley Bros. Co., and this of course carries the demand on them for the payment of the same when due, which we trust you have, less $1,250 on one note which they have paid, we remain," etc.

On September 14, 1903, Lindsley Bros. Co. sent the following statement, which was received by plaintiffs:

HARSTAD & LABRE,
Bark River, Mich.

In Account with
LINDSLEY BROTHERS COMPANY,
Dealers in Cedar Products.

Interest at 7 per cent. charged on accounts after due. Exchange and express charges on remittance must be prepaid.

1903.			
May 19	Insp. Report No. 1179		$3,606 60
June 9	" " " 1241-1242		398 05
July 14	" " " 1264		134 30
Aug. 15	Cr. Memo 8-15 31567-45191		1 00
Aug. 8	M. C. & L. Co.'s note paid by us	$1,250 00	
	Balance	2,889 95	
		$4,139 95	$4,139 95
	Balance	$2,889 95	

We are sending you this for comparison.
Very truly yours,
LINDSLEY BROS. CO.

On or about October 14, 1903, plaintiffs gave to Lindsley Bros. Company the following statement:

M. LINDSLEY BROS. CO., To HARSTAD & LABRE, Dr.
Dealers in Dry Goods, Clothing, Hats, Caps, Boots, Shoes, Groceries, Hardware and Implements, Cedar Products, and Cordwood.
Bark River, Mich.

Sept. 14.	Your stmt		$2,889 95
	Our invoice 9-7 " 35		27 00
			$2,916 95
11 24.	By 60 ds. note	$600	
Oct. 14.	By 60 ds. note	1,500	2,100 00
			$816 95

Some time in October, 1903, plaintiff Labre went to Menominee and talked with E. A. Lindsley about their statement. He testified:

"*Q.* You may state whether or not you made any objection to that $1,250 credit at that time?

"*A.* I just mentioned it. * * *

"*Q.* What did you say to him and what did he say to you about that there?

"*A.* I says, 'I don't think this note ought to be charged to me,' so he says, 'We paid it, and it is charged,' so I didn't do anything more about it; they were ahead of me three or four thousand dollars. After that I again went to Menominee. I think it was a month later. I saw Mr. George Lindsley himself in the office. At that time the Michigan Cedar & Lumber Company was in the same office with defendant.

"*Q.* What did you go there for at that time?

"*A.* The account was running behind, and I told George Lindsley I wanted some money; I told him that they were not living up to the contract at all; the account was way past due and the stuff wasn't moving as it ought to be. To that George said at that time he would take over the management of the Michigan Cedar & Lumber Company himself and see that everything went through all right and that everybody got their money. He and A. L. Lindsley were in there together. A. L. Lindsley was a member of the Michigan Cedar & Lumber Company. I understand George Lindsley was president of the Lindsley Brothers Company. At that time I took some notes from the Michigan Cedar & Lumber Company, and some of them were renewed after that. * * *

"*Mr. Ryall:* Why did you take these notes?

"*Mr. Labre:* Mr. Lindsley told me that he would take the management of the company and see that everything pulled through all right and that everybody was paid.

"*The Court:* The question is, Is that the reason you took these notes of the Cedar Company?

"*Mr. Labre:* Yes, sir.

"Whereupon the court ruled to permit the answer to stand, but not for the purpose of showing any authority of the company, and an exception was duly given to the defendant. * * *

"Myself nor any member of my firm never authorized

Lindsley Bros. Co. to apply that note on their account. There has never been anything said by them about applying this note on this account, or that I had authorized its application. I never received the $1,250 from Lindsley Bros. Co. except in the manner they indicate here by their paying that note."

The balance due, according to plaintiffs' statement to Lindsley Bros. Co., has been fully paid by that company. Plaintiffs also gave a statement to the Cedar Company, crediting it with one of the $1,250 notes and showing a balance due for which plaintiffs accepted three notes, the payment of which would have completely discharged the contract. In the spring of 1904 the Cedar Company went into bankruptcy, and plaintiffs filed the three notes as claims against its estate, but afterwards, on advice of counsel, withdrew their claim and instituted the present suit against defendant.

Mr. George L. Lindsley testified:

"*Q.* Do you remember the transaction by which you received some poles from Harstad & Labre, in 1903?

"*A.* Well, they shipped some on a contract or a sale the Michigan Cedar & Lumber Co. made to us, yes. * * * We had nothing to do with Harstad & Labre in the purchase of these poles.

"*Q.* From whom did you buy the poles?

"*A.* Michigan Cedar & Lumber Company. * * * Afterwards I made payments on these poles. I made payments in the way which I did for the convenience of bookkeeping, and so that the matter of payments would go through Harstad & Labre; and we didn't care to have them go around through the Michigan Cedar & Lumber Co., but through Harstad & Labre. We thought it simpler in bookkeeping, and otherwise. * * *

"*Q.* You may state when the arrangement was made between you and the Cedar Company.

"*A.* When the shipment commenced—that is, when we commenced to make payments and that is when the arrangement was made.

"*Q.* When the shipments commenced. That was under the contract?

"*A.* Under the contract."

At the close of the proofs defendant's counsel moved for

an instructed verdict in its favor. We are of the opinion that this motion was well founded. It is undisputed that the original contract was between plaintiffs and the Cedar Company, and that, originally, defendant contracted for the poles with the Cedar Company. It is further undisputed that the plaintiffs shipped the poles to defendant in compliance with the instructions of the Cedar Company. The contract provided for an advance payment of $2,500 and plaintiffs were paid $2,500 by the Cedar Company before they shipped a pole or a post, but by the contract they were also bound to ship the equivalent of this sum in poles or posts before they could entitle themselves to the subsequent payments. The first shipments of poles and posts, therefore, up to the amount of $2,500 were paid for in advance by the Cedar Company, belonged to it and were subject to its disposal. At the close of May 14, 1903, plaintiffs had shipped poles of the contract value of $3,606.60 and posts of the value of $513.12. Deducting the $513.12, there remained $1,986.88 worth of poles actually paid for by the Cedar Company, and sold by it to the defendant company, and as to which the plaintiffs had no claim whatever against the defendant or the Cedar Company. It turned out, however, that when the second note for $1,250 fell due August 8, 1903, the defendant, either because of its legal obligation or of some arrangement with the Cedar Company, paid the note and was, as against the Cedar Company, its vendor, legally entitled to credit therefor on the purchase price of the poles paid for by the Cedar Company. So far as the plaintiffs were concerned, having received their money on the notes, it was no concern of theirs how the notes were afterwards paid, neither was it any concern of theirs what was done with the cedar which the notes paid for, after they had delivered it in compliance with their contract. All that was done by the subsequent arrangement of the parties was to allow to the defendant the credit to which it was legally entitled.

We are also of the opinion that an account stated be-

tween the parties was conclusively established. That there was a striking of balances between the several parties, an acceptance of notes from the Cedar Company and the defendant for the balances struck, is undisputed, and we think the evidence is equally undisputed that no fraud was practiced upon the plaintiffs and that they fully understood the facts and were not laboring under any mistake, either of fact or of law.

The judgment is reversed, and a new trial ordered.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

KELLEY v. PAULSEN.

1. EVIDENCE—IMMATERIALITY—SLANDER.
   Testimony, on cross-examination of defendant's witness, in an action for slander, elicited by an immaterial question and not prejudicial, is not a ground for reversal.

2. SAME.
   No error was committed in refusing to permit the defendant to explain why he had asked plaintiff to get his name off a certain note; the subject being immaterial.

3. SAME—CROSS-EXAMINATION.
   It was proper to permit the inquiry, on cross-examination, as to defendant's understanding of, and his intent in using, the words "take" and "steal."

4. SAME—LIBEL—SUBSEQUENT WRONGFUL ACTS.
   Slanderous utterances made subsequent to the time declared and relied on are inadmissible to prove the slander charged, although they are competent evidence of malice.

5. LIBEL AND SLANDER—ADVICE OF PROSECUTOR—TRUTHFULNESS OF STATEMENT.

In an action for slander and malicious prosecution, the question of the fairness and truthfulness of defendant's statement to the prosecutor being in issue, it was not error to refuse to direct a verdict for defendant on the ground that he acted on the advice of the prosecutor.

Error to Montcalm; Sessions, J. Submitted April 8, 1910. (Docket No. 47.) Decided July 14, 1910.

Case by Ernest Kelley against Brede Paulsen for slander. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed.

R. A. Hawley, for appellant.

J. C. Youdan (*N. O. Griswold*, of counsel), for appellee.

BLAIR, J. This is an action on the case to recover damages for alleged slander and malicious prosecution. The basis of the count for slander is the publishing, on the 18th day of March, 1907,—

"To, of and concerning the said plaintiff these false, scandalous and defamatory words, to wit: 'You (meaning the said plaintiff) stole the clover seed, and you know you did, and the bridles, too.'"

The plaintiff's testimony tended to prove the uttering of the slanderous words and repetitions at subsequent dates. The basis of the count for malicious prosecution was a criminal prosecution of the plaintiff for the larceny of the clover seed and bridles, resulting in the dismissal of the case for some technical defect in the complaint.

Defendant gave notice, under his plea of the general issue, as to the slander count, that he would prove the truth of the alleged slanderous charge, and that as to the count for malicious prosecution he laid all the facts of the case within his knowledge before the prosecuting attorney and justice of the peace and acted in good faith under their advice. The jury returned the following verdict:

"We have found the defendant guilty in the first part of that count, slander, and place the damages at $325. We were not sure whether that was for expenses or some other part. And $125 making a total of $450. In the malicious prosecution we find him guilty. One part of that we didn't understand—whether damages went with that part or not; whether there should be any damages assessed to that part."

After retiring again under the direction of the court, the jury brought in the verdict upon which judgment was entered, as follows:

"*The Court:* What is your verdict?

"*Juror:* The first part the same as before, $450 damages in the slander case, $325 for the feelings and $125 for other injuries. The malicious prosecution we find him guilty, and damages $1.00, total, $451."

Defendant seeks a reversal of the judgment on account of alleged errors in the rulings upon the admissibility of testimony and in the charge of the court. There was a sharp conflict in the testimony as to most of the material questions of fact.

The second assignment of error relates to a question asked a witness for defendant, who testified that defendant told him that he was not going to rent his barn basement to him any more for storage purposes, because he lost property by renting it. The question objected to was:

"Were you surprised that he should make the statement that he would not rent the basement any more because men stole?"

Conceding that the question was immaterial, the answer was not so prejudicial as to call for a reversal of the case.

The third, fourth, and fifth assignments of error relate to the refusal of the court to permit the defendant to explain his reasons for asking the plaintiff to get his (defendant's) name off a certain note. The whole subject was immaterial, and there was no error in refusing to permit further inquiry into it.

The sixth and seventh assignments of error relate to questions put to defendant on cross-examination, as to whether he had not testified on a previous trial that there was no difference in the two words "take" and "steal," so far as he knew, and, "You don't claim now he did steal it, do you?" The answer to the last question was: "I claim I am satisfied he took it." Defendant was insisting that he did not use the word "steal," and we think the questions were properly allowed.

Error is assigned upon the following instruction to the jury:

"There has been some testimony in this case concerning the utterance of slanderous words by the defendant of and concerning the plaintiff at other times and upon other occasions. The plaintiff cannot recover in this case because of the utterance of any other words than those which he alleges were uttered on the 18th day of March and upon that occasion at the potato warehouse. You have the right, however, to take into consideration any other statements of a like nature that were made upon other occasions and at other times by the defendant of and concerning the plaintiff, if you find any were made, as bearing upon the probability or improbability of the defendant having uttered the words alleged in the declaration upon the 18th day of March, and also as bearing upon the question of the malice of the defendant in uttering those words."

We are of the opinion that this assignment is well founded, and that the circuit judge erred in permitting the jury to consider the subsequent repetitions of the slanderous words as substantive proof of the utterance of those words at the times charged in the declaration. Repetitions of the slanderous charge at other times are only admissible as bearing upon the question of malice. *Botsford* v. *Chase*, 108 Mich. 432 (66 N. W. 325); *Ellis* v. *Whitehead*, 95 Mich. 105 (54 N. W. 752); 8 Enc. of Evidence, p. 296, D.

The court did not err in refusing to direct a verdict in favor of defendant upon the ground that he had acted upon the advice of the prosecuting attorney and magistrate after

fully and fairly stating the facts within his knowledge. There was a sharp issue of fact as to whether defendant made a truthful statement of the facts. Among other things, he told the prosecuting attorney that Kelley admitted taking the clover seed. Kelley denied making any such admission, but, on the contrary, testified that he denied taking the clover seed.

The judgment is reversed, and a new trial granted.

OSTRANDER, HOOKER, MOORE, and STONE, JJ., concurred.

H. SCHERER & CO. *v.* INDEPENDENT STEEL & WIRE CO.

1. EVIDENCE—HEARSAY—CONTRACTS.
   Testimony being introduced that a witness found the goods received to be defective, in an action for breach of contract for the sale of springs, which the purchaser claimed were imperfect, an objection that the defective condition was shown by hearsay testimony concerning complaints of customers is not maintainable.

2. STATUTE OF FRAUDS—MODIFICATION OF CONTRACT—SALES.
   The objections that a contract within the statute of frauds may be modified only by writing, and that the defendant, who was alleged to have furnished defective springs and an insufficient quantity under the contract relied on, was entitled to additional time under the agreement, were *held* to be met by testimony showing that the defendant acknowledged the defective condition of the materials, advised plaintiff to purchase elsewhere and charge the loss to defendant, and assented to charges so made.

Error to Wayne; Donovan, J. Submitted April 18, 1910. (Docket No. 52.) Decided July 14, 1910.

Assumpsit by H. Scherer & Company against the Independent Steel & Wire Company for breach of a contract for the sale of certain springs. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

H. M. & D. B. Duffield, for appellant.

Bowen, Douglas & Eaman, for appellee.

MOORE, J. The plaintiff sued and recovered a judgment upon a contract for the furnishing of wagon springs. The plaintiff claimed damages on two grounds under the contract set out in the declaration:

(1) Because some of the springs furnished by the defendant company were defective, and had to be replaced by others; and,

(2) Because, the defendant, failing to furnish the number of springs called for by the contract, the plaintiff was thereby compelled to purchase elsewhere, at a price in excess of that fixed by the contract, which excess is the basis of a claim for damages.

The case was tried before a jury. From a judgment in favor of plaintiff, the case is brought here by writ of error.

Defendant claims the theory on which the trial judge permitted the case to be tried was a denial of justice, for the following reasons:

(1) He permitted alleged defects to be proved by the mere statement of a witness referring to complaints from customers, and in no way specifying wherein the springs did not come up to the kind required under the contract.

(2) Because, the principal contract being one which the statute of frauds requires to be in writing, all modifications of such contract must also be in writing.

(3) The contract gave to the defendant additional time within which to perform its obligations under certain conditions which the testimony or the offer of testimony showed did exist. It became, therefore, a matter of considerable variation, and a matter of much moment to the defendant whether it would accept the right to delay given under the contract, or whether it would, at additional ex-

pense to itself, waive that right in order that the plaintiff might sooner receive its supplies.

We think each of these contentions was fully met by the testimony offered on the part of the plaintiff.

We will call attention to some of the testimony. Mr. Hoof, who made the contract on the part of the plaintiff with Mr. Hirsch representing the defendant, testified in part as follows:

"I made up the entire bill of particulars, and access is given to all of our books, and I am familiar with all the facts with reference to all these purchases by the customers, and in each case the difference between the contract price and the market price actually paid.

"*Q.* Now you may state the total amount you paid as indicated by the bill of particulars in excess of contract price to fill the orders of customers of H. Scherer & Co. of the kind of springs specified in the contract with the defendant under their direction.

"*A.* The total amount of these charges is $782.29, and from that amount is to be deducted for defective springs $164.07, leaving a balance of $618.22. This indicates the amount charged because of difference in price. In each one of these instances mentioned in this bill of particulars, I notified the Independent Steel & Wire Co. of the sale and purchase. They probably furnished us 2,000 pairs of springs, which did not come up to quality. Apparently when making them the steel was overheated, which took the temper out, and when they were tested the seat spring would not spring back to the proper position by one or two inches, sometimes three or four. They were poorly constructed. * * *

"*Q.* I will ask you, did you, with reference to each one of these items in the bill of particulars, have defective springs furnished by the Independent to you on which you are claiming a refund of the money paid by you to the Independent? Did you call Mr. Hirsch's attention to it orally or in conversation?

"*A.* Yes, sir; orally. We called his attention to it, and he authorized them to be returned to their factory, and he promised to credit us on account with that money. Mr. Hirsch promised to pay back the amount which we claimed in the bill of particulars as a credit for defective springs returned. The defective springs in the bill of par-

ticulars amount to $236.22. Our total claim is $782.29, deducting from which $236.22, for defective springs, leaves $546.07 as representing the amount we paid in excess of the contract price."

This witness testified that he saw many of the springs which his company had sold to its customers which proved to be defective and had been returned to the defendant company at Chicago; that he examined and tested them; and that he examined many of them in the presence of Mr. Hirsch or Mr. Guiney, and that the springs were defective and were admitted to be. He further testified:

"I presented personally to Mr. Hirsch a memorandum or statement of defective springs, and then again would send him an invoice of every charge. He stated that if the springs were defective he would make the full allowance for them, and he was satisfied they were defective because they had been getting out a bad lot of springs, and the customers were justified in their complaints. We presented to Mr. Hirsch a full statement of the springs shipped on their authority from other factories to our customers, and in each instance we made an invoice to the customer. * * * We sent invoices to Mr. Hirsch in every case for the difference in price as fast as the invoices would come from other factories upon these orders and which he had authorized us to purchase outside. We afterwards had a talk with him about the amount of these items, discussing the price we were paying, and he said it was all right and that he could not make them; to go on and fill the orders and charge him with the difference in price. There was no objection whatever made to this. The only item they disputed was the freight on one or two little shipments to California. They said they would allow for the springs but said they did not feel they wanted to allow all the freight. This freight is not involved in this controversy. The total amount of interest due us is $150.22. The principal is $782.29, and the interest $150.22."

The case was carefully presented to the jury.

Judgment is affirmed.

OSTRANDER, HOOKER, BLAIR, and STONE, JJ., concurred.

BARCUS *v.* WAYNE AUTOMOBILE CO.

1. SALES—CONTRACTS—BREACH—DIRECTING VERDICT—TRIAL.
   Correspondence between the vendor and vendee of automobile gears, showing a contract and an attempt to reduce the number ordered, was properly adjudged, as a matter of law, by the court, to constitute a breach of contract.

2. DAMAGES—VALUE—BREACH OF CONTRACT.
   It was error to hold that, as a matter of law, the plaintiff could recover the cost of the finished gears and profits less the value of the property as mere junk, where the defendant offered evidence tending to show a higher value.

Error to Wayne; Donovan, J. Submitted April 18, 1910. (Docket No. 32.) Decided July 14, 1910.

Assumpsit by George Barcus and Albert B. Rowley, copartners as the Gemmer Engine Company, against the Wayne Automobile Company for breach of a contract of sale. A judgment for plaintiffs on a verdict directed by the court is reviewed by defendant on writ of error. Reversed.

Denton Guinness, for appellant.

Bowen, Douglas & Eaman, for appellees.

MOORE, J. Plaintiffs sued defendant for the breach of a contract referred to later. The judge directed a verdict for the plaintiff. The case is brought here by writ of error.

On October 30, 1906, the Wayne Automobile Company ordered from the Gemmer Engine Company, of Wabash, Ind., 500 steering gears at a price of $26 each, deliveries to be made at the times stated in the contract. Three hundred of the gears were delivered and paid for. The unfinished parts of the remaining 200 gears are boxed at the place of

business of the Gemmer Engine Company. On April 11, 1907, the Wayne Automobile Company wrote Brandenburg & Company, the selling agents of plaintiff, stating they wanted the Gemmer Engine Company instructed to reduce the order for steering gears from 500 to 300. Other correspondence followed which it is not necessary to incorporate in this opinion.

Error is assigned upon two propositions:

(1) The court erred in holding as a matter of law that under the testimony in this case the defendant was liable to plaintiff.

(2) The court erred in refusing to permit the jury to consider and determine the question of the value of the different materials, labor, and parts, as specified in plaintiff's bill of particulars.

As to the first of these propositions, it may be said that the correspondence which appears in the record, and which was for the construction of the court, clearly indicates a breach of the contract, from which liability would follow. It was not error to so hold.

As to the second proposition: The plaintiffs charged defendant for the cost of labor and material which had entered into the unfinished gears, amounting to $1,200.12. They also charged defendant with anticipated profits amounting to $468, from which amounts was deducted the sum of $141, which plaintiffs say was the value of the unfinished gears, treating them as having no more value than so much junk. The judge accepted the view of plaintiffs, which view defendant insisted was incorrect. The defendant introduced testimony as to values and sought to take the judgment of the jury upon that feature of the case. In the examination of the manager of the plaintiff company appears the following:

"*Q.* Is it not a fact that the reason they did not take them over is they had an exorbitant price upon them?

"*A.* No, I would not say that; the Gemmer Manufacturing Company could not use them, unless they had a customer actually on hand for them.

"*Q.* Did they not have some talk about making up these gears for the Wayne Company?

"*A.* There was some talk of the three companies trying to get together, just as the two companies. They tried to get together.

"*Q.* There was quite a little correspondence about it?

"*A.* Some.

"*Q.* You came up here to Detroit about it, did you not?

"*A.* No, I do not believe I did.

"*Q.* Is not that the reason that you did not take them over, is because you put too high a price upon them?

"*A.* No, sir; they would be of no value to the Gemmer Manufacturing Company unless the Wayne Company would take them.

"*Q.* You have already stated that the Wayne Company talked about taking them?

"*A.* Yes, sir.

"*Q.* They wanted them?

"*A.* Yes, sir.

"*Q.* They wanted gears?

"*A.* Yes, sir.

"*Q.* Don't you know they had to go out and buy other gears?

"*A.* Yes, sir.

"*Q.* Do you remember it was on account of that, your high price, that the Gemmer Manufacturing Company would not take them over?

"*A.* No, sir; I would not say the Gemmer Manufacturing Company could not use them unless the Wayne Automobile Company specified these parts."

The question of values and of the damage sustained were questions of fact and should have been submitted to the jury.

Judgment is reversed, and new trial ordered.

OSTRANDER, HOOKER, MCALVAY, and STONE, JJ., concurred.

ROCK ISLAND PLOW CO. *v.* SMITH.

1. JUSTICES OF THE PEACE — SPECIAL APPEAL — QUESTIONS REVIEWABLE.

   It is proper to overrule a special appeal from justice's court unless the record shows want of jurisdiction.

2. COMPROMISE AND SETTLEMENT — EVIDENCE — BEST EVIDENCE RULE.

   In an action for goods sold, for which defendants claimed they had made payment by a compromise, oral testimony that certain items were not entered in the plaintiff's books until after the alleged compromise, is not incompetent under the best evidence rule.

3. SAME—PLEADING—BILL OF PARTICULARS—COMPROMISE.

   Although no bill of particulars was filed, the claimed defense made it admissible to prove what was included in the settlement.

4. SAME—EVIDENCE.

   It is *held* that the evidence warranted the submission to the jury of the question whether or not a plow had been included in the settlement.

5. COSTS—APPEALS FROM JUSTICES' COURTS.

   Costs, on appeal from justice's court, are discretionary with the circuit judge.

Error to Allegan; Padgham, J. Submitted April 18, 1910. (Docket No. 133.) Decided July 14, 1910.

Assumpsit in justice's court by the Rock Island Plow Company against Jay L. Smith and Guy E. Smith, copartners as J. L. Smith & Son, upon an account stated. There was judgment for plaintiff, and defendants appealed to the circuit court. A judgment for plaintiff is reviewed by defendants on writ of error. Affirmed.

Clare E. Hoffman (*E. J. Anderson*, of counsel), for appellants.

David Stockdale & Son (*Charles Thew*, of counsel), for appellee.

HOOKER, J. The plaintiff sued the defendants, who were dealers in agricultural implements, in justice's court, upon an account between them. Upon the return day, an adjournment of a week was granted upon the application of the defendants, and upon the adjourned day a judgment was rendered, from which the defendants appealed. Later there was a trial of the merits at circuit, after defendants' special appeal had been overruled, resulting in a verdict and judgment for the plaintiff, and the defendants have again appealed.

A number of assignments of error are relied on, but the questions are comparatively few. We will not therefore discuss each individual assignment separately, but will endeavor to cover them all in our discussion of the questions.

1. **Questions Relating to the Special Appeal.** The record shows jurisdiction in the justice and therefore the court properly overruled the special appeal. *McGraw* v. *Sturgeon*, 29 Mich. 426; *Dalton* v. *Laudahn*, 30 Mich. 349; *Deitz* v. *Groesbeck*, 32 Mich. 303; *Benjamin* v. *Dodge*, 50 Mich. 41 (14 N. W. 675); *Stevens* v. *Harris*, 99 Mich. 230 (58 N. W. 230). This disposes of all alleged errors committed by the justice.

2. **Errors at Circuit.** The cause was tried upon its merits before a jury in the circuit. The issue was made by a declaration and a plea. No bill of particulars was ever filed in the cause. It is admitted that the parties had a settlement in August, 1906, when a statement was made and signed by both. Among the items claimed by plaintiff are three invoices of goods in the July previous to the settlement. The defendants claimed that they should be considered settled; the articles having been furnished before the settlement. This raised the question whether they were included in the statement and settlement. Plaintiff also claimed pay for some old chains and a Hilo sulky plow, while defendants claimed that they were entitled to credit for them because returned. The items in dispute which were left to the jury were: The

July items, $63.41; the sulky plow $27.50; the chains $43.20. The verdict was for $90.91 with interest at 5 per cent. from August 14, 1906, amounting to $17.81, making a total of $108.72. It is apparent that the plaintiff did not recover for the chains, and the only questions that we need consider must relate to the July items and the plow.

(*a*) **The July Items.** The question before the jury as to these items was simply whether these invoices were included in the statement and settlement of August, 1906. Defendants offered some testimony tending to show that they were. Plaintiff offered testimony to the contrary. Defendants' brief admits that the only question was whether these goods had been paid for. Van Buren testified that they were not in the statement settled, and gave as a reason that they had not been posted in the ledger when the statement was made. This testimony was objected to, but no ground was stated. It is now claimed not to have been the best evidence. The fact was a proper one to prove, and this may have been the best evidence, for the books themselves might not, and probably would not, have shown the dates when the entries were made. At all events, the alleged error should be disregarded, under repeated decisions, the ground of objection not having been stated.

It is claimed that plaintiff was allowed to prove the various items included in the settlement, and that this was error for the reason that they were not included in the bill of particulars. Counsel admit that there was no bill of particulars, unless an affidavit of items claimed, filed and served with the summons, is to be treated as one. It is enough to say that the defendant brought this question into the case by claiming a settlement of the July items. That made it proper for plaintiff to prove what was and what was not included in the statement and settlement. The court also held that an earlier settlement than that of August, 1906, was immaterial, and we do not discover anything in the record that indicates error in this.

(*b*) The Plow. The statement and settlement gave defendant a credit for the plow. In the cross-examination of plaintiff's witness he testified:

"Smith sent the chains and the plow to the company in December. Smith paid the company everything except that $43.20 for the chains, and the $27.50 for the plow, and those three July items.

"*Q.* And that is all the dispute is about, isn't it?

"*A.* That is all there is."

Defendant J. L. Smith testified:

"*Q.* Now you may state what papers Mr. Van Buren had at that settlement of August 14, 1906.

"*A.* He had a statement of the entire account for the year, and I looked it over and took him in the office with me. We went over it together, took our invoices; and they agreed exactly, each item. These invoices here were in the statement; we checked them up. I think you will find the check marks on those originals right there and he said everything was all right, and we settled up in full to date everything, and with the exception of $27.50 that was left out on the plow; that was to be fixed up and then that was to be paid for. We talked that up thoroughly.

"*Mr. David Stockdale:* I will object to anything said about the plow.

"*The Court:* Well, that is talk; that would be permissible.

"*A.* (continuing) Talked in that settlement; he was to fix the plow.

"*The Court:* It would be admissible, what was said in that settlement.

"*Q.* Now just state what he said.

"*A.* He was to fix the plow and I would send him a check and he said he didn't want to have any reflections cast on him and I said 'I will write a letter to cover that,' and I said, 'Give me your word you will fix it and I will give you my word I will send the check.'

"*Mr. John B. Stockdale:* I move to strike out the testimony of this witness relative to that plow, because the matter at that time was reduced to writing and signed by Mr. Smith, and that is the part that governs here, as we claim, not what talk he had with Mr. Van Buren; what they got in writing.

"*The Witness:* If your honor please, if I tell the conversation—

"*Mr. John B. Stockdale* (interrupting): Just a moment now.

"*The Witness* (continuing): I won't deviate a bit from it.

"*The Court:* I think that any statement that was not in writing would be inadmissible here, changing the terms of the writing. Any outside talk that they had would be contrary not only to the general rule, but would be contrary to their contract, if they ever had a contract of any kind.

"*Mr. Hoffman:* We save an exception.

"*Mr. Anderson:* I always understood there was a rule that you could show the true consideration for a settlement of a contract.

"*The Court:* Well, there was consideration enough for writing what he did write. Well, let it stand.

"On August 14, 1906, the date we settled, Van Buren brought a statement of the account, and to the best of my recollection the three items in July, '06, which are in dispute were in that statement. I didn't have the statement in my hand. I do not remember whether he left a copy of this statement of account that he brought with him with me. This statement was a different paper than the settlement of account which he made out while there. He read off the items from this statement of account, and I checked my invoices from his reading."

Cross-examination:

"I testified on the former trial that those three items in July, $27.47, $16.44, and $19.50—I understand there were four items bunched in three—were all settled for in this settlement, everything cleaned up to August 14th. I had my invoices there and they agreed exactly with his statement. Our settlement was very pleasant; just Hilo plow that had not been fixed was the only difficulty."

Identifies settlement sheet and says a copy of it was left with him.

The evidence shows that the defendants settled and were credited for this plow. His counsel contend that this was upon condition that it should be repaired. Van Buren testified that he gave him the credit as a disputed

item, and took a letter from defendants to plaintiff as follows:

"*Gentlemen:* J. D. Van Buren, your representative, called on us today and we congratulate you on having so competent a man and one who seems to be very fair in settlement on both sides, and as we have a Hilo plow that has cost us a good deal of time in trying to get settlement we think that is all we should lose, inasmuch as we are not to blame for this tool not doing business properly. Our customer claims he couldn't plow even where tall stubble was without clogging; the clogging being caused by lever holding lifting frame. Now, Mr. Van Buren does not feel like taking the liberty in making settlement for this plow to be returned. So I make a proposition to settle as follows: To settle in full, except $27.50 for Hilo plow we have on hand; has been used and could not get a settlement as stated above. We agree if this settlement is not satisfactory the Rock Island Plow Company is to notify us and we will remit check for same. Your will is our pleasure in this matter. We do not cast any shade on Mr. Van Buren, as we believe that he is working for the benefit of the Rock Island Plow Company in every way."

The reply was:

"J. L. SMITH & SON,
"Wayland, Mich.

"*Gentlemen:* Referring to the settlement of August 14th of your season's account, we have decided to accept the settlement with the exception of the conditional credit of $27.50 for a Hilo sulky plow you mention as on hand, and the 24 hay loader chains, $43.20, to return. This credit for hay loader chains has been carried in your account since Mr. Woodward's settlement of December 21, 1904, which settlement we accepted at the time as a final adjustment between us of the matters in question. We pass the allowance of extending the time on goods sold to January 15th, conditional on prompt remittance for the $27.50, and shipment of the chains or remittance for whatever you are short on returning. As soon as we receive a remittance for the $27.50 and an accounting of the chains—you should see that these are shipped at once, sending us the bill of lading so that we can trace credit to your account—we will enter the settlement on our

books. Thanking you for your prompt attention and trusting that the coming season will show a handsome increase in the sales of our goods, we remain,

"Yours truly,

"ROCK ISLAND PLOW COMPANY."

The question was fairly submitted to the jury, and they found for plaintiff. We do not see that defendant was injured by the exclusion of evidence, the remarks of counsel, or the charge of the court. We cannot interfere with the order of the circuit court in relation to costs.

The judgment is affirmed.

OSTRANDER, MOORE, BLAIR, and STONE, JJ., concurred.

KLATT *v.* CITY OF DETROIT.

1. CONSTITUTIONAL LAW—STATUTES OF LIMITATION.
   The legislature may extend or repeal a statute of limitations or abolish the rule of adverse possession so as to affect cases where the period has not already run, or title been previously acquired.

2. LIMITATION OF ACTIONS—STATUTES—DETROIT CHARTER.
   The provisions of Act No. 383, Local Acts 1899, suspending the effect of statutes of limitations upon debts for taxes assessed in the city of Detroit, does not stop the running of the statute as to the lien upon land occupied adversely as against the city which purchased the same at the tax sale.

3. TAXATION—STATUTES OF LIMITATION.
   The liability and lien for the tax assessments fixed by the statutes in force at the time of assessment govern, and are not affected, in the absence of express provision, by subsequent acts abolishing or changing the rule of limitations.

4. SAME—PURCHASE OF TAX LIEN—EXTINGUISHMENT OF OBLIGATION.
   Since the payment of a tax extinguishes both lien and liability, a purchase of the land at the tax sale by the city extinguished the lien and the obligation to pay the tax.

5. SAME—MUNICIPAL CORPORATIONS—PURCHASE.
   An equitable title vests in the city which purchases land at a tax sale for special assessments, under the charter of the city of Detroit, without the issuance of a tax deed or of a certificate of sale.

6. ADVERSE POSSESSION—LIMITATIONS—TAX TITLES.
   Adverse possession may devest an equitable title unsupported by a tax deed or certificate of sale issued, where the city of Detroit purchases property for unpaid taxes under its charter.

7. SAME—COLOR OF TITLE.
   Color of title is not necessary in the claimant of land whose property is held adversely, in order to support the adverse possession.

8. TAXATION—PUBLIC OFFICER AS PARTY.
   The Detroit city treasurer is properly made a party to a suit to quiet title against a tax title held by the city, because of which he refused to furnish a certificate of payment of taxes required to entitle a deed to registration.

9. SAME—DETROIT CHARTER.
   He could not be required to determine the validity of a claim by adverse possession.

Appeal from Wayne; Murfin, J. Submitted April 18, 1910. (Docket No. 103.) Decided July 14, 1910.

Bill by William F. Klatt against the city of Detroit and Max C. Koch, city treasurer, to quiet title to certain land. From an order overruling a demurrer, defendants appeal. Modified and affirmed.

Jasper C. Gates, for complainant.

Walter Barlow (*P. J. M. Hally*, of counsel), for defendants.

HOOKER, J. Joseph F. Weber being the owner, the

premises described in the bill in this cause were subjected to a special assessment of $100, for the opening of a street in the city of Detroit. The special assessment roll was confirmed by the council of the city, on April 3, 1884, and on December 22, 1884, the city treasurer sold the property for the nonpayment of the same, amounting to $104.40. The land was sold to the city for the period of 99 years, and has never been redeemed. On November 23, 1909, the complainant purchased the premises from Weber, taking a deed made by Weber and his wife.

On November 23, 1909, complainant presented his deed to the city treasurer and requested him to indorse thereon his certificate that all city taxes and special assessments upon the premises described in said deed had been paid, as required by section 221 of the city charter, which provides that:

"No mortgage or conveyance of real estate, or contract for the sale of any real estate, shall be received or recorded by the register of deeds of the county of Wayne, unless all city taxes or special assessments on the property described in such mortgage, contract, or conveyance shall have been paid; and it shall be the duty of the city treasurer, upon request, to furnish a certificate that such taxes or assessments have been paid, which certificate shall be filed with said register at the time of the delivery to him of such conveyance, mortgage, or contract for record." Charter of Detroit (1904), § 221 (Act No. 383, Local Acts 1899).

The treasurer refused to do so for the reason that this assessment had not been paid. Thereupon complainant filed this bill, alleging the foregoing facts, and further, that from December 22, 1884, the possession of Weber and himself had been actual, continuous, notorious, distinct, exclusive, and hostile, to the time of filing his bill. The bill prayed that the title be quieted, and that the treasurer be required to certify upon the complainant's deed that said assessment and all other taxes and assessments had been paid, so that he might have his deeds recorded.

The defendants united in a demurrer to the bill, upon the grounds:

1. That under the allegations of the bill there is a valid lien upon the premises for the amount now due and unpaid to the city on said tax sale, and that the same is a lawful and valid debt, still remaining due to the city from complainant's grantor, under the provision of section 10 of chapter 10, of the charter, Act No. 383, Local Acts 1899, passed May 2, 1899.

2. Because the period of 15 years from the date of said sale did not elapse until after December 22, 1899, and said Act No. 383 provided that, "all city taxes upon personal property and real estate and special assessments thereon, in addition to being a lien upon the property assessed, shall be and remain a debt against the owner of the property or his estate after his death, until the same are paid, and such debt shall be unaffected by any statute of limitations," which said act of the legislature went into effect on September 22, 1899, the period of three full months before the expiration of said 15 years from the date of said tax sale, and which said act of the legislature had the effect of stopping the further running of the statute of limitations against said sale of said premises for said special assessment thereon.

3. Because said section 10 requires said treasurer to withhold his certificate until said tax shall have been paid.

4. Because said complainant has not, nor has his grantor, acquired a title to said premises by adverse possession against the title of said city.

This demurrer was overruled by the learned circuit judge and defendants have appealed.

We held in the case of *Gray* v. *City of Detroit*, 113 Mich. 659 (71 N. W. 1107), that after purchase by the city of land sold for nonpayment of an assessment, and the expiration of the one year allowed by the ordinance for redemption, the treasurer was not bound to accept a tender of the tax, etc., as no such duty was imposed, distinguishing the case from *Hand* v. *Auditor General*, 112 Mich. 597 (71 N. W. 160). The bill filed prayed a cancellation of the sale. In *Schneider* v. *City of Detroit*, 135 Mich. 570 (98 N. W. 258), we held that such a sale and purchase by the city vested the title to the

premises in the city, and that whatever lien then existed was merged in the title acquired by the purchase. We also held that adverse possession might devest the title thus acquired. This case was followed in *Cass Farm Co.* v. *City of Detroit*, 139 Mich. 318 (102 N. W. 848).

We are unable to distinguish the facts in those cases from those in the present case. Counsel for the city contend that the assessment has not been paid and that the charter as amended by section 10, Act No. 383, Local Acts 1899, provides that all special assessments upon real estate, in addition to being a lien upon the property assessed, shall be and remain a debt against the owner of the property, until paid. It appears to be conceded that the act of 1899 is relied upon to establish:

(*a*) A lien upon the land for unpaid assessment.
(*b*) Personal liability of the owner.
(*c*) A suspension of the running of the statute of limitations and adverse possession.

Of these we will say in inverse order:

(*c*) We have no doubt that the legislature has power to extend or repeal a statute of limitation, or abolish the rule of adverse possession, and that such law will apply to cases where the period has not already run, or title been previously acquired, but we also think that the provision as to the statute of limitations applies only to "the debt against the owner," etc., therein provided for, according to the words of the statute.

(*b*) We hesitate to so construe a statute as to permit it to impose a liability upon a person, or a lien upon land, *ex post facto*, aside from any question of constitutionality. The liability and lien fixed by the statutes in force when the assessment was made and land sold must be the limit.

(*a*) Payment extinguishes both lien and liability, and as the city purchased the land, it was an extinguishment of the lien and obligation, as we have already held twice.

Counsel for the appellant say that as no deed was issued to the city, it acquired no title, for the reason that the sale

was not completed until the tax deed was executed, and therefore the lien continued, and that a certificate of sale will not suffice to start the statute running, as it does not constitute title or even color of title and no right of action accrued to the city. We have held in the cases cited that the purchase by the city gave it a title in which the lien merged, although no deed and possibly no certificate of sale was issued. Color of title is, in some States and some instances, essential to be shown by one who asserts adverse possession; but we do not know of any case holding that color of title in the contestant of the adverse claim is essential to the maintenance of the adverse claim. Indeed, we suppose that counsel do not so contend, and that the point is made as an argument against the extinction of the lien. Under the cases cited, we must hold that the city had an equitable title at least, and that adverse possession may devest such, as well as a legal title.

The Treasurer a Party. Manifestly the treasurer, acting under section 10, chapter 10, of the charter, *supra*, could not lawfully make the certificate demanded, unless his records showed, or should have shown, an absence of unpaid taxes, and he could not be expected to determine rights of adverse possession. If, however, his records showed this sale to the city, and an omission to redeem, it may have been sufficient to justify the making of the certificate. It is unnecessary to decide that. He was properly made a party, and will be protected by a final decree, and, should one be made in complainant's favor, he should, upon presentation and demand, comply with its terms as to entry of payment and issue of certificate.

The decree is affirmed, with the slight modification regarding the treasurer, with costs, and the cause is remanded for further proceedings.

OSTRANDER, MOORE, and STONE, JJ., concurred. BLAIR, J., concurred in the result.

HAZELTON *v.* HAZELTON.

1. DIVORCE—EXTREME CRUELTY.
   After an examination of the evidence, it is *held* that the complainant is entitled to a divorce from his wife on the ground of extreme cruelty.

2. SAME—CONDONATION.
   Continuance of the marriage relation after the wife has been guilty of extreme cruelty, does not furnish a defense on the ground of condonation, unless the offense is not repeated and unless proper subsequent treatment is shown.

3. SAME—CUSTODY OF CHILD—INFANT.
   The custody of a child under fourteen years of age will be awarded to the mother, in divorce proceedings, in the absence of a showing of her unfitness to have the child.

Appeal from Wayne; Hosmer, J. Submitted April 19, 1910. (Docket No. 44.) Decided July 14, 1910.

Bill by William S. Hazelton against Julia V. Hazelton for a divorce. From a decree dismissing the bill, complainant appeals. Reversed, and decree entered for complainant.

A. J. Groesbeck, for complainant.

Graves, Hatch & Wasey, for defendant.

HOOKER, J. As this cause is for divorce, and is mainly a question of fact, it requires no lengthy discussion, especially as no possible good could follow the spreading of the differences of the parties upon the records of the court or the pages of its reports. The application is by the husband, and an earnest effort to familiarize ourselves with the testimony has induced the conviction that complainant has proved his case. Counsel for defendant say that the proof shows mere incompatibility. We think it shows more. That there was incompatibility is obvious enough,

but we think its manifestations on the part of the defendant amounted to extreme cruelty. It is contended that complainant is not entitled to a divorce, because of his condonation of defendant's misconduct. We are of the opinion that the case is well within the rule of *Creyts* v. *Creyts*, 133 Mich. 4 (94 N. W. 383). See, also, *Creech* v. *Creech*, 126 Mich. 267 (85 N. W. 726).

It appears that the parties have one child, which is with the mother. There is no evidence of unfitness on the part of the mother to have charge of it, and its custody will be awarded to her until it reaches the age of 14 years, or until the further order of the circuit court. No request for alimony or provision for the maintenance of the child has been made. We therefore recommit the case to the circuit court for further proceedings in this regard should application be made hereafter.

A decree in conformity to the above opinion may be taken, granting to complainant a decree of divorce from the bonds of matrimony, and allowing to defendant her expenses of printing, and a solicitor's fee of $75.

OSTRANDER, MOORE, BLAIR, and STONE, JJ., concurred.

WELTON v. McBRIDE.

FRAUDULENT CONVEYANCES—CREDITOR'S BILL—EVIDENCE.

Upon a question of fact as to the fraudulent character of a debtor's transfer of land, a decree setting aside the deed in favor of a judgment creditor is *held* to be warranted.

Appeal from Chippewa; Steere, J. Submitted April 19, 1910. (Docket No. 71.) Decided July 14, 1910.

Bill by Guy D. Welton, trustee, against Thomas J. McBride and others to set aside a deed. From a decree for complainant, defendants appeal. Affirmed.

Davidson, Hudson & Greene, for complainant.

Sharpe & Handy, for defendants.

MOORE, J. This is a bill of complaint filed for the purpose of having a conveyance of real estate made, for an alleged consideration of $5,300, by Thomas McBride and Hannah McBride to Joseph T. Delaney set aside and subjected to the claims of the creditors of the firm of McBride & Bailey, of which last-named firm the defendant Thomas McBride was a member. The defendants John J. McBride and Mamie McBride have no interest in the proceedings except as the occupants of the land described in the conveyance. The trial was had in open court. From a decree in favor of complainant the case is brought here by appeal. The question involved is one almost wholly of fact. It is insisted by appellants that complainants have failed to make a case. All of the defendants answered, but none of them signed the answer personally; they all signed by their attorneys. None of the defendants appeared upon the trial, nor was the deposition of any of them taken and offered in evidence.

The record shows that the firm of McBride & Bailey commenced business in March, 1907, at Sault Ste. Marie, Mr. McBride contributing to the firm $5,000. Mr. Bailey was not able to contribute anything to the capital of the firm, but he was the working and managing member thereof. Mr. McBride reported himself to be worth at this time upwards of $20,000. He was engaged in lumbering operations. He had an interest in a harness business. He had a logging outfit, an interest valued at $2,000 in a land contract, and 180 acres of farming land, which it is claimed was worth upwards of $7,000, and which is the subject of this litigation. In June, 1908, judgments were taken against the firm of McBride &

Bailey to the amount of upwards of $6,000. Their assets inventoried about $19,000, and their debts were upwards of $15,000. At the request of McBride & Bailey a stay of execution without bond was granted upon the earlier of the judgments which aggregated about $4,500. Shortly before this stay expired McBride conveyed away all his property, and, the record shows, absented himself from Sault Ste. Marie except upon an occasional Sunday thereafter. The purchasers of the various properties before mentioned, except the grantee in the deed for the 180 acres of land, all appeared and showed they had in fact paid for the several properties they had purchased. The deed from McBride and his wife to Mr. Delaney was drawn by the attorneys for McBride & Bailey at the house of McBride. The grantee named therein was stated to be a resident of Montreal. The record satisfies us that the deed was delivered to the attorneys for McBride & Bailey and by them caused to be recorded, and, after it was recorded, was returned to them. In another proceeding the draughtsman of the deed testified that he did not know anything about the residence of Mr. Delaney.

The record discloses that, prior to the making of the deed, a son of Mr. McBride had been in possession of the farm, and that he continued in possession up to the time of the trial. From the proceeds of the sales made by Mr. McBride it appears that he paid none of the creditors of the firm. We have stated in the most general way what appears in the record. We think there was an abundance of testimony to justify the decree of the court. See *Berry* v. *Whitney*, 40 Mich. 65; *Lake* v. *Nolan*, 81 Mich. 112 (45 N. W. 376); *Ferris* v. *McQueen*, 94 Mich. 367 (54 N. W. 164); *Manhard Hardware Company* v. *Rothschild*, 121 Mich. 657 (80 N. W. 707).

The decree is affirmed, with costs.

OSTRANDER, HOOKER, BLAIR, and STONE, JJ., concurred.

JARSTFER *v.* JARSTFER.

DIVORCE—EXTREME CRUELTY.

A decree for divorce in favor of the wife for extreme cruelty is *held* to be sustained by the evidence.

Appeal from Kent; McDonald, J. Submitted April 19, 1910. (Docket No. 89.) Decided July 14, 1910.

Bill by Agnes Jarstfer against Frank A. Jarstfer for a divorce. From a decree for complainant, defendant appeals. Affirmed.

E. J. Doyle, for complainant.

William B. Brown, for defendant.

BLAIR, J. This is a bill for divorce. The parties were married May 22, 1900, the complainant, Agnes, being at that time 29 years, and the defendant 34 years, of age. Soon after the marriage the parties purchased a farm of 66 acres in the township of Ada, Kent county, from complainant's parents for the sum of $3,000. Complainant paid $1,200 and defendant paid $1,000 of the purchase price, and a mortgage was given back for the balance of $800. The farm was deeded to complainant and defendant, as husband and wife, by the entireties. The parties continued to reside on this farm until their final separation, which occurred June 28, 1907, at which time complainant removed to the village of Cannonsburg, where she has since resided with her mother. Defendant remained upon and still occupies the farm. Three children were born to the parties, as follows: Francis L., born October 10, 1903; Augustine, born May 18, 1906; and the third child, August 17, 1907. This child did not survive its birth, which occurred some two months after the separation.

The original bill of complaint charged defendant with extreme cruelty and prayed a decree for separate maintenance. The foundation of the bill was a charge of extreme cruelty, consisting of a continued course of fault-finding, nagging, aggravating and exasperating conduct on the part of defendant, as well as abusive, profane, and indecent language, and several instances of personal violence, resulting in serious injury to complainant, and in upholding, as against complainant, ill-treatment of her by the parents of defendant. The bill was subsequently amended so as to pray for an absolute divorce. Defendant, in his answer to the bill of complaint, denied in detail every allegation of cruel treatment and claimed to have always treated his wife with the utmost kindness and consideration, and by way of cross-bill claimed the right to a decree for an absolute divorce in his favor because of alleged extreme cruelty of complainant towards him, stating in great detail in his cross-bill alleged instances of her querulous fault-finding and unreasonable abuse and annoyance of him, and numerous occasions when, without just cause or any cause, she slapped him in the face and struck him otherwise, and insisted on having in the house certain of her relatives who were objectionable to him, and whom he had ordered to keep out of his home, and, also, that she called defendant many opprobrious names and charged that his mother was a prostitute, and did all in her power to inflame and anger him.

The testimony in this case was, for the most part, taken in open court before the late Judge Wolcott. Near the close of the case a settlement was proposed in open court by counsel for complainant, and an adjournment was taken for the purpose of arranging such settlement, if possible. No settlement was arranged and, Judge Wolcott having died, the case was resumed before his successor, before whom the complainant and defendant gave some testimony. Except as Judge McDonald had the advantage of listening to a portion of the testimony of the defendant and complainant and of observing their attitude

and conduct as witnesses, his consideration of the case, as ours must be, was based upon a reading of the testimony taken before his predecessor.

The complainant testified that when others were present defendant's treatment of her was very kind and considerate, but that when they were alone it was quite the contrary. Among the instances of trouble between herself and her husband upon which she relies, and which appear to be the most serious charges against him, we refer briefly to the following: The first trouble she says that she remembers was that one Sunday they went to church, leaving some young fowls at home which had not been taken care of, and she wished to return immediately from church to care for them; that, against her wish, her husband took her to his mother's house and stayed there longer than necessary; that his mother had had some pictures of defendant enlarged and asked her opinion of them; that she was provoked and wanted to get home and told her mother-in-law she had no choice—

"They were all alike to me, and she was very impudent about it; she says, 'You have no choice? Haven't you no eyes in your head?' And I did not answer her back any more."

That on the way going home they never spoke at all but when she asked him to get a pail of water he said he would not.

"* * * He said he wouldn't do anything for a Goddamned, cursed thing like me.

"*Q.* Did he get the pail of water?

"*A.* No. * * *

"*Q.* Called you names?

"*A.* I believe he did; I am not certain, but I believe he called me a bitch."

The next trouble to which she refers related to their attendance at a wedding, when, as she claims, her husband kept her waiting for a couple of hours after she had got her wraps on to go home. After starting for home—

"I said to him: 'Frank, I wish when we get ready to

go home you would go and not leave me standing around waiting for you so long,' I said. 'A person might better be dead than waiting around and not knowing where he was, whether he had gone.' I don't know what I said; something like that.

"*Q.* What did he answer, if anything, when you said that to him?

"*A.* He said: 'God-damn, old hag, I wish to God you were dead. I have never had a moment's comfort with you since I married you.' * * *

"*Q.* What else was said going home?

"*A.* I told him to stop his swearing, and I slapped him with my hand.

"*Q.* What did he say then, or do?

"*A.* He slapped me several times going home that night. One time he threw me out of the buggy. The wedding was about three miles from home."

The next trouble involving physical violence occurred when defendant's mother was there. Complainant claimed that she was getting supper as fast as she could when defendant asked her what was the matter with her, "and after a while he swore he would put me in the poorhouse and swore: 'By Jesus Christ, Aggie, I will put you in the poorhouse * * *' or, 'I will put somebody in the poorhouse around here.' Those are the words he used. Then I slapped him with my hand." He then sprang up and caught hold of her neck and choked her for some time, and his mother loosened his hands from her throat and told defendant that complainant did not want her there and he better take her away.

"I told her if she was the cause of the trouble that the same roof could not be over us both, or some such words as that, and then he choked me again after that—about twice. I am not sure, but I think it was about twice that he choked me.

"*Q.* After you came out of the bedroom?

"*A.* Yes. He throwed me against the wall and slammed me down against the wall several times. Two or three times against the wall, against the floor, and the wall. * * * Then he slapped me with all his strength. * * *

"*Q.* Now, when did the next serious trouble arise between you?

"*A.* We never got along after that; there was no pretense of getting along.

"*Q.* No pretense of getting along at all?

"*A.* Frank was never even a friend to me after that."

The next charge of physical violence relates to an occasion when defendant put complainant's niece off the premises. He had before that time ordered the niece to keep off the premises, but on this occasion complainant had called her niece in from the road, to do an errand for her, and defendant, finding she was there, took her by the coat collar and put her off the place without, however, hurting her. After he had put her off the porch, complainant went down and put her arm around her and brought her back, and she claimed that in the struggle which ensued—

"He seemed to strike out—he did not push or did not strike me—but he seemed to strike out at me, and I must have been going towards him, or I don't know what I was doing.

"*Q.* Well, did you fall?

"*A.* Yes; I fell.

"*Q.* On to the ground?

"*A.* On my face.

"*Q.* When you got up were you bleeding?

"*A.* Yes; my nose was bleeding.

"*Q.* What did you do after that?

"*A.* I picked up a stone, and said: 'I ought to hit him,' told him I ought to hit him. Then I tossed the stone over and he caught it. I did not hit him with the stone. He caught the stone in his hand. * * * Later in the night he choked me. We were quarreling and he began calling my—

"*Q.* Later, when?

"*A.* The same evening.

"*Q.* How did that happen?

"*A.* He was calling my relations dirty names that I could not stand, and I said I would slap his mouth. Something like that. And he caught my throat and pushed me up against the door and choked me. * * * A few nights after that; after I got my work done, it was

late, I had a lot to do; and he—it was some trouble that came about the baby being left in the bed; the baby was sick, vomiting, and I thought that he left the baby in the bed just without any protection at all, just because he see me sitting down and wanted to give me some work to do, and I told him so, and during the quarrel he began about my relatives again, calling them some dirty names that I cannot remember what they are, but I know they were not—they were some bad names, and I took my elbow and hit him with it. I had the baby in my arms at the same time. I could not have hurt him. He gave me a blow on the side of the head then, right there on the side of the head (indicating).

"*Q.* Did it blacken your face or head?

"*A.* Blackened my ear, and my head was all sore, and shoulders, from the night before; my whole side there; every bone in me there was sore and bruised.

"*Q.* When was the next time after that that he struck you?

"*A.* He did not strike me after that.

"*Q.* That was the last?

"*A.* That was the last time he struck me."

The immediate cause of complainant's leaving defendant was, as she claimed, trouble with his father with reference to the care of the baby, because of which the father, who was past 80 years of age,—

"Jumped up and run over and struck me on the head and face and tried to push me back into the dining room and gave me quite a beating at that time.

"*Q.* Make your nose bleed?

"*A.* Yes.

"*Q.* Mark your face?

"*A.* Yes.

"*Q.* Bruise and blacken it up considerable?

"*A.* Yes; bruised me around my shoulder and arms.

"*Q.* Strike you on the arms?

"*A.* Yes.

"*Q.* On the body or breast?

"*A.* I don't remember where else he struck me; I know he struck me on the shoulders and arms and breast.

"*Q.* Blackened both of your eyes?

"*A.* No; I don't think both of them were blackened.

"*Q.* Blackened one of them?

"*A.* Yes, sir.

"*Q.* Blackened your face?
"*A.* Yes, sir.
"*Q.* That was some time in June last?
"*A.* Yes; my nose was cut right down there, dented in, and sore for some time afterwards."

On the morning of that day complainant testified that defendant's father had struck her and she went down to the field after her husband to come up and take care of her, but when he came up he began to abuse her and call her names and abuse her relatives and call them such names as "old bastards" in the presence of his father, and in nowise took her part or endeavored to protect her.

Defendant contends that complainant was entirely in the wrong in all of these transactions and that he had done nothing whatever to justify her conduct, and the record indicates that, so far as physical violence is concerned, in most of the instances relied upon by complainant, she was guilty of the first act.

A determination of the merits of this case must depend largely upon the credibility of the complainant and the defendant. The circuit judge evidently gave credence in the main to the complainant's version of the facts, since he granted a decree in her favor. While the great mass of the testimony was not given before the circuit judge who rendered the decree, the complainant and defendant were recalled and testified with reference to some of the prominent facts of the case before him, so that he possessed some advantage over us with reference to determining the credibility of the witnesses.

It is difficult to accept the testimony of the defendant as being entirely candid. As disclosed by the record, he was a large, able-bodied, powerful man, able to handle the complainant as he would a child, as the complainant must have known. Under such circumstances, it is inconceivable that complainant would have made the attacks upon him which she admits she did without any occasion therefor whatever, and we are satisfied that, as claimed by the complainant, he goaded her by his allusions

to her relatives and friends, and upholding his parents against her, to a condition of rage which she was unable to control. It is clear that in many things the complainant was in the wrong and defendant was within his legal rights, as, for instance, in removing her niece from the premises; but, on the whole, we are inclined to the belief that he did this, not so much because of his desire to protect the morality of his home, as to aggrieve his wife. This is indicated by his final testimony:

"I don't mean to say she was a girl of immoral character or anything of that kind, but I saw her go in the barn with a young man and they were there until morning. This young man lives there in the neighborhood. I didn't want her to come in there after they tried to prosecute me for telling what is true about her. I know they tried to prosecute me because the prosecuting attorney wrote me a letter that I should come there."

The defendant denied that complainant told him that his father had struck her when she came to the field in the morning, but merely that his father was interfering with the baby. We think the version of the complainant is the more probable one, particularly in view of the occurrence of the afternoon, which occasioned her leaving, the effects of which were visible and testified to by other witnesses. While we have no doubt that the complainant exaggerates the occurrences to which she testifies, and that she was quick to anger and had become, perhaps, morbidly suspicious, still we are satisfied that, in the main, she was endeavoring to tell the truth and narrated the things which bore against her as well as those that were in her favor. On the other hand, we are satisfied that the defendant was not candid in his statement of the facts, but was endeavoring throughout to suppress the things which might afford some justification for his wife's conduct, and to exaggerate and enlarge upon the things which were in his favor, as in the instance of calling the Catholic priest, the parties both belonging to that church, and stating to him beforehand the case against his wife

in its harshest features without any mitigation and with a desire to have the priest, influenced by his statement, call upon his wife and advise her to keep her relatives away from the house.

We have, therefore, concluded, upon a review of the whole case, that the circuit judge reached the right conclusion, and his decree is in all things affirmed.

OSTRANDER, HOOKER, MOORE, and STONE, JJ., concurred.

WHEELER *v.* OCKER & FORD MANUFACTURING CO.

1. CORPORATIONS—STOCK AND STOCKHOLDERS—SUBSCRIPTION.
   Subscriptions to capital stock must be for a definite number of shares.

2. SAME—CONTRACTS—EMPLOYMENT.
   A contract to employ a corporate manager to be paid a salary up to a specified sum in cash, the balance in corporate stock, is not a stock subscription or a sale of the stock.

3. SAME—CONTRACTS—BREACH.
   Under such contract, the corporation has the option to pay in stock or in cash up to the time payment is due; thereafter the obligation becomes one to pay in cash.

4. SAME—TRUST MORTGAGES—ASSIGNMENT FOR BENEFIT OF CREDITORS.
   Trust mortgages, conveying all the property of a corporation in trust for the benefit of creditors, amount to an assignment for that purpose.

5. EQUITY—TRUSTS—ENFORCEMENT.
   The jurisdiction of equity to enforce trusts of real or personal property is well established.

6. SAME—ADEQUATE REMEDY AT LAW.
   The remedy at law is not adequate as between the creditor under a contract to pay for part of his services and trustees for creditors, since the court of law could not compel the trustees to recognize complainant's claim.

7. SAME—PARTIES.
   The corporation is a proper party defendant to a bill to require the trustees to recognize the creditor's rights, since it has an interest in the surplus or residue of the trust fund.

8. SAME—MULTIFARIOUSNESS.
   A bill in equity is not multifarious for adding to an equitable cause of action a claim in which there is no equity, and which may be treated as surplusage.

9. SAME—TRUSTS—ADMINISTRATION.
   Where trust mortgages given by a corporation of its business and property do not authorize the trustees to continue the business or hire a manager, they are not authorized to employ the services of a manager for that purpose.

Appeal from the superior court of Grand Rapids; Stuart, J. Submitted April 19, 1910. (Docket No. 110.) Decided July 14, 1910.

Bill by Charles E. Wheeler against the Ocker & Ford Manufacturing Company, and Henry G. Dykhouse, John Jungbaecker and Robert H. Sherwood, trustees for the benefit of the creditors of said company, to establish a claim as creditor of the corporation and of the trustees. From a decree sustaining a demurrer to the bill, complainant appeals. Reversed.

Cleland, Heald & Montgomery, for complainant.

Gleason & Lee and *H. A. McNitt*, for defendants.

By his bill of complaint in this cause, the complainant states: That the defendant the Ocker & Ford Manufacturing Company, a corporation duly organized and existing under the laws of this State, having its principal office at the city of Grand Rapids, prior to the 11th day of October, 1906, was desirous of obtaining the services of the complainant as the manager of its plant in said city, and

some negotiations were had to that end by the parties; that on October 11, 1906, the board of directors of said company met at the office of its president, for the purpose of entering into a contract with complainant to act as its manager; that complainant then and there offered to act as such manager at a salary of $250 per month; that the board of directors there stated to complainant that the said company could not pay $250 per month in cash, but that it would be willing to pay $150 per month in cash, and $100 per month in stock; that complainant then stated that he would be willing to receive a portion of his salary in stock, but that he was wholly ignorant of the value of the stock, and that the only arrangement under which he would consent to take stock was that he was to receive: *First*, $150 cash per month; *second*, $100 per month in an amount of stock actually worth $100; that this offer was accepted by said board of directors at said meeting, and that in furtherance of said agreement the following resolution was unanimously passed by said board of directors:

"Resolved that Mr. Charles E. Wheeler be employed by the Ocker & Ford Manufacturing Company as manager for six months from October 15, 1906, at a monthly salary of one hundred fifty dollars cash, and one hundred dollars book value of the stock of the company. Subject to termination of contract at any time upon two weeks' notice."

Complainant accepted said offer of employment, and on October 15, 1906, entered upon his duties as said manager, and faithfully performed his said duties during the entire six months following; and on April 16, 1907, the board of directors of said company passed the following motion:

"That Mr. Wheeler be employed for the next three months at the same terms and conditions of his contract of October 15, 1906."

It is further averred that he accepted said offer and continued in the employ of said company during the three months next ensuing under said contract; that during all

of the time of such employment the said company paid to complainant $150 in cash each month; but it never paid him stock of the value of $100 per month, nor any stock whatsoever, and that complainant has never received from said company any of the stock which it agreed to pay him, nor any stock; that he is not now and never was a stockholder in the said company, and that he has never acted as such stockholder, nor exercised any of the rights of such stockholder; that said company has never offered or tendered to complainant stock of the book value of $100 per month, nor any stock whatsoever; that on June 10, 1907, said company was in debt to a large amount, and found that it was unable to pay its said debts at maturity, and that some of its creditors were demanding that they be paid or secured at once; that at that time none of the creditors of said company was secured, except the Michigan Millers' Mutual Fire Insurance Company, which held, and still holds, a mortgage for $4,500 on some of the real estate of said company; that for the purpose of securing the creditors at that time unsecured, including complainant, said company on said June 10, 1907, executed two certain mortgages to the other defendants herein, as trustees; one on all of the personal property then owned by said company, and one on all of the real estate owned by it, copies of which mortgages are attached to said bill as exhibits; that both mortgages refer to a certain agreement of even date made between said company and said other defendants, as trustees, a copy of which agreement is attached to said bill, and is made a part thereof; that in accordance with said agreement a certain schedule, purporting to contain a list of all the creditors of said company, was made and delivered to said trustees; that the claim of complainant was not listed in said schedule; that said mortgages were duly filed for record on June 13, 1907, and thereupon the said trustees took possession of the property of said company, under said mortgages, and have ever since held possession of the same; that on July 16, 1907,

the said trustees, being in possession of the property of said company as aforesaid, entered into an agreement with complainant, by which he was to continue to act as manager of said company, upon the same terms and conditions, at a monthly salary of $250; that in pursuance of said contract complainant faithfully performed his duties as said manager under said trustees, from July 16, 1907, until September 1, 1907; that during said time complainant was paid $150 per month, but that the remaining $100 per month was never paid to him, nor tendered to him by said trustees, nor by said company; that said trustees, upon taking possession of said property, proceeded to sell out the property of said company, under the terms of the mortgage, and have paid dividends on certain of the indebtedness secured under the mortgage, the amount of which is unknown to complainant; but he avers that a dividend of 40 per cent. was paid on certain of the indebtedness secured under the mortgage, and that said trustees still have on hand all, or nearly all, of the real estate of said company and some of the personal property, the amount of which is unknown to complainant; that complainant has frequently demanded of said trustees that they recognize complainant's claim and pay to him the same dividends that they have paid to other creditors secured under the mortgage; but they have refused to recognize the claim of complainant, or to pay him such dividends, or anything on the said claim; that even if complainant obtained a judgment at law against said company, there would be no property upon which an execution could be levied; that unless the said trustees are restrained from paying out the entire amount received from the sale of said property, and are required to keep on hand sufficient to pay a dividend to complainant, he will lose the entire amount of his said claim; that he has no remedy except in a court of equity to determine that his claim is secured under the mortgage, and to require said trustees to recognize his claim as secured thereunder, and to pay him

the same dividends thereon that other creditors of said company, under said mortgage, are paid.

The bill prays that complainant's claim may be decreed to be secured by the terms of said mortgages, and that said trustees be required to recognize the same, and to pay him the same dividend on his claim, as is paid to the creditors, and for an injunction.

The trustees demurred to said bill upon the following grounds:

(1) That complainant by his bill shows that he became a stockholder of said company, and therefore is not entitled to the benefits of the trust deeds.

(2) That complainant does not show any refusal on the part of said company, or other defendants, to deliver to him certificates of stock earned under said agreement; nor does he allege such breach of contract as makes him a creditor of said company.

After the filing of this demurrer, complainant amended his bill by alleging, as hereinbefore set forth, that he is not, and never was, a stockholder in said company, and never acted as such. Thereupon said trustees filed a demurrer to said bill as amended, upon the same grounds as stated in the demurrer to the original bill, and:

(3) That complainant has an adequate remedy at law.

(4) That said trustees were not parties to, nor interested in, any of the salary contracts made with said company, and that they are improperly joined in this suit with said corporation.

(5) That said bill seeks relief upon separate contracts, between different parties, having no common interest, and is multifarious.

The defendant corporation also demurred to said bill, upon substantially the same grounds urged by said trustees, with the additional reason that complainant prayed for no relief against said company, and no cause of action is stated against it.

The court sustained said demurrers and finally dismissed the bill, and the complainant has appealed.

STONE, J. (*after stating the facts*). 1. **Did the Complainant by the Terms of the Contract of Employment Become a Stockholder of the Defendant Corporation?**

The same legal principles govern with regard to the elements of a contract for the sale of stock, as apply in the case of contracts generally. It is a general rule that subscriptions to capital stock must be for a definite number of shares. *Peninsular R. Co.* v. *Duncan*, 28 Mich. 130; 1 Cook on Corporations (6th Ed.), § 10; 10 Cyc. pp. 380, 381, 390. In *Bostwick* v. *Young*, 118 App. Div. 490 (103 N. Y. Supp. 607), it was held that a railroad construction contract, by which work is paid for by stocks and bonds, is not a stock subscription nor a sale of the stock, but is merely a contract. 1 Cook on Corporations (6th Ed.), § 22.

2. **Should Complainant have Demanded the Stock, or Was it the Duty of the Company to Tender it?**

It should be borne in mind that this is not a case where complainant is seeking to rescind a contract and recover the consideration paid. It is rather a case where he seeks to recover upon the contract; the defendant having failed to tender performance by payment, or offer of stock. We think the case falls within the general rule that, wherever a contract provides for the payment of a given amount in a commodity, the payor has the option to pay in that commodity, or in cash up to, and including, the time payment is due; but, upon failure to pay in the commodity on that date, the obligation becomes one to pay cash. See discussion of this subject in 2 Mechem on Sales, § 1439, *et seq.*, and authorities there cited, including case of *Crowl* v. *Goodenberger*, 112 Mich. 683 (71 N. W. 485). Manifestly, this stock was due complainant at the close of each month, as earned. It has been held that, even in case of subscriptions for stock payable in property or labor, the same are not subject to calls, and a demand for the property or labor must be made by the corporation. But upon failure of the subscriber to furnish the property or labor when due, such subscription becomes payable in cash. Here complainant had fully

performed on his part; but, the company having failed to tender the stock when due, the obligation became one to pay in cash.

3. **Has a Court of Equity Jurisdiction, or Has Complainant an Adequate Remedy at Law?**

The defendant company here sought to dispose of all of its property, real and personal, to pay all of its creditors. There is authority in this State which holds that such a disposition of property amounts to an assignment for the benefit of creditors. See *Charles Maloney & Co.* v. *Gonhue*, 152 Mich. 325 (116 N. W. 436), for a review of the cases. If that is the condition, then by express provision of the statute (section 9549, 3 Comp. Laws) chancery has jurisdiction of all questions and disputes arising under the assignment. Without question, there is here a trust relation between the trustee defendants and a creditor. The complainant asserts by his bill that he is a creditor of the corporation, and that his name should have been included in the list of creditors, but that it has been omitted. He asks that he be decreed to be a creditor, and entitled to the benefits conferred by said mortgages. The jurisdiction of a court of equity to enforce trusts, and to decree the execution of trusts, even as to personalty, is well established. 22 Enc. Pl. & Prac. pp. 9, 14, 15; 1 Pomeroy's Equity Jurisprudence (3d Ed.), §§ 62, 182; *Ledyard's Appeal*, 51 Mich. 623 (17 N. W. 208). Neither do we think that the remedy at law, as pointed out by defendants, is an adequate one. While complainant might recover a money judgment in a suit at law, that court would have no power to compel the trustees to give to complainant the benefit under the mortgages, to which he would be entitled, and he might be compelled to invoke the power of equity to enforce his rights.

4. **Is the Bill Multifarious?**

Complainant seeks to enforce his alleged rights under a contract made with the defendant corporation. The mortgages both recognize that if, after the payment of all debts and expenses, any surplus or residue remains, it shall belong to and be returned to said company. We

think that the corporation is therefore a proper party, and the prayer for general relief would enable the court to enter a proper decree against it. Primarily, the object of the bill is to establish complainant's alleged rights as a creditor of the corporation and to compel the trustees to recognize and deal with such rights. There can be no question, therefore, that the trustees are proper parties. Incidentally, complainant asks that the trustees pay him for services rendered by him to them, in their trust capacity, in the course of administering the trust. There was nothing in the mortgages, nor in the accompanying agreement, either authorizing or permitting the trustees to continue the business, or hire a manager. The alleged claim against the trustees for services under the agreement of July 16, 1907, did not, therefore, arise under the aforesaid instruments, or either of them. While it may be that for these services complainant can apply to the chancery side of the court for relief, independently of this suit, he cannot have relief here. But mere surplusage will not render a bill multifarious, and therefore a bill is not rendered multifarious if, in addition to stating a case for equitable relief, it contains allegations with reference to another matter, but insufficient to entitle complainant to relief with reference thereto. 16 Cyc. p. 241; *Hammond* v. *Michigan State Bank*, Walk. Ch. (Mich.) 214; *Stone* v. *Railroad Co.*, 139 Mich. 265 (102 N. W. 752); 14 Enc. Pl. & Prac. p. 205. Therefore a bill is not multifarious for adding to an equitable cause of action matter in which there is no equity. Id.; 1 Daniel's Chancery Pl. & Prac. p. 346, and note.

The demurrers should have been overruled.

The decree of the superior court will be reversed, and the case remanded for further proceedings. The defendants should be permitted to answer within 30 days after said cause is remitted to the court below; the case then to proceed under the rules of court. The complainant will recover his costs in this court.

OSTRANDER, HOOKER, MOORE, and BLAIR, JJ., concurred.

RUTERBUSCH *v.* SUPREME COURT OF THE INDEPENDENT ORDER OF FORESTERS.

1. INSURANCE—JOINDER OF PARTIES—LIFE INSURANCE.
   It is not a misjoinder, in an action on a life insurance policy payable in stated amounts to several beneficiaries, to join them as parties plaintiff.

2. SAME—BURDEN OF PROOF AS TO SUICIDE.
   The burden of proof in such action is on the defendant to show that the insured committed suicide, as a defense under the terms of the policy.

3. SAME — APPEAL — EXHAUSTING REMEDIES — FRATERNAL BENEFICIARY SOCIETY.
   Failure to give notice of the association's decision as to a claim for insurance against a fraternal beneficiary association, until after the time had elapsed for taking an appeal to a higher tribunal of the order, waives the by-law limiting the time for appeal.

4. APPEAL AND ERROR—SAVING QUESTIONS FOR REVIEW.
   The point that such by-law had been amended so as to prevent the waiver cannot be raised for the first time in the Supreme Court.

5. INSURANCE — FRATERNAL BENEFICIARY ASSOCIATIONS — EXHAUSTING REMEDIES IN THE ORDER.
   Where defendant had deprived plaintiff of his right to appeal within the order, by failing to give notice of its determination in time to permit an appeal under its by-laws, plaintiff did not lose his right to institute an action by attempting to obtain a hearing before the final tribunal of the association.

Error to Bay; Collins, J. Submitted April 20, 1910. (Docket No. 123.) Decided July 14, 1910.

Assumpsit by William Ruterbusch and others against the Supreme Court of the Independent Order of Foresters on a policy of insurance. A judgment for plaintiffs is reviewed by defendant on writ of error. Affirmed.

Stevenson, Carpenter & Butzel (*Charles W. Hitchcock* and *Joseph S. McDowell*, of counsel), for appellant.

De Vere Hall, for appellees.

BLAIR, J. In March, 1904, the defendant upon the application of Leonora Ruterbusch, wife of the plaintiff William Ruterbusch, issued to her its benefit certificate whereby it did agree, among other things, "on the death of the said member being established to the satisfaction of the executive council, to pay to the beneficiary or beneficiaries designated hereon * * * a mortuary benefit of one thousand dollars."

By indorsement on the certificate, Mrs. Ruterbusch directed that the mortuary benefit due at her death be paid to the following beneficiaries:

William Ruterbusch, husband	$200
Elsie Maud Ruterbusch, daughter	150
Leonora Ruterbusch, daughter	150
Helen Sophia Ruterbusch, daughter	150
Ruth Beatrice Ruterbusch, daughter	200
Walter William Ruterbusch, son	150

Mrs. Ruterbusch died April 10, 1905, from the effects of carbolic acid administered by herself, and, the defendant refusing to pay the mortuary benefit, William Ruterbusch brought this action in his own right and as next friend of the five infant children. Defendant demurred to the declaration on the ground of a misjoinder of plaintiffs, the demurrer was overruled, the case tried by a jury, and verdict and judgment rendered for plaintiff.

Appellant groups the assignments of errors as follows:

"(*a*) There is a misjoinder of parties plaintiff and causes of action.

"(*b*) Under the constitution and by-laws of defendant society, if appellees are entitled to recover at all, they are only entitled to recover one-thirtieth of the amount of mortuary benefit held by decedent, or $33.34, she having come to her death by self-destruction within three years after her initiation into the order.

"(*c*) Under the constitution and by-laws of defendant

society, it was the duty of appellees to appeal from the finding of the supreme chief ranger within 20 days after receipt of notice of his decision made October 18, 1905, and failure to do so barred any action or right to recover in this case.

"(*d*) Under the constitution and by-laws of defendant society, it was the duty of appellees to exhaust their remedy within the order, and failing to prosecute their appeal before the supreme court, they are foreclosed from suing in a court of law or equity on such benefit certificate."

(*a*) In support of this point, counsel cite 4 Joyce on Insurance, § 3647; 11 Enc. Pl. & Prac. p. 402; 25 Cyc. p. 915; *Keary* v. *Life Ass'n*, 30 Fed. 359. The *Keary Case* is referred to in support of the text in Cyc., the Enc. of Pl. & Prac., and Joyce. The decision in the *Keary Case* was apparently based, to some extent, at least, upon "the practice which obtains and the rule laid down under the State code." Our attention has not been called to any statute of this State, nor are we aware of any such statute, which affects the question before us.

In *Voss* v. *Insurance Co.*, 119 Mich. 161 (77 N. W. 697, 44 L. R. A. 689), it was held that one of two beneficiaries in an insurance policy could not maintain an action against the company to recover his proportion of the insurance without accounting for his failure to join the other beneficiary. If, in the present case, Mrs. Ruterbusch had not specified the amount to be paid to each, the case would be ruled by the *Voss Case*. We do not think the use of fractions to designate the amount received should require that all should sue, when, if the corresponding shares were specified in cash, each must sue for his own share. Nor do we think that the fact that the fractional proportions are different should change the result. In its essence the contract provides that the interest of the beneficiaries in the policy is joint, and that the company is to pay one entire sum to be divided among the beneficiaries as joint owners of such fund in specified proportions. As was said in *Castner* v. *Insurance Co.*, 46 Mich. 18 (8 N. W. 554):

"It can make no necessary difference to the insurance company in what way their interests are apportioned."

See, also, *Olson* v. *Morrison*, 29 Mich. 395; *Monaghan* v. *Insurance Co.*, 53 Mich. 238 (18 N. W. 797); *Beebe* v. *Insurance Co.*, 93 Mich. 514 (53 N. W. 818, 18 L. R. A. 481, 32 Am. St. Rep. 519). We are of the opinion that the court did not err in holding that there was no misjoinder of plaintiffs.

(*b*) The burden of proof was upon defendant to show that the insured committed suicide. *Ferris* v. *Court of Honor*, 152 Mich. 322 (116 N. W. 448). We cannot say that the evidence, though strongly supporting defendant's contention, was conclusive upon this point. There was also testimony tending to show that Mrs. Ruterbusch might have taken the acid by mistake.

(*c*) The provision of defendant's laws as to an appeal in force at the time of the member's death was as follows:

"All appeals must be made within twenty days from the date of the decision, except from a decision of a high chief ranger, or from the decision of the supreme chief ranger, when the high court or supreme court, as the case may be, is in session, when an appeal must be taken forthwith and before any other business is begun."

There was testimony tending to show that notice of the decision of the supreme chief ranger was not given to the beneficiaries until after the time for appeal had expired, and such failure to give the notice, if found by the jury, would constitute a waiver of the by-law. *Steiner* v. *Supreme Court I. O. F.*, 149 Mich. 567 (113 N. W. 15).

But it is said that the law relative to appeals was amended by defendant in the session of July and August, 1905, after the death of Mrs. Ruterbusch, so as to provide, as follows: "An appeal must be taken within twenty days from the time written notice of the decision is given to or served upon the interested party," etc.; and that this provision was in force at the time the beneficiaries actually received notice of the decision of the supreme chief ranger and they permitted more than 20 days thereafter to elapse

before taking an appeal and thereby became bound by such decision. We find no proof in the record of the adoption of any such amendment. All that the record contains on the subject is the following:

"*Mr. Hall:* I wish to offer in evidence also, in view of the statement of counsel, that at the last meeting of the defendants, they changed the by-laws so that they should always meet in Toronto. I offer in evidence the constitution and by-laws of the defendant enacted in July and August, 1905, being the last meeting before the suit was begun. The same was admitted in evidence, and is marked 'Exhibit 6,' and is attached hereto. It is stipulated and agreed by and between the parties hereto, that for the sake of economy and brevity said Exhibit 6 may be omitted from the printed record.

"Counsel for plaintiffs called attention to section 5 at page 22, reading as follows:

"'Session of the supreme court and regular and special sessions. The supreme court shall meet in regular sessions, triennially or quadrennially, as the supreme court shall determine from time to time at the headquarters of the order, in the city of Toronto, Can.'"

Although the offer of plaintiffs' counsel included the entire constitution and by-laws, it is apparent that he was specifically offering section 5 at page 22 thereof. There is nothing in the record to indicate that defendant's counsel directed the attention of the court or opposing counsel to an amendment of the by-law as to the time for taking an appeal, or claimed any benefit or legal right by virtue of it. It is not referred to in defendant's requests to charge, nor mentioned in the charge of the court, and is only before us in defendant's brief. Under such circumstances, we must decline to consider the effect of the amendment upon the rights of the parties.

(*d*) The jury have found that defendant deprived plaintiffs of their opportunity to appeal within the time prescribed in the by-laws and he, therefore, had—

"No right of appeal or any other remedy furnished by the laws of the order. Under this reasoning plaintiff had

exhausted all the remedies of the order before bringing suit." *Steiner* v. *Supreme Court I. O. F., supra.*

Although plaintiffs were under no obligation to take any further proceedings before the tribunals of the order, they did attempt to appeal to the executive council, but, after considerable delay, were notified that the council would not entertain their petition, for the reason that they had not taken their appeal within 20 days.

On April 24th, following, an appeal from the action of the executive council to the supreme court was taken, the petition therefor and the affidavit each containing a request that the supreme court convene in special session at some convenient place of reasonable access and entertain jurisdiction of the appeal, the affidavit accompanying the same setting forth that it would be necessary for plaintiff to secure the testimony of numerous witnesses to establish the justness of his claim, all of whom resided at Bay City, and that some of the witnesses declined to make voluntary affidavits concerning the matter, and that there was no process of law known by which he could compel such witnesses to testify outside of a court of law or equity; that plaintiff was advised that the next regular session of the supreme court would not be held until some time in the year 1909, which session might, under the laws of defendant, be held in any country where defendant had branches, including Europe and Australia, and that the appeal of plaintiff would thus be required to be brought on in such foreign countries, at an unreasonable distance from his residence and at an expense which would be prohibitive of the attendance of witnesses, and that substantial justice could not be done, unless the claim be heard speedily and at some place within reasonable distance from Bay City.

Under date of May 15, 1906, a communication was forwarded by the supreme secretary to counsel in which he stated:

"Your appeal, and all other papers and correspondence in the matter, will be presented to the supreme court at its

next session. With respect to the matter of your petition that the executive council order a session of the supreme court at some convenient place within a reasonable time to hear your appeal, the executive, at its recent meeting on the 7th instant, declined to order a special session of the supreme court. Your appeal will be presented to the supreme court at its next regular session."

Thereupon, plaintiffs' counsel advised defendant that suit would be instituted.

We do not think that the efforts of the plaintiffs to get a hearing of their claim by the courts of the order, after their release from any legal obligation to do so, should be held to affect their right to seek redress in the courts of law. The appeals which they were seeking were not required of them, but were prohibited to them by the laws of the order, and, if allowed, would only be by courtesy. The fact that the laws of the order, upon the failure of the supreme chief ranger to serve timely notice of his decision, prevented any appeal, clearly distinguishes this case from *Conley* v. *Supreme Court I. O. F.*, 158 Mich. 190 (122 N. W. 567), and the cases therein cited.

The judgment is affirmed.

OSTRANDER, HOOKER, MOORE, and STONE, JJ., concurred.

MICHIGAN CENTRAL RAILROAD CO. *v.* FERGUSON.

1. EMINENT DOMAIN—PETITION—PLEADING.
   Objections to the sufficiency of a petition to take land by proceedings in eminent domain for railroad purposes are not sustainable, when it is alleged that the petitioner requires the premises for constructing and operating its road, that they are adjacent to its main line, that there is a public necessity for such taking, and that the corporation has duly attempted to acquire title by purchase.
2. SAME—EVIDENCE—PRESUMPTIONS—NECESSITY.
   No presumption prevails, in such proceeding, that the petitioner has determined to erect a passenger station on premises to be taken.
3. SAME.
   It is an indispensable prerequisite to acquiring land in condemnation proceedings, that the corporation shall determine by proper action that the land is required for corporate purposes, and that the purposes shall be such that the private right must yield to the larger public necessity.
4. SAME—ATTEMPT TO PURCHASE—STATUTES.
   An attempt to purchase the premises to be acquired is not properly evidenced by a showing that a representative of the petitioner had no authority except to agree upon a price and secure an option thereon in favor of a trust company. 2 Comp. Laws, § 6242.

Appeal from Wayne; Murfin, J. Submitted April 20 1910. (Docket No. 102.) Decided July 14, 1910.

Proceedings by the Michigan Central Railroad Company against Elizabeth Ferguson, Edwin Miller, and Burr Lobdell to condemn land for depot purposes. From an order confirming the award of the jury, respondents Miller and Lobdell appeal. Reversed and proceedings dismissed.

Brakie J. Orr, for appellant *Lobdell*.

Albert McClatchey, for appellant *Miller*.

N. E. Slaymaker (*Gray & Gray*, of counsel), for appellee.

OSTRANDER, J. Petitioner seeks to acquire title to two small parcels of land adjoining each other, fronting on Seventeenth street in Detroit; each parcel being 50 by 103 feet in size. It filed its petition, verified by its attorney, in which it is alleged that petitioner is the owner of and has a railroad constructed and in operation between the city of Detroit, in the State of Michigan, and the town of Kensington, in the State of Illinois, and requires "for the purpose of constructing and operating its railroad and appurtenances, the premises adjacent to its main line," describing them; that the taking thereof is necessary for the public use; that it endeavored to acquire title to the premises by purchase; "that your petitioner has offered * * * for said premises a sum in excess of what your petitioner believes is the fair value thereof, which offers have been refused." A demurrer to the petition was overruled, and respondents Miller and Lobdell filed separate answers. There was a preliminary hearing, in which some testimony was introduced on the part of petitioner and which ended with an order granting the prayer of the petition. At this stage, proceedings were interrupted by the issuing out of this court of a writ of certiorari, which was afterwards dismissed without prejudice. New directions were then given for the summoning of a jury, and such proceedings were had that the jury determined that public necessity required the taking of the land in question by the petitioner and awarded as compensation for said land, to respondent Lobdell, as mortgagee, $8,000; to respondent Miller, owner of the fee, $1. Respondent Ferguson disclaimed any interest. Objections to confirmation of the award were overruled, and it was confirmed September 28, 1909; the order of confirmation specifying, also, that counsel for each of said respondents should be paid $150, that respondent Lobdell be paid $15.30, and respondent Miller $51.40 costs and expenses. Respondents have taken separate appeals. With the notice of appeal each respondent pointed out the errors

and the objections taken to the proceedings upon which he relies.

As we are of opinion that some of the objections made by respondent Miller, the owner of the land, are good and require the dismissal of the entire proceedings, we proceed at once to consider them. It cannot be said, we think, that the petition is, upon its face defective. If the averments were admitted, an award would not be set aside for want of jurisdiction. The brevity and general nature of the averments are, however, calculated to attract attention when the nature of the case sought to be made by petitioner is considered. The case, briefly stated, is that the petitioner operates, and has for many years operated, a railroad from Detroit to Chicago. Its passenger depot in Detroit is at the foot of Third street. A tunnel is being constructed under the Detroit river, by means of which trains which have heretofore been transported to and from Canada by boats may be conveyed under the river. The mouth of this tunnel, in Michigan, will be at some distance from the present passenger depot and at or about Fourteenth street. An economical and speedy service and public and private convenience require the construction of a new passenger depot with appurtenances, including necessary tracks, near the mouth of the tunnel. Plans have been made which contemplate the acquisition of the lands in a district, irregular in outline and dimensions, including the streets and alleys lying north of the right of way of petitioner and extending from Fourteenth street to Twentieth street. The parcels in question are so situated that it is practically imperative that they be controlled and used with surrounding property if the scheme and purpose referred to is carried out. The engineering department of petitioner has prepared maps showing the outlines of the district and plans, or studies, tentative in character as to details, of the passenger station and appurtenances laid out therein. These were submitted, with explanations, to the jury. At some length witnesses stated the proposed methods of operating

trains in the tunnel, the equipment required, the reasons for constructing a new passenger depot, the supposed resulting convenience to the public and to the petitioner. One of the powers of petitioner is—

"To erect and maintain all necessary and convenient buildings, stations, depots, and fixtures, and machinery for the accommodation and use of their passengers, freight, and business, and to obtain and hold all the lands necessary therefor." 2 Comp. Laws, § 6234, subd. 8.

If unable to agree for the purchase of any real estate required for the purpose of its incorporation, "it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this act." 2 Comp. Laws, § 6242; Act No. 266, Pub. Acts 1899.

It does not appear, affirmatively, that petitioner has ever determined to erect a passenger station and to acquire the lands in this district for that purpose. We are not permitted to indulge any possible presumptions in favor of such action. None arises from the filing of the petition and this proceeding to condemn. The petition indicates no such purpose and mentions only two small parcels of land, neither of which is, within any reasonable definition of the word or construction of the statute, "*adjacent*" to the main line of the railroad. It does not appear that petitioner has ever acquired any land in the district. It does appear, affirmatively, that the whole matter is tentative and indefinite. Streets and alleys must be vacated. So far as efforts to acquire land are concerned, it appears that options have been acquired and none of those to petitioner. This means that petitioner may buy, at a price fixed in the option, but need not buy. We are not concerned about the method adopted by petitioner to secure land by purchase. The point and ruling is that it is an indispensable prerequisite to acquiring land in condemnation proceedings that the corporation shall determine by proper action that the land is required for corporate purposes, that the purposes shall be such that the private right must yield to the larger public necessity, that no

such determination is indicated by the action disclosed.

What has been said supports also the objection that the testimony wholly fails to prove any attempt to purchase the land described in the petition. It is essential there should be evidence of an attempt to purchase—to agree for the purchase of the land—to support these proceedings. The testimony warrants but one conclusion, and that is that the representative of petitioner had no authority in the premises except to agree upon a price and secure a right of the Union Trust Company to buy at that price. No citizen is under obligations to treat with the corporation for a right to sell his land at the option of the corporation. It is said in the brief for petitioner that the general authority of the agent covered the taking of options which he reported; but in the particular case of Miller he had direct authority to make a cash offer of $6,000. This statement is not supported by the record. The agent in his testimony makes it very plain that he had no authority to sign for or to bind the petitioner, and that he had no other authority when he saw Mr. Miller than he had when he saw Mrs. Ferguson or any other property owner.

We are of opinion that petitioner cannot maintain this proceeding, and that an order should be entered dismissing it. Whether the contemplated improvement is not one which requires the making and certification of a map, and its approval and filing (2 Comp. Laws, § 6232), is a matter demanding serious consideration.

An order will be entered dismissing the proceeding, with costs of both courts to appellants.

HOOKER, MOORE, BLAIR, and STONE, JJ., concurred.

PEOPLE v. HENNARD.

1. ASSAULT AND BATTERY—CRIMINAL LAW—EVIDENCE.
   Where respondent was charged with assault with intent to do great bodily harm, less than murder, upon the person of his infant son, and the injuries and attendant circumstances, taken with admissions of the boy at the time, tended to prove the crime, the case was one for the jury, even though the son testified that he might have been kicked by a horse.

2. EVIDENCE—CRIMINAL LAW—RES GESTÆ.
   What the boy said to a minister, to whose house he fled from the place of the assault, concerning the cause of his injuries, was competent as a part of the *res gestæ*.

3. SAME.
   Evidence as to the appearance of the barn, the curry comb, and the wounds, was admissible as tending to show whether or not the injury was produced by a horse.

4. SAME—LEADING QUESTIONS.
   In the discretion of the circuit judge, leading questions may be properly put to hostile witnesses of the prosecution by the prosecutor.

Exceptions before judgment from Bay; Collins, J. Submitted April 21, 1910. (Docket No. 138.) Decided July 14, 1910.

Joseph Hennard was convicted of an assault with intent to do great bodily harm less than the crime of murder. Affirmed.

Pierce & Kinnane, for appellant.

John E. Bird, Attorney General, and *Charles W. Hitchcock*, Prosecuting Attorney, for the people.

STONE, J. The respondent was charged in the information with having, on the 18th day of March, 1909, in the county of Bay, made an assault upon Wilfred Hen-

nard with intent to do him great bodily harm less than the crime of murder. The trial resulted in the conviction of the respondent of the offense charged. The case is here upon exceptions, and there are a number of assignments of error.

The principal point urged by respondent's counsel is that the evidence did not warrant the trial court in submitting the case to the jury. It was claimed that the assault was committed in the barn of one Mrs. Walthy Tibado, who kept a general merchandise store at Fraser Center, in whose home Wilfred Hennard was living, and that the respondent was stopping there at the time of the alleged assault. The boy Wilfred was in the barn taking care of the horses between 9 and 10 o'clock of the morning in question. The father, the respondent, was there with him.

One cannot read the record without being impressed by the fact, as undoubtedly the trial court was, that the boy, Wilfred Hennard, and Mrs. Tibado, sought to shield the respondent, and that they were very reluctant to testify against him. The case is an unusual one. The father and son were alone in the barn. The boy received a blow or blows upon the head described by the physician as follows:

"I found one cut on the right side of the forehead, just outside the eye, pretty near on the temple and just in front of the temple bone. It was more on the frontal bone. There were three other cuts on the top and back part of the head. One was on the top, and the others were back. The top one was not bad. It was really a bruise. The other was cut down to the bone so that it was necessary to put a stitch in it. After stitching the wound, stitching this one, I noticed the blood coming from the wound. He blew his nose, and I noticed that the air came from this, so that there was, must have been, a puncture and wound of the bone at that point. * * * The finger of one hand—the nail was crushed and the finger crushed. There were some other small scratches on the head, but not of any significance."

The boy testified: That he was rendered unconscious; that after he came to he asked his father, the respondent, what was wrong, and he was standing very nearly in the same position as when the boy went into the barn.

"He didn't say nothing when I said, 'What is wrong?'

"*Q.* Why did you run over to the preacher's?

"*A.* Why, I don't know what struck me. I don't know whether it was my father, or whether it was a horse, or what it was. I don't know exactly what struck me, and I imagined at that time it was him struck me, but since I realize that it might have been the horse as well as my father. * * * I recall going over to the preacher's. I ran over there, I guess. As I ran over I was hurt and bleeding. The preacher met me before I got to the house, and when I got there I sat down in a chair, and he washed my head off. Then he took me upstairs and laid me down on the couch.

"*Q.* Did you say anything to the preacher when you went over there?

"*A.* Why, yes; I told him—he asked me what was wrong, and I told him I thought my father struck me, and I told him my father struck me, as near as I could think at that time. I couldn't say how it was."

He further testified that when he gained consciousness he said: "Don't, father. Oh!"

Mrs. Tibado testified that she heard the boy's outcry and started for the barn, and met the respondent coming from the barn.

"*Q.* What did he say to you?

"*A.* I could not tell what he said to me.

"*Q.* What is your best recollection of what he said?

"*A.* He said something about Wilfred being hurt; but I would not attempt to swear whether—to just what he said or how he said it."

After giving a number of evasive answers, she testified to going to Mr. Butler's, the minister's, and finding Wilfred there; how the physician was called, the wounds dressed; and she remained there caring for him from Saturday, the day of the injury, until the following Thursday.

While the boy was being cared for, the respondent hitched up a horse and buggy and went away in the direction of Linwood, and sent the horse and buggy back. This was very remarkable conduct for the father of a boy who had been severely injured by the kicking of a horse, if everything was pleasant between them, as is claimed. The fact that the father and son were alone together when the boy was injured, in an unusual manner, coupled with the conduct of the father after the injury, leads the mind of an unprejudiced person to believe that these witnesses suppressed the truth when they testified that there had been no trouble, and that everything was of the pleasantest nature. Whether there was an assault, and, if so, who made it, and with what intent, were questions for the jury. The court did not err in overruling the respondent's motion to direct a verdict of not guilty as claimed in the first assignment of error.

There was no error, as claimed, in the second and third assignments, in receiving and refusing to strike out the testimony of Wilfred as to what he said to the preacher, and what he said to respondent when he was struck. They were part of the *res gestæ* within our repeated decisions.

The assignments of error relating to leading questions are without merit. The record shows that respondent's counsel had stated to the court that he had advices that Mrs. Tibado and the son did not desire to urge the prosecution, and there was enough in the conduct of these witnesses to warrant the allowing of leading questions, in the discretion of the court.

There was no error permitting evidence relating to the appearance of the barn, the curry combs, and of the wounds upon Wilfred's head. The location and appearance of the wounds were pertinent as bearing upon the question whether they had been inflicted by the horse, or not, as claimed.

The remaining assignments of error are, in our judg-

ment, without merit. Some of them are too general for consideration.

The charge of the court is criticised; but we think that it was fair, and covered the law of the case. As we have said, the case is unusual in many respects. The respondent and his son were alone together in a barn. The son receives a blow, or some external injury, is knocked senseless, is bruised, wounded, and his skull is fractured, and he is covered with blood. The nature of the injuries is such as to render it improbable that they were inflicted by the kick of a horse, as was claimed.

The father does nothing to relieve the son, but walks unconcernedly away, and soon leaves the vicinity. The son, instead of going to the home, goes to a neighbor's across the way, and there states that his father struck him. Because no third person saw the blows inflicted, it does not follow that all of the circumstances, taken together, may not be sufficient to warrant a jury, under the evidence, and in the exercise of their common sense, in saying that the respondent was guilty, notwithstanding the fact that the witnesses "did not desire to urge the prosecution."

We find no error in the record, and the conviction is affirmed.

OSTRANDER, HOOKER, MOORE, and BLAIR, JJ., concurred.

PEOPLE *v.* BEDELL.

1. TRIAL—CRIMINAL LAW—ARGUMENT.

   In a prosecution for violation of the local-option law, argument of the prosecutor that persons frequently met at the respondent's room and made it a rendezvous, objected to by respondent's attorney on the ground that the testimony referred to was stricken from the record, was not reversible error where it was withdrawn from the jury by the interposition of the court at the time and later in his charge.

2. INTOXICATING LIQUORS—LOCAL OPTION—GIVING AWAY SPIRITUOUS LIQUORS.

   It was not error to charge the jury, in a criminal proceeding for violation of the liquor law in a county which had adopted prohibition, that obtaining intoxicating liquor, keeping it on ice with intoxicants belonging to another in respondent's bedroom, and permitting third persons to come and drink of it at will, constituted a violation of law. *People* v. *Peterson*, 156 Mich. 235 (120 N. W. 570, 21 L. R. A. [N. S.] 134), distinguished.

Exceptions before judgment from Kalkaska; Lamb, J. Submitted April 22, 1910. (Docket No. 143.) Decided July 14, 1910.

Frank Bedell was convicted of violating the local-option law. Affirmed.

Gaffney & Miltner, for appellant.

Ernest C. Smith, Prosecuting Attorney, for the people.

MOORE, J. The information filed in this case charges that the respondent, Frank Bedell, on the 14th day of September, 1909, at the town of Boardman, in the county of Kalkaska, did give and furnish to one Judd Richardson a certain quantity of spirituous and intoxicating liquors, to wit, beer; said beer being then and there so given and furnished contrary to the local-option law in

force in the county of Kalkaska. The respondent was convicted after a trial before a jury, and brings the case to this court on exceptions before sentence. It is admitted that he was not a druggist nor a registered pharmacist. At the close of the testimony for the people, the court was requested to discharge the respondent for the reason that there was no evidence of any violation of the law. No evidence was offered on the part of the respondent. The court charged the jury, in substance, that if Bedell gave or furnished Richardson some of this beer in those rooms, the law was violated, and the verdict should be guilty as charged.

The errors assigned are stated by counsel in their brief as follows:

"The verdict should be reversed: *First*, because of the improper remarks of the prosecuting attorney; and,

"*Second*, Because the evidence introduced in the case does not show that the offense alleged was committed, and we further submit that the respondent should be discharged."

As to the first of these propositions, the following occurred. The prosecuting attorney in his argument said:

"Those men met there that afternoon; that they met there often; that they made it their place of meeting; that it was their rendezvous.

"*Mr. Gaffney:* We object and except to that remark of the prosecuting attorney—this is not a charge of keeping a place where liquors are furnished or given away. The testimony concerning everything that took place there on the evening of the 14th of September was stricken from the record and counsel has no right to refer to it at all.

"*The Court:* I think you had better confine yourself to the testimony as admitted, Mr. Smith.

"*Mr. Smith:* I am simply mentioning, gentlemen of the jury, the statement that was made in open court at that time.

"*Mr. Gaffney:* We object to that remark as highly improper and we take exception to it."

Mr. Smith, in closing his argument, said:

"And we will be satisfied, gentlemen, with your verdict, which, in this case, we believe, cannot be otherwise than a verdict of guilty."

Not content with what was said at this time by the court, counsel for respondent asked the court to say to the jury:

"I further charge you that there was some testimony of something occurring in respondent's room on the evening of the 14th day of September, which was stricken from the records, and I charge you that you must consider this testimony as never having been given. You are to give it no consideration, nor should you allow it to enter into your consideration of the case."

This request was given. What occurred as to this feature of the case is not reversible error.

2. Should the trial court have directed a verdict for respondent? Did he err in saying to the jury:

"Now, gentlemen, I charge you, as a matter of law, that if you find from the evidence in the case beyond a reasonable doubt, that the respondent, Frank Bedell, had liquor, to wit, beer, in his bedroom on the day in question, at the village of South Boardman, in the county of Kalkaska, and that he placed the can in which the beer was on ice, where it was accessible to persons who might frequent the room in question, and that, with his knowledge and consent, several men, including Mr. Richardson, came to the bedroom on the day in question, and that said Bedell knowingly allowed and permitted said Judd Richardson to partake of the liquor, to wit, beer, so procured by said Bedell and by him placed on ice in his bedroom, such a state of facts would constitute a giving and furnishing of liquor within the meaning of and in violation of the local-option law, as now in force in this county."

It is claimed that respondent was in the exercise of an act of hospitality, and that the case is on all fours with the case of *People* v. *Peterson*, 156 Mich. 235 (120 N. W. 570, 21 L. R. A. [N. S.] 134). In this connection it is important to learn what is disclosed by the testimony: Judd Richardson, sworn for the people, testified as follows:

"Am acquainted with Frank Bedell and is in the barber business and runs a shop in South Boardman. We were both living in South Boardman during the month of September of this year, at which time Bedell was running a barber shop on the same business street where the post office is. Was in Bedell's barber shop September 14th last; first, about three o'clock in the afternoon. Bedell was there. Went in to set down and rest and stayed about fifteen or twenty minutes. Went back into the next room opening off the shop. He had some clothing, chairs, and one thing and another in there. Clothing hanging on the wall. Room was about 12x20 feet. Passed into the next room which led off from this one and which was his private room, in which there was a bed and some clothing. This room was about 10 feet square, in which was William Taylor and George Burdick. Bedell went in with me. Burdick and Taylor were talking when I went in and were setting down, one on a chair and the other on the edge of the bed. Saw some liquor setting on the floor some time after I went in, in a quart bottle, to which I helped myself and drank some and then set it back. Made no inquiries and did not learn whose liquor it was at the time. Just went in, saw the bottle, took it up and drank from it without being invited by any one. No one invited me in there in the first place. Followed Bedell in. He just opened the door and I followed him in. Never was in there before. Went in to talk with Bedell and did not know what his business was in the back room and couldn't say that he was there when I drank the whisky. He went back in the barber shop. Drank some beer which set on the floor with the rest, to which I helped myself. Bedell was not there then; he had gone back into the shop. It was on the floor when I went in, by a can in which there was some ice. I followed Bedell into the room, where we stayed about five minutes and then went back. While Bedell was there Burdick, Taylor, and myself were just talking. I saw nobody drinking then, nor until after Bedell went out. I was there about one hour and took three or four drinks from one beer bottle. Bedell passed through at different times. Did not see him drink, nor was there anything said about it, nor did he say anything about drinking to me. Think he was working in the shop and occasionally came back where we were. Did not know there was any liquor before I went in and did not know where the liquor

or beer came from, and did not find out. Testified before the justice of the peace in my cross-examination that George Burdick brought the liquor there, which was what I heard after I left the barber shop. Did not hear it at the time. I left the room first. While there I think Ben Allen and Ernest Murphy came in. They stated no business and came in to visit with the rest of us, and I think drank while there. They drank out of the bottles of beer on the floor, which was all that I saw. Think we all left about four o'clock, together."

Upon the cross-examination witness testified as follows:

"The defendant's shop is the front end of the building at the north side of the street and faces west. It is partitioned off so that it can be entered from the barber shop through which you go back into a couple of rooms that he keeps for a bedroom. The shop door faces the east; to come in and set down and visit, which is customary, and on this day we went into the back room with Bedell and found Taylor and Burdick there, one setting on the bed and the other on a chair, and after being there a few minutes, noticed that there was a bottle of whisky on the floor. Took it up and took a drink out of it and placed it back upon the floor. Do not know whether Bedell was there at that time or not. Did not see him drink any whisky and said nothing to me about drinking liquor, nor called my attention to the liquor, nor said anything to anybody about drinking liquor in there. We were there about one hour, during which Bedell passed in and out through the room out of the back door three or four times."

Upon redirect examination witness testified as follows:

"When I went in, did not know that Taylor or Burdick were there, nor that there was any liquor there. Just went in to talk with Bedell and stayed with the rest of the boys. There were some clothes, overcoat, bed, and some other barber fixtures there. Saw no sweepings nor any great amount of empty bottles piled up. I seen some bottles in the room, but cannot say how many. Did not notice any barrels."

There was much other testimony of a like character. As before stated, no testimony was offered on the part of respondent. A reference to the case of *People* v. *Peter-*

son, supra, will show it easily distinguishable from the case at bar. In the case of *People* v. *Giddings*, 159 Mich. 523 (124 N. W. 546), it was claimed that one Foster saw a small bottle of whisky on a table belonging to respondent, from which he poured a small quantity of whisky into a cup into which respondent poured some hot water, after which the witness drank the mixture. In disposing of the case Justice MCALVAY, speaking for the court, said:

"In view of a new trial which must be had, some other questions must be passed upon. One contention of respondent was that if liquor was furnished Foster by Giddings, it was furnished to a guest and not unlawfully. There is nothing in the case which would warrant the court in giving a request to charge embodying that contention. This case is clearly distinguishable from the cases of this court relied upon by respondent. The court was not in error in refusing such request to charge."

In the case of *People* v. *Myers*, 161 Mich. 40 (125 N. W. 701), where the respondent, who was a clerk in a hotel in a local-option county, had gratuitously, and for social purposes, furnished some dining room girls with beer in their rooms, it was held he had violated the law. In disposing of the case, Justice BLAIR, speaking for the court, said:

"The Michigan act under consideration includes within its title a prohibition of the giving away of intoxicating liquors in local-option counties; the first section makes it unlawful for any person to give away such liquors, and the act has been repeatedly held constitutional in every respect. The general liquor law deals with the regulation of a legitimate business. The local-option law was intended, in my opinion, not only to wipe the business out of existence in the county, but to prevent the inhabitants of the county from obtaining liquor within the county. For the latter purpose, the act prohibits any person from giving away intoxicating liquor, and thereby heads off the numerous subterfuges which would interfere with the enforcement of the law. We have held that the statute was not intended to prohibit the individual use of intoxicating liquors, nor to invade the privacy of the home and inter-

fere with the owner's decent exercise of hospitality towards his guests, but we do not think the terms of the act warrant a further limitation of its operation."

The facts disclosed by the record before us do not show a case of the exercise of a justifiable act of hospitality, but, on the contrary, show the conducting of what is vulgarly known as a "blind pig." If what was done by the respondent was not a violation of the law, then it permits what the legislature never intended—a method by which a substitute for the saloon may be found, while exempt from the payment of taxes and without the regulations and restrictions which experience has shown to be necessary if intoxicating liquors are to be sold.

The exceptions are overruled, and the case is remanded for further proceedings according to law.

HOOKER, BLAIR, and STONE, JJ., concurred.

OSTRANDER, J. (*concurring*). The testimony, undisputed, discloses that on September 14, 1909, some one at respondent's request purchased for him in another village, nine pint bottles of beer. The same person purchased for himself two bottles of whisky, and, upon his return to the village of Boardman, took the liquor to respondent's sleeping room, arriving about noon. Respondent is a single man, boarding at a restaurant, and occupying rooms in the rear of his barber shop, where he sleeps and keeps his personal belongings. The beer was placed on ice, the whisky was in evidence, and in the afternoon there were gathered there a number of men who were drinking the liquor.

Under the circumstances disclosed by the testimony, the trial court was right in refusing to direct a verdict for respondent, and the conviction may be sustained. But I think it proper to say that in my opinion the rooms occupied by an unmarried man may be considered to be his home, in which, in a proper manner, he may be host to a friend or to friends. If the testimony were less conclusive in establishing the fact that this respondent, on this occa-

sion, was permitting others to use his rooms for the purpose of drinking, not only his beer, but the whisky of another, I should regard the charge as faulty in not presenting to the jury the question whether the respondent was acting in good faith and exercising a decent hospitality. Former decisions of this court, which are referred to in the opinion of Mr. Justice MOORE, recognize the distinction here pointed out.

MOORE *v.* YOUNG.

1. DEEDS—RESERVATION—LOGS AND LOGGING.
   A conveyance reserving to grantor's wife the timber "now on" a portion of land, "with privilege to remove the same at any time," did not reserve to her underbrush which grew upon the property after she had removed all the timber.
2. SAME—CONSTRUCTION.
   Any doubt existing as to what construction should be given the language used in the deed should be construed most strongly against the grantor.

Appeal from Newaygo; Palmer, J. Submitted June 7, 1910. (Docket No. 20.) Decided July 14, 1910.

Bill by Joseph H. Moore against Charles S. Young and Mary L. Young to enjoin the removal of certain timber. From a decree dismissing the bill, complainant appeals. Affirmed.

J. Claude Youdan, for complainant.

John G. Anderson, for defendants.

Complainant is the son, and defendant Mary L. Young the daughter, of John Moore, who on October 15, 1887, was the owner of two farms, one in Montcalm county, and one in Newaygo county, separated only by a highway. On that day John Moore executed two deeds; one of the homestead farm in Montcalm county to his wife, Parizade Moore, and the other of the farm in Newaygo county to his three daughters. The latter deed contained the following reservation:

"Reserving therefrom the timber now on ten acres off the south end of said land to Parizade Moore, for a period of thirty years with privilege to remove the same at any time."

Complainant now owns the interest of his mother in the home farm and likewise any interest she may now have in the timber on the south 10 acres of the farm deeded to the daughters, growing out of the reservation in the deed above quoted. Defendants have acquired all the title to the Newaygo farm, conveyed by John Moore to his three daughters. During the years 1888, 1889, and 1890, Parizade Moore sold and removed from said 10 acres all the timber then growing thereon, first the large timber, then the smaller trees suitable for railway ties, and finally all the other timber except brush and undergrowth. During the 20 years which have elapsed since said land was denuded of the timber, the brush and undergrowth have grown, in places, into saplings. Lately defendants started to clear said 10 acres by cutting and removing the undergrowth and saplings, whereupon complainant filed his bill of complaint, praying for an injunction restraining defendants from cutting or carrying away any timber of any and every nature off of or from said land. From a decree dismissing the bill, complainant appeals.

BROOKE, J. (*after stating the facts*). It is the contention of the complainant that the language of the reservation, construed in the light of the circumstances sur-

rounding the parties at the time the deed was executed, should be held to mean that Parizade Moore took title, not alone to the timber then growing upon said 10 acres (all of which, it is conceded, she removed), but also to all timber that should grow thereon for a period of 30 years. It is pointed out that the homestead was without timber, and that it was doubtless intended by John Moore to provide that necessity for his wife for a period of 30 years. We find no difficulty in agreeing with complainant that this was probably John Moore's motive in making the reservation; but, instead of using said timber as it was no doubt intended she should do, she chose, as she had a right, to go on and at once cut off everything except underbrush. The language of the reservation is clear and unequivocal, and refers in set terms to "the timber *now* on ten acres," etc. It is conceded that all timber on the land, at the time the reservation was made, has been removed. The 30 years mentioned in the reservation refers distinctly to the period within which "*the same*"—that is, the timber reserved—may be removed. If any doubt remained as to what construction should be given the language used—and there is none—still it should be construed most strongly against the grantor. *Bolio* v. *Marvin*, 130 Mich. 82 (89 N. W. 563).

Inasmuch as everything standing upon the land was cut except underbrush, it is unnecessary to again define what is meant by the word "timber." That was done by this court in the case of *Huron Land Co.* v. *Davison*, 131 Mich. 87 (90 N. W. 1034), and again in the recent case of *Balderson* v. *Seeley*, 160 Mich. 186 (125 N. W. 37).

The bill of complaint was properly dismissed, and the decree is affirmed, with costs to defendants.

BIRD, C. J., and MCALVAY, BLAIR, and STONE, JJ., concurred.

DAVIS *v.* DETROIT UNITED RAILWAY.

1. DISMISSAL AND NONSUIT—TRIAL—RIGHT TO SUBMIT TO VOLUNTARY NONSUIT.
   A plaintiff is entitled to submit to a voluntary nonsuit at any time before the jury retires from the box to deliberate upon their verdict.

2. SAME—NEW TRIAL—WAIVER.
   After a refusal to permit the plaintiff to submit to nonsuit, and on motion for a new trial, the amendment, at plaintiff's request, of a conditional order granting the right to nonsuit, on payment of costs within a specified time, waives the objection that the plaintiff was technically entitled to a new trial.

3. STREET RAILROADS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.
   Crossing a street car track when plaintiff's view was obscured by a gust of wind and sleet, so that she could not see whether or not a car was approaching from one direction, is negligence contributing to an injury caused by a car coming from that direction.

Error to Wayne; Donovan, J. Submitted June 7, 1910. (Docket No. 21.) Decided July 14, 1910.

Case by Roseltha J. Davis against the Detroit United Railway for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Philip A. McHugh and *William Henry Gallagher*, for appellant.

Corliss, Leete & Joslyn, for appellee.

BLAIR, J. This is an action on the case brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligent operation of defendant's street car at a street crossing. After the

court had announced his opinion, at the close of the proofs, that plaintiff could not recover, and had begun to instruct the jury to that effect, plaintiff asked leave to submit to a nonsuit. This request was refused and a verdict directed. Afterwards counsel for plaintiff made a motion for a new trial, on the grounds that the court erred in refusing to grant a nonsuit and in directing a verdict. Upon the argument of the motion, defendant's counsel asked that the verdict be set aside and the motion for a nonsuit granted. Plaintiff's counsel objected to such order being entered. Thereupon the following action was taken:

"*The Court:* You may take this down. In order to grant a new trial this court would have to set aside the verdict in view of the doubt raised by the two cases cited. An order will be entered setting aside the verdict and entering a verdict of nonsuit, provided the costs are paid within 10 days; otherwise the same verdict will stand.

"And thereafter counsel for plaintiff appeared and asked that the order be amended so as to provide that the costs be paid within 30 days, which amendment was granted, and subsequently on the 3d day of November, the following order was entered: * * *

"Upon hearing of the motion for a new trial on the part of the plaintiff in this cause, and upon consideration thereof and argument of counsel thereon, it is ordered that the said motion for new trial be denied, provided, however, that the said plaintiff shall have the right upon payment within 10 days from this date of the taxed costs of the defendant herein to enter judgment of nonsuit in this court; and

"It is further ordered that upon default of the payment of said taxed costs within the time mentioned, and upon failure to enter judgment of nonsuit as above provided, there shall thereupon be entered judgment upon verdict of the jury heretofore rendered in favor of the defendant of no cause of action."

The plaintiff was entitled to submit to a nonsuit at any time before the jury had gone from the jury box to deliberate upon their verdict. Cir. Ct. Rules 27 *a*, 24 *d*; *Deneen* v. *Railway Co.*, 150 Mich. 235 (113 N. W. 1126). However, the court having granted the right to a

nonsuit, even if plaintiff was technically entitled to an order granting a new trial, she waived her right to object to the order by procuring its amendment extending the time for 30 days.

We are satisfied that plaintiff was not entitled to recover upon this record, and that the court properly directed a verdict, so far as the evidence was concerned. The accident happened in daylight on a stormy day with snow, sleet, and rain at intervals. Plaintiff was holding her umbrella close to her to protect herself from the sleet and towards the west. As plaintiff, going north on Farrar street, stepped off the curb onto Gratiot avenue, a car passed going east.

"When she stopped within a few feet of the track, she looked out from behind her umbrella westward to see if another car were coming. The sleet struck her in the eyes, interfering with her sight; but she thought she could see well enough to make sure there was no car coming. Observing none, and hearing no warning from any, she started on to cross the first pair of tracks, turning to look eastward for a west-bound car that might be coming upon the second pair of tracks. She had taken more than two steps, and was just upon the first track, when she saw the fender of an east-bound car in front of her. She tried to dodge back, but before she could do so was struck by the corner of the vestibule and thrown to the pavement."

Plaintiff testified:

"*Q.* Now, after you looked and had the sleet in your eyes, you advanced a step and was struck by the car?

"*A.* No, sir; I had looked a ways before I got to the track, and then started to go across, or I started on, I could not see, I did not see no car, I started on.

"*Q.* The reason you could not see was because you had this sudden gust and sleet?

"*A.* Yes, sir.

"*Q.* That is the reason you could not see?

"*A.* Yes, sir. * * *

"*Q.* You gave up a car coming from the west when you were farther back?

"*A.* I was looking; I could not see towards the west.

"*Q.* You could not see because your eyes were blinded?
"*A.* Yes, sir.
"*Q.* Farther back?
"*A.* Yes, sir.
"*Q.* You could not see because your eyes were blinded?
"*A.* Yes, sir. I started on. I had given up the other car."

If plaintiff could not see because of the sudden gust blowing the sleet in her eyes, she should have awaited the cessation of the gust, and it was negligence on her part to proceed to cross, relying upon such a view.

The judgment is affirmed.

BIRD, C. J., and MCALVAY, BROOKE, and STONE, JJ., concurred.

A. M. CAMPAU REALTY CO. *v.* CITY OF DETROIT.

1. BOUNDARIES—LANDS UNDER WATER—RIPARIAN RIGHTS.
The boundary line between two adjoining riparian owners, as to the land covered by water, is not in any way dependent upon the direction of the lines on land, but the lines from the shore should run, as near as may be, perpendicular to the course of the stream.

2. APPEAL AND ERROR—PREJUDICIAL ERROR.
On appeal from a decree which gave to appellant more than it was entitled to, no complaint may be made of the error.

Appeal from Wayne; Murfin, J. Submitted June 7, 1910. (Docket No. 11.) Decided July 14, 1910.

Bill by the A. M. Campau Realty Company against the city of Detroit and others to quiet title to certain land. From a decree for complainant, defendants appeal. Affirmed.

William F. McCorkle (*Beaumont, Smith & Harris*, of counsel), for complainant.

Richard I. Lawson (*P. J. M. Hally*, of counsel), for defendants.

STONE, J. The bill of complaint in this cause was filed to quiet complainant's alleged title to a triangular parcel of land and dock frontage in the city of Detroit, on the Detroit river; also to remove a cloud arising from defendants' claim of title thereto; also to permanently enjoin defendants from interfering with complainant's possession of the disputed land, and from removing complainant's buildings now standing thereon. The answer denies all material averments of the bill. It insists that the title to the disputed parcel is in the city, and that complainant is in wrongful possession thereof. Upon the hearing on pleadings and proofs a decree was entered for the complainant in accordance with the prayer of the bill, and the defendants have appealed.

In this court the complainant contended that the decree of the circuit court should stand for either of two reasons:

(*a*) The west line of the disputed triangle is the correct westerly line of that portion of complainant's lot 193.

(*b*) Or if this is not so, then complainant has acquired title to the disputed triangle by adverse possession.

It appears that the complainant is the owner of a parcel of land fronting on the Detroit river, bounded on the east by Randolph street, on the north by a public alley, and on the west by property belonging to the city of Detroit, and used by it for a public lighting plant. Complainant's property is described as lots 193 and 27 (the latter north of the former) of section 4, of Governor and Judges' plan of Detroit. This property is almost entirely covered by brick and sheet-iron buildings, which have been standing for many years. Upon the entire river front complainant and its predecessors in title have maintained a private dock, extending out into the river, with the same western boundary lines, for about 40 years.

The defendant city owns the property lying west of complainant's property. It comprises lots 192 and 170 (the latter north of the former) of said section 4, Governor and Judges' plan. It also has a dock along the front of its land.

The parcel in dispute is a triangle which was originally wholly under water. It has its apex at a point where the lot line, on land, between lots 192 and 193, intersects the old shore or water line. The easterly line of this triangle is this lot line extended out into the river to the thread of the stream. The westerly line of the disputed triangle is a line, extending from the apex of this triangle on the old shore line, and running out into the river to, and at right angles with, the thread of the stream. The westerly line of complainant's dock, and of a sheet iron shed standing on the dock, is identical with the westerly line of the disputed triangle.

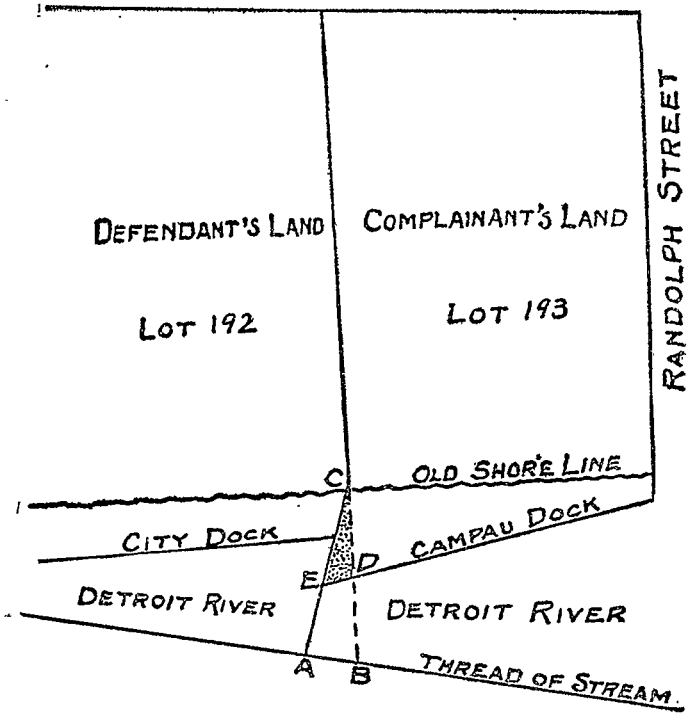
The location of the disputed parcel can be seen from the following sketch, the lines A C and B C indicating the west and east lines of the triangle. C E D is a part of complainant's dock, and is included in the disputed triangle C A B.

It is well settled in this State that the boundary line between two adjoining riparian owners, as to the land covered by water, is not in any way dependent upon the direction of the lines on land, but that the lines from the shore should run, *as near as may be*, perpendicular to the course of the stream. *Clark* v. *Campau*, 19 Mich. 325; *Lorman* v. *Benson*, 8 Mich. 18 (77 Am. Dec. 435); *Rice* v. *Ruddiman*, 10 Mich. 125; *Bay City Gas-Light Co.* v. *Industrial Works*, 28 Mich. 182; *Maxwell* v. *Bay City Bridge Co.*, 41 Mich. 453, 466 (2 N. W. 639); *Backus* v. *City of Detroit*, 49 Mich. 110–114 (13 N. W. 380, 43 Am. Rep. 447); *Webber* v. *Pere Marquette Boom Co.*, 62 Mich. 626–636 (30 N. W. 469); *Grand Rapids Ice & Coal Co.* v. *South Grand Rapids Ice & Coal Co.*, 102 Mich. 227 (60 N. W. 681, 25 L. R. A. 815, 47 Am. St. Rep. 516); *Pittsburgh, etc., Iron Co.* v. *Lake*

Superior Iron Co., 118 Mich. 109–125 (76 N. W. 395).

We do not understand that defendants' counsel disputes the above proposition, or its application to this case. We quote from his brief wherein he says:

"We are entirely satisfied, and agree with counsel for complainant, that the boundary line between adjoining riparian owners, as to the land covered by water, is not in any way dependent upon the direction of the lines on



land, but that the line from the shore should be run, as near as may be, perpendicularly to the course of the stream. *Clark* v. *Campau*, 19 Mich. 328. But the decree entered in the lower court in this case does not follow that rule of law, as a glance at the decree will disclose. At the bottom of page 6 of complainant's brief it is said:

"'The west line of the disputed triangle is a line running *approximately* at right angles to the thread of the stream.'

"Why not run the line *exactly* at right angles with the thread of the stream, and have the decree so declare, if it is to stand? No reason is given for the departure from the rule."

Complainant answers this criticism of the decree by stating that if the west line of the disputed parcel ran *exactly* at right angles to the thread of the stream, it would be placed still farther west than it is, and the undisputed evidence in the record supports this position. The witness George Jerome testified:

"The westerly line of the property in dispute, the dock property, we projected to the harbor line to make nearly a right angle. It would be less than a right angle. In other words, if the line made is a right angle, it would have to be carried a little bit further west."

Appellants would seem to have no reason to complain because of the line fixed by the decree.

Being of the opinion that the case is ruled by application, as between adjoining riparian owners, of the doctrine above stated, we do not consider the question of adverse possession.

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

BIRD, C. J., and MCALVAY, BROOKE, and BLAIR, JJ., concurred.

KAISER *v.* WAYNE CIRCUIT JUDGE.

1. EXCEPTIONS, BILL OF—EXTENDING TIME TO SETTLE.

After the denial of a motion for a new trial the moving party has twenty days in which to settle a bill of exceptions, and if more than eighty days have elapsed since the entry of judgment, the time may be extended on motion made and cause shown, so as to grant a reasonable time to settle the same. Cir. Ct. Rule 47; 3 Comp. Laws, § 10504.

2. SAME—MANDAMUS.

Mandamus will issue to vacate an order made without a showing of cause, eighty-four days after judgment and twenty-two days after denial of a motion for a new trial, extending the time sixty days in which to settle a bill of exceptions.

3. APPEAL AND ERROR—TIME TO ISSUE WRIT.

Neither 3 Comp. Laws, § 10504, nor the court nor any order of the court made pursuant thereto, may operate to extend the time limited by statute in which to take out a writ of error.

Mandamus by Christopher E. Kaiser to compel George S. Hosmer, circuit judge of Wayne county, to vacate an order extending time to settle a bill of exceptions. Submitted July 1, 1910. (Calendar No. 24,086.) Writ granted July 14, 1910. Rehearing denied October 10, 1910.

Robert M. Dalton and *William M. Mertz*, for relator.

Brennan, Donnelly & Van De Mark, for respondent.

OSTRANDER, J. The action is trespass on the case. A verdict for the plaintiff was rendered October 12, 1909. On October 15, 1909, an order was made staying proceedings for 20 days, extending the time to move for a new trial 30 days, and the time to settle a bill of exceptions 60 days. November 5, 1909, judgment was entered on the verdict. Orders succeeded each other thereafter as follows: November 19, 1909, time to move for a new trial extended 20 days more; January 6, 1910, motion for a new trial denied; January 28, 1910, time to settle bill of exceptions extended 60 days; April 2, 1910, motion to set aside the order of January 28th denied; April 7, 1910, bill of exceptions settled as of April 2, 1910; April 9, 1910, motion to set aside order settling bill of exceptions denied. The order of January 28, 1910, was made without cause being shown and without notice. The question presented by the petition is whether that order should be vacated.

We held in *Harper* v. *Wayne Circuit Judge*, 155 Mich. 543 (119 N. W. 913), that the provisions of the stat-

ute regarding the settlement of a bill of exceptions were to be construed in connection with the rule of the court (Cir. Ct. Rule 47) and with 3 Comp. Laws, § 10504, and that by construction appellant had a reasonable time after the denial of a motion for a new trial in which to settle a bill of exceptions, and had 20 days after such denial as matter of right. In that case an application for an extension of time was made within 20 days, was denied, and a writ of mandamus was issued to compel the entry of an order giving the appellant a reasonable time in which to settle the bill of exceptions.

In the case at bar, the order of October 15, 1909, allowing a 60-day extension of time in which to settle a bill of exceptions, expired January 3, 1910, if we reckon from the date of entry of the order. Reckoning from November 5th, the day when judgment was entered, the 60 days expired January 4, 1910, and the date when the further order extending time in which to settle bill of exceptions was entered was 84 days after judgment, and 22 days after the motion for a new trial was denied.

Following *Harper* v. *Wayne Circuit Judge*, *supra*, we hold, upon the facts stated, that appellant had a right to settle a bill of exceptions at any time within 20 days after the denial of the motion for a new trial, and that within that time the court below had jurisdiction, upon motion and upon cause shown, to extend reasonably the time to settle a bill of exceptions. The court had no jurisdiction within said 20 days to extend the time to settle a bill of exceptions, except upon notice and for cause. It had no jurisdiction after the expiration of said 20 days, and after the expiration of 80 days from entry of judgment, to extend the time to settle a bill of exceptions for cause.

The rule of practice is this: A party has 20 days after judgment, as matter of right, in which to settle a bill of exceptions. The court may extend this time for 60 days. The court may make no other or further extension of time for settling a bill of exceptions in any case, except upon

notice and cause shown. A party has 20 days after denial of motion for a new trial in which to settle a bill of exceptions; the motion for a new trial having been seasonably made and brought on for hearing in a reasonable time. Within said 20 days the court may, upon notice and for cause, grant a reasonable extension of the time. Neither the statute nor the rule, nor any order of the court made pursuant thereto, may operate to extend the time limited by the statute in which to take out a writ of error.

The order of January 28, 1910, should be vacated, as well as the order settling the bill of exceptions. Relator will recover costs of this motion of the Detroit United Railway.

Writ granted.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

ON MOTION FOR REHEARING.

OSTRANDER, J. A rehearing is denied, for the reason that the order of the court below extending the time in which to settle a bill of exceptions was properly set aside. But in so far as the opinion limits the right of the court to at any time entertain a motion, supported by affidavits, after due notice to opposing counsel, to extend the time for settling exceptions, we think it should be modified. We are impressed that, in view of some former decisions of the court, a rule upon this subject should be announced only in the form of a rule to take effect in the future.

The opinion, therefore, will be considered as deciding only the precise question presented by relator's motion.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

KIRKPATRICK *v.* PHILLIPS.

1. INTOXICATING LIQUORS—BONDS—STATUTES.
   The bond of a liquor dealer and his sureties running to the city of Kalamazoo, instead of to the people of the State of Michigan, as provided by 2 Comp. Laws, § 5386, omitting the recitals and covenants prescribed by the statute, and containing a differently phrased condition, is not a substantial compliance with the law.

2. SAME.
   It is the duty of a liquor dealer to see that a proper bond is given, and the same is a condition precedent to his conducting the business and avoiding criminal responsibility.

3. SAME—CIVIL-DAMAGE ACT—IRREGULAR BOND—LIABILITY BY ESTOPPEL.
   In an action on such irregularly executed bond, which contains a proviso that the principal shall conduct his saloon in conformity to the laws of the State, the defendants are estopped, by acting on it and conducting the business, to deny their liability under its terms.

Error to Kalamazoo; Knappen, J. Submitted June 7, 1910. (Docket No. 7.) Decided July 14, 1910.

Case by Anna L. Kirkpatrick against George Phillips, principal, and Edwin Jaseph and John H. Burke, sureties, under the civil-damage act. A judgment for defendants on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

Barnard & Lewis and *Earl L. Burhans*, for appellant.

Alfred J. Mills and *E. M. Irish*, for appellees.

BLAIR, J. This is an action under the civil-damage law in which the plaintiff seeks to recover for loss of sup-

port, mental suffering, etc., growing out of the death of her husband in a runaway, which resulted from illegal sales of liquor made by the defendant Phillips. On the trial of the cause the plaintiff offered in evidence the bond given by the defendant George Phillips and his sureties, which said bond had been duly approved by the city council of Kalamazoo and filed with the county treasurer. The court held the bond irregular and defective and directed a verdict, in favor of all the defendants, of no cause of action. Plaintiff contends that the judgment for the defendants rendered by the circuit court should be reversed, for the following reasons:

(1) The bond is a good statutory bond and substantially conforms with the form of bond indicated in 2 Comp. Laws, § 5386.

(2) If not good as a statutory bond, it is enforceable as a common-law obligation, and plaintiff should have been allowed to go to the jury under the second count of the declaration.

(3) Because, as a matter of law, the parties defendant were estopped from raising the question of the validity of the bond.

(4) Because the court erred in directing a verdict in favor of all the defendants, *i. e.*, in favor of both the principal and his sureties.

The bond in question is as follows:

"Know all men by these presents that we, George Phillips, as principal, and Edwin Jaseph and John H. Burke, as sureties, are held and firmly bound unto the city of Kalamazoo, a municipal corporation, in the sum of four thousand ($4,000) dollars lawful money of the United States of America to be paid to the said city of Kalamazoo or to its certain attorneys, heirs, executors, administrators or assigns and to which payment well and truly to be made we bind ourselves, heirs, executors and administrators and each and every of them firmly by these presents.

"Sealed with our seal, dated the 24th day of September, one thousand nine hundred eight.

"The condition of this obligation is such that whereas the said George Phillips desires to engage in the saloon

business in the city of Kalamazoo, Mich., at 106 East Water street, in said city, now therefore if the said principal, George Phillips, shall conduct the said saloon in conformity with the laws of the State of Michigan, and the ordinances of the city of Kalamazoo relating to saloons, and save harmless the said city of Kalamazoo from all loss or damage in connection or growing out of the suing of said saloon at the place above mentioned, then this obligation is to be void; otherwise to remain in full force."

In connection with the bond, plaintiff made the following offer of proof:

"We offer, if the court please, to show that under this bond the principal, George Phillips, conducted this saloon and gave this bond for the purpose of conducting a saloon; that the bond was drawn by the city attorney of the city of Kalamazoo for that purpose; and that the two sureties knew that he was operating this saloon and selling liquor and signed and executed the bond for the purpose of enabling him to sell liquor as a saloon keeper under the general laws of this State."

A mere comparison of the bond with the form prescribed by the statute (2 Comp. Laws, § 5386) is sufficient to disclose that the bond in suit is not substantially in the statutory form. The bond was, however, intended to be the bond required by statute by the principal and sureties. It was the duty of the principal to see that a proper bond was furnished. *Wolcott* v. *Judge of Superior Court*, 112 Mich. 311 (70 N. W. 831).

The giving of the statutory bond was the condition precedent to the principal's conducting the saloon business and avoiding criminal responsibility, as he and his sureties understood. They agree in their bond that the principal shall conduct the saloon in conformity to the laws of the State of Michigan relating to saloons, including the provisions of section 5386. By reason of this bond, Phillips was permitted to carry on the business and to accomplish the injury to plaintiff of which she complains, and we think that, under such circumstances, they should be held estopped to question the validity of the bond as a statutory

bond. *Brockway* v. *Petted*, 79 Mich. 620 (45 N. W. 61, 7 L. R. A. 740); *Schullherr* v. *State*, 68 Miss. 227 (8 South. 328); *Lyman* v. *Brucker*, 56 N. Y. Supp. 767.

The judgment is reversed, and a new trial granted.

BIRD, C. J., and MCALVAY, BROOKE, and STONE, JJ., concurred.

BENNETT *v.* MAURICE.

1. PLEADING—BILL OF PARTICULARS—VARIANCE.

In an action for money loaned to defendant, a variance of a few days between the dates named in the bill of particulars and the dates shown by plaintiff's testimony, was not fatal to plaintiff's claim, where no objection was made to the admissibility of the evidence, and no opportunity given to amend the bill of particulars, and where no claim was made that defendant's attorney was surprised or misled.

2. DAMAGES — TRIAL — AMOUNT OF VERDICT — INSTRUCTIONS TO JURY.

It was not error for the court to instruct the jury that if the plaintiff, by a preponderance of the evidence, had convinced them of the truth of his claim that he had loaned defendant at one time $2,000 and at another $8,500, and that he had subsequently agreed to accept a room in defendant's house during his life and $7,000 in full satisfaction, then he was entitled to recover the $7,000 and interest, and such instruction did not amount to the direction of a verdict.

Error to Wayne; Murphy, J. Submitted June 7, 1910. (Docket No. 23.) Decided July 14, 1910.

Assumpsit by Charles D. Bennett, executor of the last will and testament of Alvin S. Clark, deceased, against

Grace Mary Maurice upon an account stated. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Charles Flowers, for appellant.

Harry M. Lau and *George M. Sayles*, for appellee.

BIRD, C. J. Plaintiff brought suit against the defendant in the Wayne circuit court and declared upon all the common counts in assumpsit, and filed a bill of particulars of his claim in compliance with defendant's demand, the items of which were as follows:

"September 21, 1903, to cash loaned to defendant, $2,000.

"January 6, 1906, to cash loaned to defendant, $8,500."

It was the claim of plaintiff that he had loaned these amounts to defendant to enable her to purchase certain real estate in the city of Detroit. The real estate was purchased by her upon a contract, and the $2,000 loaned in 1903 was to enable her to make the first payment thereon, and the $8,500, loaned on January 6, 1906, was to enable her to make the final payment on the contract and get her deed. The deed was made January 9, 1906, and placed of record the following day. The defendant was desirous of obtaining a loan to make certain repairs and improvements upon the property, and the plaintiff gave this as a reason why he took no security for the loan. He also gave as a reason that he was well acquainted with her and had confidence in her honesty. The investment did not turn out as well as expected, and there was talk between them of making a sale of it. The plaintiff at that time agreed to accept $7,000 and the use of a room in defendant's house for the rest of his life in payment of the loan. The defendant denied that she owed plaintiff these sums or any sum, and denied that she ever borrowed any money from the plaintiff, save in some small amounts to pay her current expenses. The jury returned a verdict for plaintiff for $7,525.

The defendant's counsel assigns error upon the refusal of the court to instruct the jury in accordance with following request:

"That they would have to find that the moneys were loaned at the times specified in the bill of particulars, as testified to by plaintiff."

The court refused to give this request and we think properly so. To say that, because plaintiff's testimony disclosed a variance of a few days from the date named in the bill of particulars, he should fail in this action, would be laying down a rule stricter than the law demands. In 1 Green's New Practice (2d Ed.), p. 512. It is said:

"But as the object of this strictness in a bill of particulars is that the defendant may know what will be attempted to be proved against him at the trial and may prepare his evidence accordingly, a mistake in a particular not calculated to deceive or mislead him will not be regarded as material."

In *Sogge* v. *Schwartz*, 116 Mich. 635 (74 N. W. 1000), an error was made in both the date and amount named in the bill of particulars, but this court held that, inasmuch as the defendant was neither surprised nor misled, the variance should be disregarded. If there were any variance in point of time between the dates named in the bill of particulars and plaintiff's testimony, counsel for defendant should have objected to its admission when offered or subsequently moved to strike it out, at which time plaintiff's counsel could have applied for, and secured, an amendment, if the variance was regarded material by the court. This not having been done and there being no claim upon the part of defendant's counsel that he was surprised or misled on account of the variance, we think the court was not in error in refusing to give the request.

Error is also assigned upon that part of the charge wherein the court instructed the jury that—

"If the plaintiff, by a preponderance of the evidence, has convinced you of the truth of his claim, then he is entitled to a verdict at your hands in the sum of $7,000, plus interest at the rate of 5 per cent. per annum, which is stipulated here to be the sum of $525."

Counsel contends that this instruction was "in effect a direction of a verdict; that if they found for plaintiff it left nothing for them to decide." In other words, if the jury found that the plaintiff was entitled to recover, the amount of the verdict was foreclosed by the court. We do not so view it. It was the claim of plaintiff that he had loaned the defendant the two sums of money, and that subsequently he had agreed to accept $7,000 in payment of them. The court left it to the jury to say whether this claim was established by a preponderance of the evidence. If it was, it would necessarily follow that the plaintiff would be entitled to a verdict of $7,000, plus the interest. The jury could not well be convinced of the truth of plaintiff's claim and then award him less than $7,000, plus the interest, because that was his claim. If the jury believed the truth of his claim, there would be no basis upon which they could render any other verdict.

The issues were all issues of fact, and we think they were fully and fairly submitted to the jury.

The judgment is affirmed.

McALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

MARX *v.* KING.

1. EVIDENCE—CONTRACTS—PAROL EVIDENCE RULE—SUBSEQUENT MODIFICATION.

   While parol contemporaneous evidence is inadmissible to vary the terms of a written contract, subsequent oral negotiations modifying its terms are admissible in evidence.

2. PRINCIPAL AND AGENT—HOLDING OUT—ESTOPPEL.

   Advice by the principal to a purchaser of goods from a salesman, who had been making prices to the purchaser below the usual invoice rates, that any prices or arrangements made by the salesman would be satisfactory to the principal, binds the latter and estops him to claim that the prices thereafter made were unauthorized.

3. SAME—AUTHORITY OF AGENT.

   Persons dealing with an agent may rely on his apparent authority.

4. SAME—SCOPE OF AUTHORITY.

   The apparent power of the agent is to be determined by the acts of the principal and not by the acts of the agent.

5. SAME—EVIDENCE.

   It is incompetent, for the purpose of showing apparent authority of an agent or as characterizing his employment, to introduce evidence of acts not authorized or known to the principal or to the one with whom he dealt.

6. EVIDENCE—ADMISSIONS.

   Testimony tending to contradict plaintiffs' testimony and showing admissions made by them is admissible.

Error to Washtenaw; Kinne, J. Submitted June 8, 1910. (Docket No. 28.) Decided July 14, 1910.

Assumpsit by Jacob L. Marx and Eugene H. Kopple, copartners as B. Marx & Son, against Johanna King, executor of the last will and testament of Joseph King, deceased, for goods sold and delivered. A judgment for

plaintiffs for an insufficient amount is reviewed by them on writ of error. Reversed.

Bernard B. Selling, for appellants.

John P. Kirk (*M. J. Cavanaugh*, of counsel), for appellee.

STONE, J. The plaintiffs bring this case to this court on a writ of error from the circuit court, where a jury rendered a verdict in favor of the plaintiffs in the sum of $161.95, an amount conceded by defendant to be due. The plaintiffs' claim, which was disallowed by the jury, was about $4,500. Plaintiffs are jobbers and wholesale dealers in shoes, leather findings, and shoe store supplies, and have been so engaged for many years, having their place of business in the city of Detroit. Defendant, Joseph King, who died a few days after the judgment in this case was rendered in the lower court, and against whose executrix this suit has been properly revived, was engaged in the shoe business at Ypsilanti, Mich., and had been so engaged for many years. Jacob L. Marx, one of the plaintiffs, had known Joseph King for many years, and had business dealings with him off and on for 15 years, or possibly longer. The plaintiff Marx for a long time, but after him Mr. Kopple, one of the plaintiffs now, then a traveling salesman, and finally Sidney Berger, another of plaintiffs' traveling salesmen, had taken orders from said King for goods. The plaintiffs claim that Berger, the traveling salesman, simply took orders, and had no right to make any contracts.

It is the claim of the plaintiffs that prior to July, 1906, Mr. King had always paid his bills by checks sent direct to the house, and that after July, 1906, Mr. King, with one or two exceptions, never sent any checks direct to the house. Money that was received at the office of the plaintiffs on his account was received through the said Berger. One Clarence C. French was a bookkeeper for plaintiffs during the year 1906, and down to the latter part of 1907.

It was conceded by Mr. King that from January 4, 1906, to August 31, 1907, plaintiffs had shipped to him, and he had received, goods invoiced at the sum of $16,260.30. The books of the plaintiffs, as they appeared at the time of the discovery by the plaintiffs of the transactions claimed by them to be fraudulent between Berger and the defendant, King, showed credits during the same period of $12,305.22; but the plaintiffs claim that, after the discovery of the fraud, it appears that the bookkeeper French changed the entries in the ledger to correspond with those appearing in the cashbook and journal, whereby the amount of credits was reduced $700. In other words, it is claimed Mr. King had been credited on the ledger by French, the bookkeeper, with $700 more than the cashbook and journal showed, so that the balance, according to the original entries on the books of the plaintiffs (cashbook and journal), showed a balance still due from King to plaintiffs in the sum of $4,592.08, on September 1, 1907.

The defendant, King, both in his pleadings and evidence, admitted that he had not paid the full invoice prices for the goods, but through transactions had with Berger, plaintiffs' traveling salesman, had deducted large amounts for discounts and allowances other than those appearing on the invoices sent by the plaintiffs to the defendant; and the said King claimed the amount of the discounts and allowances added to the amount actually paid to Berger totaled the full amount of the invoice prices of the goods, with the exception of said sum of $161.95, which the defendant paid into court and admitted to be due the plaintiffs, and which was the amount allowed by the jury.

The method of doing business between the plaintiffs and the defendant, King, was as follows: The traveling salesman, Berger, would go to the store of King, at Ypsilanti, and take orders for goods. These orders, when so taken, would be sent to the plaintiffs, who would ship the goods to the defendant, King, at the same time sending him an invoice for the same at the prices stated in the

orders, which had in all cases either one of two rubber stamps impressed thereon:

"Terms, strictly net 30 days and 2 per cent. discount in 10 days, subject to draft when due," or "Positively no discount allowed other than specified on bill."

It appears that each and every invoice sent by the plaintiffs to the defendant for merchandise contained one or the other of these rubber stamp markings thereon.

Plaintiffs concede that Berger had authority to collect, and that the defendant is entitled to be credited with all the money that he actually paid Berger, whether Berger turned it over to the plaintiffs or not.

The declaration contains a special count setting up a conspiracy between King, Berger, and French to defraud the plaintiffs, and sets forth the invoice prices of the goods shipped to King, the credits as they appear upon the books of the plaintiffs, and the alleged fact that it was discovered that some of the credits in the ledger were fictitious and raised from the amounts actually shown by the cashbook. The declaration also contained the common counts, including a count for goods sold and delivered, and a bill of particulars was filed setting forth the amount of the goods sold and delivered.

Both of the plaintiffs testified in the case, and both claimed that neither had any knowledge nor notice at any time that Berger was assuming to give King any discounts or allowances other than those named in the invoices until August, 1907, when it is claimed the fraud was discovered and that Berger made a complete confession, in which it appeared that Berger and French, acting in conjunction, embezzled moneys collected, and gave unauthorized discounts to increase Berger's sales.

Upon the trial, the defendant, King, seemed to rely upon the following defenses: (1) He claimed that he instructed his clerk, one Minnis, in July or August, 1906, to call up the plaintiffs, and Minnis claims that he got plaintiff Marx on the telephone and asked him why the

invoices came billed higher than the prices that Mr. Berger made to Mr. King, and that Mr. Marx stated that Mr. Berger and Mr. King had an understanding, and to settle with Mr. Berger, and that it would be all right. Evidence to this effect was taken under objection and exception on the part of the plaintiffs, and Mr. Marx denied any such conversation or arrangement. (2) That Berger had given discounts to other customers of the plaintiffs which, although a fact, was shown not to have been with the knowledge of plaintiffs or Mr. King. This evidence was received under objection and exception, and will be referred to more specifically hereafter.

There were many exceptions taken by the plaintiffs upon the trial. There was a motion for a new trial, which, having been denied, exceptions were duly taken, and there are 83 assignments of error in the record. We shall not discuss all of them. They may be discussed under three headings:

(1) The admissibility of certain testimony showing the dealings of the plaintiffs through Mr. Berger, their agent, with defendant King and other customers.
(2) The argument of counsel to the jury.
(3) The refusal of the court to grant certain requests in the charge to the jury.

1. Assignment of error 56*a* involves the question as to whether it was competent to receive the evidence of the witness Minnis as to the telephone communication, which he claims he had with the plaintiff Marx, relating to the right of the said Berger to allow discounts and allowances to the defendant. The plaintiffs presented a request to charge, reading as follows:

"The plaintiffs in this case have proved the sale and delivery of merchandise of the invoice value of $16,197.30 from January 1, 1906, to August 31, 1907. I charge you that there is no evidence in this case from which you have the right to infer that Sidney Berger, plaintiffs' agent for soliciting orders, had any authority to give any discounts or allowances to defendant other than those stated upon the invoices."

This request was refused, and the following language occurs in the charge of the court:

"In this case, however, the defendant insists that in all of his large dealings with the plaintiffs they have always made him discounts and allowances; that he had a distinct understanding with Mr. Marx, the leading member of this firm of the plaintiffs, that he should have these discounts and allowances; that he refused to trade with him except upon those terms; that it was so understood by the plaintiffs; and that the plaintiffs distinctly explained and waived the conditions stated in their invoices; and that in July or August, 1906, when Mr. King raised this question over the phone through Mr. Minnis, that Mr. Marx replied that Mr. Berger and Mr. King had an understanding about the question of discounts and allowances, and that whatever settlements were made by them would be all right. Now, gentlemen of the jury, if you find from the evidence that these contentions on the part of the defendant are sustained and established, then the plaintiffs are bound by such understanding, and the defendant is entitled to your verdict, except as to the amount conceded."

The plaintiffs insist that it was error to receive evidence of this nature, and that the court erred in refusing to give plaintiffs' requests in charging the jury as above. It is claimed by plaintiffs that this was permitting parol evidence to alter, or vary, or abrogate, a written contract. It will be borne in mind that this claimed conversation arose at a time when defendant King's attention was called to the fact that goods were shipped to him with invoice prices larger than those agreed upon with Berger. There is no legal objection to the receiving of parol evidence of subsequent agreement to vary, and even to abrogate, a written contract, if it were conceded that this was such contract. The rule which it is sought to apply is the well-known rule that contemporaneous parol evidence will not be received to alter or vary the terms of a valid written instrument. The distinction is plainly pointed out in the case of *Cohen* v. *Jackoboice*, 101 Mich. 409 (59 N. W. 665), cited by counsel for plaintiffs. The true rule is laid down in 17 Cyc., at page 734.

In support of the rule that a subsequent parol agreement may abrogate or modify the contract, we need only refer to two or three of our own cases. *Town* v. *Jepson*, 133 Mich. 673 (95 N. W. 742). In *Mouat* v. *Bamlet*, 123 Mich. 345 (82 N. W. 74), where the parties had acted under a parol agreement which had been substituted for one in writing, and had made settlements thereunder, they were held estopped to claim under the old contract; and that the old contract had been waived. *Wolff* v. *Alpena National Bank*, 131 Mich. 634 (92 N. W. 287).

In our opinion, the question of the altering of a valid written instrument by parol, is not here involved; and we think it very clear that if the plaintiffs, pending the dealings between the parties, when their attention was called to the fact that Berger was making prices to the defendant which were below the invoice prices, stated to the agent of the defendant, intending that it should be communicated to him, that any prices or arrangements made by Mr. Berger would be satisfactory to them, and would be all right, and that the dealings continued, the defendant relying upon such statement in all the subsequent settlements that were made with Berger, the plaintiffs are estopped to claim that no such arrangement was made, or that it was not binding. When the plaintiffs referred the defendant to Mr. Berger as the person who had authority to fix prices and settle accounts, they held him out to the defendant as clothed with authority in that respect. This court has repeatedly held that if one party refers another to a third person for information, as authorized to act or answer for him, he will be bound by the actions and statements of the person so referred to. *Reeves* v. *Kelley*, 30 Mich. 132; *Beebe* v. *Knapp*, 28 Mich. 53; *Beebe* v. *Young*, 14 Mich. 136; *Rosenbury* v. *Angell*, 6 Mich. 508. We find no error in this action of the court.

2. This brings us to the other main claim of error urged by the plaintiffs upon the trial of the case. It appears that the court permitted the defendant to show that Berger had dealt in a similar manner with divers other par-

ties, in that he had allowed discounts and allowances to them differing from the invoices, and that this had been done without the knowledge of either of the plaintiffs, or of the defendant, King. This may be said of the testimony of the witnesses Leo Gruner, Fred Tagg, A. Levy, John Wahr, and John Lambert. This question was raised by objection and exception to the testimony, by motion to strike out the testimony, and by request to charge, and the question is presented by the 81st assignment of error.

Plaintiffs' 22d request to charge was as follows:

"There is evidence in this case that Berger gave discounts and allowances to dealers other than the defendant; the evidence further shows that plaintiffs had no knowledge nor any information on the subject, nor did defendant, King. I charge you therefore that the giving by Berger of discounts or allowances to others under these circumstances may not be considered by you as a holding out by plaintiffs of said Berger as having any authority to grant discounts or allowances to King, nor as a circumstance from which King had a right to infer or believe that Berger had such authority."

This request was refused, and the court charged the jury in the following language:

"The evidence as to the dealings of Berger with others was admitted in evidence as tending to show his apparent authority, and to characterize his agency, and as affecting the probable knowledge of the plaintiffs as to the conduct of their agent. If, in point of fact, Mr. Berger had no such authority, and the plaintiffs were ignorant of the conduct of Mr. Berger, inasmuch as the defendant had no knowledge of those transactions, it would in itself be no justification or protection to him, and his defense would fail, unless the defendant himself had express authority from Mr. Marx himself to settle with Mr. Berger according to their understanding."

The last portion of the above charge attempts to qualify the former portion, but it is the claim of the plaintiffs that the admission of the evidence was error, and that the whole subject should have been taken from the consideration of the jury, and that it was error to submit the question at all to the jury.

The doctrine is clearly stated in 31 Cyc. p. 1331, *et seq.*, as follows:

"While as between the principal and the agent the scope of the latter's authority is that authority which is actually conferred upon him by his principal, which may be limited by secret instructions and restrictions, such instructions and restrictions do not affect third persons ignorant thereof; and as between the principal and third persons the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. The apparent authority so far as third persons are concerned is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. The authority must, however, have been actually apparent to the third person who, in order to avail himself of the rights thereunder, must have dealt with the agent in reliance thereon in good faith, and in the exercise of reasonable prudence, in which case the principal will be bound by acts of the agent performed in the usual and customary mode of doing such business, although he may have acted in violation of private instructions, for such acts are within the apparent scope of his authority."

In 1 Am. & Eng. Enc. Law (2d Ed.), pp. 989, 990, the author, after discussing the authority which an agent has been given by his principal, proceeds as follows:

"Beyond that, he is bound by the acts of the agent within the apparent authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent within his express authority the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent within the scope of the authority which he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such case would be to enable him to commit a fraud upon innocent persons."

In Mechem on Agency (Ed. of 1889), § 84, that author says:

"It may therefore be stated as a general rule that whenever a person has held out another as his agent, authorized to act for him in a given capacity; or has knowingly or without dissent permitted such other to act as his agent in such capacity; or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent, authorized to act in that capacity; whether it be in a single transaction or in a series of transactions, his authority to such other to act for him in that capacity will be conclusively presumed, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith, and in the exercise of reasonable prudence, and he will not be permitted to deny that such other was his agent, authorized to do the act that he assumed to do, provided that such act is within the real or apparent scope of the presumed authority."

It would seem that we need not go outside of the decisions of this court upon this question. They have been so numerous, and have arisen under so many different circumstances, that they seem to cover the entire field. *Jewett* v. *Bryant*, 159 Mich. 345 (123 N. W. 1097); *Davis* v. *Kneale*, 97 Mich. 72 (56 N. W. 220); *Wierman* v. *Sugar Co.*, 142 Mich. 422 (106 N. W. 75).

In the last-named case Justice GRANT said:

"The apparent power of the agent is to be determined by the acts of the principal, and not by the acts of the agent. * * * No act of the principal in this case appears upon the record to show that it clothed its agent with authority to pledge its liability to pay the debts of third persons. The evidence here is one of original authority. There is no evidence of ratification."

See, also, *Heffron* v. *Armsby*, 61 Mich. 505 (28 N. W. 672); *Barry* v. *Insurance Co.*, 62 Mich. 424 (29 N. W. 31); *Verdine* v. *Olney*, 77 Mich. 310 (43 N. W. 975); *Leo Austrian & Co.* v. *Springer*, 94 Mich. 343 (54 N. W. 50, 34 Am. St. Rep. 350); *Hirschmann* v. *Railroad Co.*, 97 Mich. 397 (56 N. W. 842).

In *Clark* v. *Dillman*, 108 Mich. 627 (66 N. W. 570), Justice HOOKER said:

"It is undoubtedly the law that a person may be bound by the representations and acts of another, as agent, where there has been such a holding out as to reasonably lead one dealing with him to believe in the existence of such agency. But all of the elements of an estoppel must be present. There must be conduct calculated to mislead, and it must be under circumstances which justified the claim that the alleged principal should have expected that the representations would be relied and acted upon; and further, it must appear that they were relied and acted upon, in good faith, to the injury of the innocent party."

In all of these cases the action of the agent had been brought home to the principal, and recognized and ratified; and it appeared that the other party had relied upon the apparent authority, and had acted in good faith. Many authorities in other States may be cited. *Gallinger* v. *Traffic Co.*, 67 Wis. 529 (30 N. W. 790); *Law* v. *Stokes*, 32 N. J. Law, 249 (90 Am. Dec. 655); *Edwards* v *Dooley*, 120 N. Y. 540 (24 N. E. 827); *Olcott* v. *Railroad Co.*, 27 N. Y. 558 (84 Am. Dec. 298); *Beattie* v. *Railroad Co.*, 90 N. Y. 643; *Creighton* v. *Finlayson*, 46 Neb. 457 (64 N. W. 1103); *Brown* v. *Eno*, 48 Neb. 538 (67 N. W. 434).

In the light of these authorities we feel compelled to hold that the court erred in receiving this testimony and allowing it to go to the jury. Especially is this true with reference to the testimony of the witnesses Gruner, Tagg, and Levy. The testimony of John Wahr and John Lambert, in so far as it contradicted the testimony of plaintiffs and showed admissions made by them, was admissible for that purpose, and should have been so submitted to the jury. But we are constrained to say that neither for the purpose of showing apparent authority, nor as characterizing the employment, was it proper to submit this evidence to the jury, and in our judgment it was reversible error to do so.

3. We have read this record carefully and find no other

error worthy of consideration. The main charge of the court finds support in our own decisions; and in *Leo Austrian & Co.* v. *Springer*, *supra*, many of the principles are discussed which are embodied in the charge. We find nothing in the conduct of counsel in the argument of the case that is worthy of consideration, but we feel compelled to reverse the case upon the error pointed out.

Judgment reversed, and new trial ordered.

BIRD, C. J., and MCALVAY, BROOKE, and BLAIR, JJ., concurred.

HATHAWAY *v.* VAUGHAN.

1. CORPORATIONS—STOCK—SALE—CONTRACTS.
   A corporation may sell its capital stock at par and at the same time, in good faith, sell its personal property for a sum payable partly in cash, partly, if at all, from dividends thereafter to be declared upon the stock issued to the vendee of the personalty, and may not, without disaffirming the agreement and retendering the consideration, recover the value of the personal property.

2. CONTRACTS—IMPLIED AND EXPRESS OBLIGATIONS.
   The existence of an express contract executed upon both sides precludes recovery upon an implied contract relating to the same matters.

3. SAME—ACTIONS.
   The commencement of an action of assumpsit affirms a contract where one exists and has not been disaffirmed.

Case made from Eaton; Smith J. Submitted June 9, 1910. (Docket No. 34.) Decided July 14, 1910.

Assumpsit by C. Roy Hathaway, trustee in bankruptcy of the Dolson Automobile Company, against Barret D. Vaughan, for the price of an automobile. A judgment for defendant is reviewed by plaintiff on writ of error. Affirmed.

Frank A. Dean and *Thomas, Cummins & Nichols*, for appellant.

Garry C. Fox, for appellee.

This is an action in assumpsit to recover the value of an automobile, sold by plaintiff's insolvent to defendant. The facts agreed upon by the parties and adopted by the court are as follows:

"(1) That the Dolson Automobile Company was incorporated under the general law for the incorporation of manufacturing and mercantile enterprises on the 11th day of October, 1905.

"(2) That they were incorporated for the purpose of manufacturing and selling automobiles, and did manufacture and sell automobiles from the date of the incorporation up to the time of its bankruptcy.

"(3) That one L. M. Disney was the general manager of said corporation and had authority from said corporation to sell its stock.

"(4) That he (Disney) had a contract with the corporation to sell its stock; he to receive as compensation and expenses the sum of 15 per cent. of the stock sold.

"(5) That one George Stephens was employed by Mr. Disney to sell such stock, and had a talk with the defendant in regard to the purchase of stock, and also of a sale to the defendant of an automobile.

"(6) That he (Stephens) represented that the company at such time could declare a dividend of 50 per cent., and offered the defendant, if he would buy 100 shares of stock at par value of $1,000, that the company would accept the dividends on such stock for four years, and that such dividends with a cash payment of $500 should pay for the automobile, if any, which he (the defendant) purchased of the Dolson Company.

"(7) That the defendant came to Charlotte and had a talk with Disney, who verified such offer so made by Mr.

Stephens, and did so after he had a talk with the three Dolsons, namely, John L. Dolson, D. Eldo Dolson, and W. Elton Dolson; the three being directors of said corporation.

"(8) That Stephens, as an inducement to defendant to purchase said stock and said automobile, represented to him or furnished him with an itemized statement showing that the total cost of said automobile, which was sold at the market price of $2,500 without top, was $1,272.06; that that was, as appeared later, in the nature of an estimate; and that the real cost, including cost of sale, was something like $1,400.

"(9) That on the 1st day of February, 1907, the defendant, after talking the matter over with Mr. Disney, and after Mr. Disney had referred the matter to the three Dolsons above named, entered into a contract or gave what might be called a note, which reads as follows:

"'CHARLOTTE, MICHIGAN, Feb. 1, '07.

"'Four years after date, for value received, I promise to pay Dolson Automobile Company of Charlotte, Michigan, $2,670.00, for one Dolson automobile, Model H, with full lined top complete with all accessories. It is understood that payment of this paper is to be by dividends on certificate of stock 127 and in no other way, and on the dividends accruing on this stock in the next four years. If at the end of four years from date said dividends have not paid this note, it is to be delivered to the signer paid, excepting $500, which is to be paid previous to the 15th of February. Machine to be delivered to B. D. Vaughan, Bellevue, Michigan, not later than April 1, 1907.'

"(10) That such contract was signed by the defendant and accepted by the Dolson company, and on the same day the defendant paid to the Dolson Automobile Company $1,000 for 100 shares of stock pursuant to said contract, which certificate of stock was numbered 127.

"(11) That later and on or before the 15th day of February the defendant paid the $500, which was indorsed upon the contract above referred to.

"(12) That the defendant has paid no other sum or sums for the automobile which was contracted for and delivered to him on April 1, 1907.

"(13) That at the time the Dolson Automobile Company and the defendant entered into this contract, and at the time the defendant purchased the stock referred to, the company was insolvent; but this fact was known

neither to the officers of the corporation nor to the defendant.

"(14) That the company never earned or declared any dividends.

"(15) That on the 9th day of July, 1907, at a meeting of the directors of said corporation, there were also present by representatives a large number of creditors; that it was arranged there by the directors of the corporation that a competent bookkeeper to be named by the directors was to be placed in full charge of the affairs of the company; that the bookkeeper was to be placed under a good and sufficient bond to be paid for by the company conditioned to account to the said company and to the said creditors of the said company weekly as to all moneys received and disbursed in carrying on the said business; that a competent superintendent was to be employed by said Dolson Company to have the entire charge of manufacturing the output of said corporation; that the directors should act in co-operation with the creditors and should hold weekly meetings on Thursday of each week at 4 o'clock p. m., at which meetings there should be reports read of its financial affairs, and in case the creditors should deem it advisable they should be represented on said board of directors.

"(16) That the largest creditors of the company had agreed that no one of them should be preferred over any other in the way of collecting accounts.

"(17) That the Dolson Company was adjudicated a bankrupt on the 26th day of November, 1907, and on the 17th day of December, 1907, C. Roy Hathaway was appointed trustee; he being the plaintiff in this suit.

"(18) That the list price of the automobile which was purchased or of the class of automobiles one of which was purchased by the defendant was $2,500, and in addition thereto was a top at $150 and a speedometer at $20, for which the note was given, that being the purchase price, $2,670, and that that was the usual selling price of the machine."

The case was tried by the court, and a judgment was entered for defendant. Plaintiff has removed the case to this court for review by writ of error.

BROOKE, J. (*after stating the facts*). It is urged by appellant that the contract entered into between his insol-

vent and defendant was an absolute nullity; that it amounted in effect to an agreement on the part of plaintiff's insolvent to pay dividends upon defendant's stock, whether such dividends were earned or not; and that, the contract having been performed by the insolvent, the trustee may maintain an action in assumpsit, upon the ground that the defendant has accepted and appropriated the benefit of the contract—this alleged right of action resting, not upon the contract, but upon the duty, promise, or obligation springing from the property, money, or benefit conferred by plaintiff and received by defendant.

We think that appellant is in error upon each one of the foregoing propositions. There can be no doubt that the responsible officers of a corporation may sell its capital stock at par, and may likewise, in good faith, sell its personal property for a sum, part to be paid in cash, and the balance, if paid at all, to be paid from dividends thereafter to be declared upon the stock of the corporation sold to the vendee of the personal property in the same transaction.

It will be noted that the corporation did not agree to pay dividends upon the $1,000 of stock sold, to the amount of $2,170, within four years. It did agree that it would accept $500 in cash and such dividends upon the stock as might be declared, up to the amount of $2,170, within four years, in full consideration for the automobile, and further, that if, within said period, the dividends declared did not amount to $2,170, then the $500 cash, paid by defendant, should be accepted by the corporation in full of his obligation. This contract was entered into between the corporation and defendant in good faith, and in the evident belief that the stock sold was worth the sum paid for it by defendant, and would produce dividends to meet the balance of the obligation. As a matter of fact, the stock was absolutely worthless. While this was unknown to the corporation, or its responsible officers at the time, it had the means of ascertaining the truth, while the

defendant was obliged to rely upon the representations of the corporation as to the value and probable earnings of the stock. This was not a contract between a corporation and a stockholder, but one between the corporation and a stranger, by the terms of which the stranger became a stockholder and vendee of certain personal property.

Plaintiff cannot recover upon the theory of an implied contract. The contract was express and fully executed upon both sides. Defendant has done all he agreed to do, and plaintiff's insolvent has done nothing more than it contracted to do. *Galloway* v. *Holmes*, 1 Doug. (Mich.) 330; *Van Fleet* v. *Van Fleet*, 50 Mich. 1 (14 N. W. 671); *Searles* v. *Reed*, 63 Mich. 485 (29 N. W. 884).

An action in assumpsit affirms a contract where there is one. *Galloway* v. *Holmes*, *supra*.

Aside from this, neither plaintiff nor his insolvent has attempted to avoid the contract. Plaintiff still retains the $1,500, the fruits of the contract to his insolvent, and now seeks to impose new and alien liabilities upon the defendant. The plainest elements of justice forbid such a course. As was said in *Parish* v. *Wheeler*, 22 N. Y. 494:

"The executed dealings of corporations must be allowed to stand for and against both the parties, when the plainest rules of good faith so require."

See, also, *Rehberg* v. *Tontine Surety Co.*, 131 Mich. 135 (91 N. W. 132).

The judgment is affirmed.

BIRD, C. J., and MCALVAY, BLAIR, and STONE, JJ., concurred.

In re HOYLES' ESTATE.

1. EVIDENCE—EXPERT AND OPINION TESTIMONY—INCOMPETENCY—WILLS.

   An opinion that a testatrix was incompetent, in proceedings for the probate of a will, may only be given after the witness has testified to circumstances upon which it is predicated and which tend to justify his conclusion.

2. SAME—WILLS—OPINIONS.

   A physician who attended deceased at intervals up to three days before she executed her will, and who saw her a few days after, who testified that she had locomotor ataxia, that she was nearly blind, and was helpless, that the disease had produced physical and mental debility, and stated other circumstances relating to her appearance and condition, is sufficiently qualified to express an opinion as to her competency to transact business.

3. WILLS—COMPETENCY—BURDEN OF PROOF.

   In a case where the evidence is conflicting as to competency of the testatrix, and the trial court has denied a new trial, and the burden of proof is on the defeated party, a verdict will not be set aside as contrary to the weight of the evidence, unless the case is a very clear one affording strong evidence that the jury was biased or prejudiced.

Error to Lapeer; Smith, J. Submitted June 9, 1910. (Docket No. 37.) Decided July 14, 1910.

Samuel Hoyles presented for probate the last will and testament of Euretta A. Hoyles, deceased. The will was allowed in probate court, and Elizabeth Briggs and another, contestants, appealed to the circuit court. A judgment for contestants is reviewed by proponent on writ of error. Affirmed.

Geer, Williams & Halpin, for appellant.

William E. Brown, for appellees.

STONE, J. The question in this case was upon the validity of the paper claimed by Samuel Hoyles, the appellant and proponent, as the last will and testament of Euretta A. Hoyles, deceased. The instrument was admitted to probate in the probate court, and contestants, two sisters of testatrix, appealed to, and prevailed in, the circuit court. The proponent has brought error. The main ground upon which the validity of the paper was assailed was that, at the time it was drawn and executed, the testatrix was not of sound and disposing mind and memory; but that her mental faculties were so enfeebled and overcome by disease as to render her incapable of properly understanding her relations to others, their relative claims upon her bounty, the particulars of her property, and the nature of the disposition made by the instrument. The following statement of facts is compiled from proponent's brief:

The testatrix, a single woman, died July 6, 1906, at the home of William Osborne in Lapeer county, aged about 52 years. The will in question was executed June 19, 1906. Miss Hoyles' father died when she was about two years old, and shortly after his death she was taken into the family of Samuel Hoyles of Aurora, Ill.; her mother being in poor circumstances. She was not legally adopted by him, but was raised by Samuel Hoyles and his wife as their own child, and lived in their family until she was 38 years old. They had no children, and Euretta did not know that she was not their child until she was 16 years old. She received her early education in the public schools of Aurora, and taught there and in a seminary for more than 20 years. She then went to the University of Michigan, where she graduated, and in the same year went to Lapeer as principal of the high school, which position she held for five years, during which time the children of William Osborne were her pupils. She then went to the Philippines as a government teacher, and remained there three years. The climate there proving injurious to her health, she returned

to the United States in the fall of 1904. She landed in New York, and went from there to Aurora, stopping a few days in Lapeer on her way. Her foster mother had died in the meantime, and she spent the winter in Aurora, boarding at the same place where Mr. Hoyles made his home. The plan was that she and Mr. Hoyles should thereafter live together. When she was a student at Ann Arbor, Mr. Hoyles visited her there, and, during one or more of the summer vacations, took apartments where they spent the summer together. He also visited her while she was teaching in Lapeer. In the spring of 1905 she was afflicted with a nervous disease called "locomotor ataxia." She had become weak and emaciated, and went to a sanitarium at Castile, N. Y., hoping to be benefited, and intending to return to Aurora. She soon became satisfied that she could not be benefited by the treatment at the sanitarium, and she wrote to a niece living not far from there, proposing to go and spend some time there. Not hearing from her after waiting a few days, she started home to Aurora. She stopped at Lapeer to visit friends. She went into the country to spend a few days at the farm home of Mr. Osborne, and, believing that the conditions there would prove beneficial to her health, she arranged with the Osborne family to permit her to make a more protracted stay. She then sought to have Mr. Hoyles come there to be with her; but the condition of his health would not permit, and he was not able to go until June 15, 1906, about a year after Miss Hoyles went to live with the Osbornes. Soon after he arrived, she asked him to draw her will. He suggested that this could better be done by a lawyer, but finally drew it for her June 19th, and it was witnessed by Mr. Osborne and his son. During the year she was at Osborne's she required a good deal of care, being unable to dress herself, and this, and many more unpleasant duties, were discharged by Mrs. Osborne. Miss Hoyles paid $3 a week for her board and also for washings. Her estate consisted of about $1,000, nearly all in money. By the terms of the alleged will,

Mr. Hoyles was to have $300, and there were other small bequests to his relatives aggregating $125, and $50 to the daughter of Mr. Osborne. Her trunk of clothing was to go to her sister, Mrs. Briggs, one of the contestants, and Mrs. Osborne was made residuary legatee.

Miss Hoyles had executed a prior alleged will on April 27, 1906, at the home of Dr. Blake at Lapeer, in and by which she had given Mr. Hoyles $100, Mrs. Cora Hoyles $25, Mrs. Osborne $50, and the balance to be equally divided between her two sisters, the contestants, after taking out $25 for each of her three nieces, and $50 for a monument; and some gifts of personal effects to friends were made. It was the claim of proponent's counsel on the trial at the circuit court, that there was no evidence in the case that would warrant the jury in finding a verdict against the will of June 19th, and they asked the court to direct a verdict, which it refused. A motion for a new trial was made on the ground that the testimony of the only witness for the contestants was incompetent, and that the verdict was contrary to the weight of evidence. The motion was denied, and by exceptions and assignments of error the said questions have been raised and argued.

Dr. William Blake was the principal witness for the contestants, and it is the claim of the proponent that his testimony, as to the mental condition of Miss Hoyles, was incompetent, for the reason that he did not testify to any facts or circumstances that would sustain the opinion he expressed. We shall not undertake to give all the testimony of Dr. Blake which is contained in this record, but enough to indicate the nature and trend of it. He testified: That he had lived in the city of Lapeer 18 years. Was a physician, and had been in the practice of medicine for over 30 years. That he knew Miss Hoyles in her lifetime, and knew her during the five years in which she taught school at Lapeer, and that she had been a frequent visitor at his home. That she had visited his home after her return from the Philippines in the fall of 1904. That

members of his family corresponded with her while she was in the Philippines. That by invitation she was present at the marriage of his daughter in June, 1905, and remained some days, probably a couple of weeks, in the family as a guest. That when she returned from the Philippines he observed she was in a very poor condition, suffering from nervous trouble. That she was very weak and debilitated, and very thin in flesh. That she stayed a few days upon her return from the Philippines and then went to Aurora. In June, 1905, he noticed she was in very poor health. That especially the nervous disease was then progressing. That she was then afflicted with locomotor ataxia. That she went to a sanitarium in the State of New York, for a time, in the spring of 1905, returning to his house in June, and was there a few days off and on, and that soon after she went to Mr. Osborne's to live. That he saw her frequently, and observed that the nervous trouble was gradually growing worse, so that at times she was not able to get up or arise from a chair, and when she did so she staggered. That she had paid a visit to him and his family in the month of April, 1906, was there some two or three days, and that while there, on the 27th of April, his wife, at her request, prepared the will of that date. He further testified that he saw her the last Sunday previous to her death, and the Sunday before that. That she died July 6th. Also that he saw her about the middle of June. He had not been her physician, but in the fall of 1905 had treated her for an ulcer upon her foot. The relations between herself and his family had been very close. That she had issued two small volumes of poems, and that one of these books was dedicated to his wife. These friendly relations continued. During the second Sunday before she died, he saw her, and he testified that she was so nearly prostrated that she could not see distinctly. She could only talk in whispers. That her condition continued to grow worse, and on the second Sunday he thought she was totally blind, and that the disease from which she suffered is one that leads to the

deterioration of the nerves. That the nerves become hard and deteriorated, and that the optic nerve becomes affected, and that persons frequently become blind before death with this disease. That the physical condition becomes weak and debilitated, and that the brain suffers with the rest of the body. That the brain is the center of the nervous system. That this particular disease is affecting to the nerves of the trunk and spine, leads to great inanition, loss of flesh, muscles become hard and weak, and the digestion is affected; and, in fact, the whole system is broken up, and with it the brain becomes weak and feeble. That he saw Miss Hoyles at Mr. Osborne's on the 16th day of June, three days before the will in question was drawn. He took Mr. Hoyles up there and left him. He noticed that she had been failing very rapidly since he last saw her. That she was becoming weaker and more debilitated in the way of helping herself, and by loss of flesh she had become a mere skeleton. In fact, her face was drawn, mere skin and bones, and presented a skeleton-like appearance.

After giving testimony of this nature, Dr. Blake was asked the following questions:

"*Q.* From the progress of the disease and the condition you saw her in that day you have described, what would you say about her being able to remember her relatives or beneficiaries at that time without prompting?"

Under objection and exception he answered:

"*A.* I think she could not remember.

"*Q.* What would you say with reference to her being able to remember all of her affairs and property interests?

"*A.* I think she could not remember.

"*Q.* Doctor, was she in a mental and physical condition to transact any business requiring exercise of the judgment or reasoning faculties and the consecutive continuation of thought?

"*A.* No, she was not."

Upon cross-examination Dr. Blake testified that he never heard her say or do anything that would show she

was not mentally competent, but he judged of her condition from her general appearance and the recognized progress of the disease. He testified that he thought she would not be able to call to mind friends or property unless they were suggested to her; that he made no test to determine her mental competency, but based his opinion upon her weakened physical and mental condition resulting from the progress of the disease. He further said:

"The disease that she was suffering from is one that we call locomotor ataxia, or disease of the spinal cord, and nerves coming from it; and the peculiarity of that disease is the general loss of power: First, local loss of power generally in the lower limbs, and that is progressive, goes from bad to worse. There is connected with it loss of flesh, loss of nutrition. Nutrition becomes poor, and if the patient lives long enough not only the spinal cord, but the general nervous system and the brain itself become affected, and the brain is somewhat hardened, and the optic nerves especially are liable to become affected, so that the patient may early become blind. It is not necessarily the case that blindness occurs, but it may. I wish to impress that it is a progressive disease, from bad to worse, and causes such great debility that the person before she dies is liable to be very weak and debilitated, and may be in various nervous conditions. That is as far as I think it is necessary for you to understand what the case is, and how it leads to the termination, and what effect it has upon the general system, and through the general system on the brain itself. The blood supply becomes poor; nutrition is poor; the person cannot assimilate food enough; the blood doesn't supply the brain properly, so that it becomes so dull that the person may be around but not know some things, somewhat disconnected, and at times not able to think in a consecutive manner; and this may come even before the brain itself has any organic disease. It will in time. Any organic disease is where a change takes place in the structure of the brain or in the nervous system, and the principal thing is that the nutrition becomes so poor, the ability to take food is poor, and the body is so poorly fed that it becomes thin to a mere skeleton, and the supply of blood to the brain is not sufficient to keep it in an active or normal condition."

He further testified that it was not merely because Miss

Hoyles was so poor physically that led him to say she was not able to make a will, but it was his knowledge of her condition and the disease, and its progress, from which she was suffering; that, while he did not gain this information by any tests, he did gain it from observation and anxiety to know the condition of the woman, as she was, and had for years been, a great friend of the family.

Dr. Blake was really the only witness offered by the contestants to show mental incapacity. There were a number of witnesses who testified on behalf of the proponent; but a careful examination of the record will disclose that many of these witnesses, upon cross-examination, gave evidence tending to strengthen the position of the contestants. For instance, the witness Mrs. Polglase, the wife of Dr. Polglase, testified to an intimate acquaintance with Miss Hoyles. She saw her about a week after the will in question was made. Again she saw her in July, just before her death, when she was helpless. She testified:

"The last of June she could help herself a little. The last visit she would need some one to help her out of the chair. Up until the last visit I did not see much change in her. The condition was practically the same all the spring, May and June. She looked pretty bad to me. Her flesh was gone, and she was a mere skeleton. Skin drawn over her face. There was nothing but the bone, and it was surprising to think that she knew what she was doing. She had barely enough vitality to live."

There was other evidence that Miss Hoyles was totally blind during the last two weeks of her life. The witness Mary Osborne, one of the legatees in the will, wrote to Mrs. Briggs, one of the sisters of testatrix, on July 19, 1906, detailing the circumstances of her death. She said:

"During the winter she could not walk because of abscesses which formed on foot and knee. From that time there were few meals that she ate with us. We had to carry them to her. Gradually her appetite failed, and this, of course, reduced her strength. During June she failed very fast. We supposed Mrs. Blake told you of

Miss Hoyles' condition. Miss Hoyles became blind about two weeks before she died, and was unable to help herself in any way for about three weeks. It was certainly pitiful to see her. The last week she was so weak she couldn't utter a whole sentence at a time."

It is worthy of note that in the will of June 19th no reference was made to the will of April 27th. In fact, Mr. Hoyles testified that testatrix did not tell him of the former will, and that he had never seen it, and did not know its contents, but had learned from Mrs. Blake that such former will had been made. There was other testimony that he did know its contents and said he had read it, and that the last will was not satisfactory, but was better than the first one. He testified that he drew the will from memoranda which he had made at dictation of testatrix; that after drawing the will he read it to her twice; and that she said it was right. Contestants claim that here was evidence of suggestion.

1. This raises the principal question in the case. The correct rule is well stated in a number of the cases cited by counsel for proponent. In *White* v. *Bailey*, 10 Mich., at page 161, Justice CAMPBELL, speaking of the testimony of medical experts, said:

"Dr. Blumerick was introduced, apparently as a medical expert, to give opinions not supposed to be receivable from others. Undoubtedly there are many cases in which medical witnesses can do this. They may sometimes, where a question arises upon the proper scientific conclusions depending on facts sworn to by others, give their opinions upon a hypothesis presented to them, as to what such facts denote. Before doing so, however, the witness must be examined as to his qualifications as an expert. But when he is examined concerning facts which have occurred under his own observation, and his opinion is required concerning the proper inferences from those facts, he occupies, as to the facts themselves, the same position with all other witnesses, although there may be some questions arising out of the facts, which he can answer, and which others cannot. Upon questions of mental capacity, even nonprofessional witnesses may give evidence, not only of specific facts and conduct falling under their own

observation, but also of the impression they derived at the time, involving to some extent matters of opinion. The difference between them and those who, in addition to being eyewitnesses, are also experts, is *that there may be peculiar indications which the latter understand better, and concerning which they can express an opinion as scientific deductions, and not mere common sense inferences.* But neither class can be allowed in any case to give an opinion upon mental capacity or condition, without first showing the circumstances and facts upon which that opinion is based. This is necessary for two reasons: *First*, it is necessary in order to enable other experts to determine whether the opinions expressed by the witness are correct, and to enable the parties to contradict them, if wrong. *Second*, it is necessary in order that, if an opinion is given on a mistaken or perverted statement of facts, the truth may be elicited from others to destroy the foundation of the conclusions. And a third reason might be mentioned, which is that the court and jury may know, from his opportunities, what means the witness had of forming any opinion at all. These are rudimentary principles which cannot safely be departed from."

In *Kempsey* v. *McGinniss*, 21 Mich., at page 138, Justice CHRISTIANCY said:

"But in case of such professional witnesses, as well as in that of unprofessional witnesses, who are allowed to give their opinions only from personal observation, the facts upon which the opinion is founded must be stated, and the jury must be left to determine whether the facts stated, as well as the opinions based upon them, are true or false."

In *Beaubien* v. *Cicotte*, 12 Mich., at page 502, Justice CAMPBELL said:

"The general doctrine is that all witnesses speaking from observation must, as far as possible, state such facts as they can give as the basis of their opinion. This rule does not require them to describe what is not susceptible of description, nor to narrate facts enough to enable a jury to form an opinion from those alone. This would be impossible; and, if it could be done, there would be no occasion for any opinion from the witnesses. It is a matter of daily experience that the opinion of an intelligent

and familiar eye-witness is the only satisfactory means of ascertaining mental condition, or disposition, or expression, or any other of those impalpable but important facts upon which men rest in dealing with each other. There is no substitute for personal observation. But, if witnesses were not compellable to state such facts as are tangible, there would be no means of testing their truthfulness. * * * But no testimony can be of any real value, unless it appears the witness had adequate means and opportunities for forming some conclusion."

See, also, *Prentis* v. *Bates*, 93 Mich. 241 (53 N. W. 153, 17 L. R. A. 494).

In *O'Connor* v. *Madison*, 98 Mich. 188 (57 N. W. 107), Chief Justice HOOKER, after referring to *Beaubien* v. *Cicotte*, *supra*, said:

"This opinion, if read in the light of the writer's opinion in the case of *White* v. *Bailey*, 10 Mich. 161, leaves no room for doubting that it is the settled law of Michigan that an opinion that a testator was incompetent can only be given when the witness has testified to circumstances upon which it is predicated, and which to some extent justify it. (Citing cases.) The extent to which such proof must go cannot be limited by an inflexible rule. It must depend upon the familiarity of the witness with the testator, the character of the disqualification, the nature and number of extraordinary circumstances detailed, and proximity to the act involved in point of time. Taken as a whole, they should move the judicial discretion of the trial judge, by apprising him that the witness may fairly doubt the competency of the person upon reasonable grounds; and this discretion must be carefully exercised."

See, also, *People* v. *Borgetto*, 99 Mich. 340 (58 N. W. 328); *Roberts* v. *Bidwell*, 136 Mich. 191 (98 N. W. 1000); *Sullivan* v. *Foley*, 112 Mich. 1 (70 N. W. 322).

In the light of this record, and of the decisions cited above, we are of opinion that it cannot be said that Dr. Blake did not have the opportunity and means, and sufficient familiarity with the condition of the testatrix, to enable him to express an opinion as to her mental capacity. We think that he stated sufficient grounds upon which to base an opinion to warrant the court in per-

mitting his evidence to go to the jury. The facts were within his own observation. He gave the reasons for this opinion, referring to the appearance of the testatrix, and the progress of the disease. There was proximity in time; he having seen her only three days before the alleged will was made, as well as a few days thereafter, and down to her death. The facts and circumstances stated by him were sufficient, in our judgment, to move the judicial discretion of the trial judge, and, in permitting this evidence to go to the jury, we think there was no error.

2. It is also urged that the verdict was against the weight of the evidence, and it is claimed that the circuit judge so held in denying the motion for a new trial.

The question of undue influence was withdrawn from the jury, and the sole question was as to the mental competency of the testatrix. There was evidence *pro* and *con* upon this last question, and in our opinion it presented a fair question of fact for the jury to consider, and the burden of proof was on the proponent. *In re Mansbach's Estate*, 150 Mich. 348 (114 N. W. 65). While the language of the circuit judge would indicate that in his opinion the verdict was contrary to the weight of evidence, it is evident that he thought there was a conflict in the evidence, and that the verdict was not so clearly against the weight of the testimony as to call for a vacation of the verdict, for he refused to disturb it. The verdict certainly was not contrary to the undisputed evidence, as was the case in *County of Montmorency* v. *Putnam*, 144 Mich. 135 (107 N. W. 895), cited by the circuit judge. In *Stevens* v. *Michigan Soap Works*, 134 Mich. 350 (96 N. W. 435), this court held that the verdict of a jury will not be set aside, on writ of error, on the ground that it is against the weight of the evidence, unless it clearly appears it is against the overwhelming weight of the evidence. That cannot be said here. In *Lovely* v. *Railway Co.*, 137 Mich. 653 (100 N. W. 894), Justice MONTGOMERY, speaking for the court, said:

"The case must be a very clear one, affording very strong evidence that the verdict is the result of bias or prejudice, to justify this court in overturning a decision of the trial judge adverse to a new trial on this ground"

—viz., on the ground that the verdict was opposed to the great weight of the evidence. We cannot say that the verdict was not supported by evidence, nor that it was at variance with the great preponderance of the evidence; nor can we see any indication of passion or prejudice on the part of the jury. They found a verdict for contestants upon a fair issue of fact, and under proper instructions. We find no prejudicial error in the record.

The judgment of the circuit court is affirmed.

BIRD, C. J., and MCALVAY, BROOKE, and BLAIR, JJ., concurred.

ELY *v.* DETROIT UNITED RAILWAY.

1. APPEAL AND ERROR—SAVING QUESTIONS FOR REVIEW—EXCEPTIONS.

   Although counsel for plaintiff omitted to except at the time to the court's ruling that he must elect between a count under the death act and a count under the survival act, a subsequent exception to the ruling that the plaintiff could not recover under the survival act should be held to apply where the election was made because of the ruling.

2. PLEADING—ELECTION BETWEEN COUNTS.

   A ruling that plaintiff must elect under which count he would proceed was erroneous, where the decedent was struck by a falling trolley pole and wheel of the car on which he was riding, and died after being unconscious from five to twenty minutes.

3. DEATH—NEGLIGENCE—SURVIVAL ACT.

The direct cause of death not operating continuously during the period in which the decedent survived, it was a question for the jury whether his administratrix was entitled to recover under the survival act.

Error to Wayne; Donovan, J. Submitted June 9, 1910. (Docket No. 35.) Decided July 14, 1910.

Case by Bertha Ely, administratrix of the estate of Henry Austin, deceased, against the Detroit United Railway and the Detroit, Monroe & Toledo Short Line Railway for the negligent killing of plaintiff's intestate. A judgment for plaintiff for an insufficient amount is reviewed by her on writ of error. Reversed.

Clarence P. Milligan, for appellant.

Brennan, Donnelly & Van De Mark, for appellees.

BLAIR, J. The plaintiff's intestate in this case, Henry Austin, met his death as the result of being struck on the head by the trolley wheel and pole of an interurban car of the Detroit, Monroe & Toledo Short Line upon the back platform of which he was riding, and this case was instituted by the plaintiff as administratrix and daughter of the deceased to recover damages for his death. The declaration contained two counts; one setting up liability under the "death act," and the other alleging liability under the "survival act." The length of time which elapsed between the fatal blow and the complete extinction of life is uncertain. According to the highest estimate, about 20 minutes elapsed from the time of the injury until the car reached Rockford. At this place a physician was sent for and procured, which must have consumed some time. The physician testified:

"The man was on the platform of the car when I got there, and I looked at the man, and he was breathing at that time, and he was alive, and blood was coming out of his mouth and some blew on my vest. The man did not

live longer than a minute after I got there. I raised the man up and tried to see what his pulse was and noticed that it was nearly gone. He had a contusion on the back part of the base of the brain, five inches and a half. * * * Mr. Austin was unconscious during the time I saw him. The breathing was not a normal breathing, still he breathed so that the blood came out of his mouth on my hand."

The lowest estimate of the time between the accident and taking Mr. Austin from the car at Rockford was 5 or 10 minutes. At the close of plaintiff's case the following occurred:

"*Mr. Brennan:* I would like Mr. Milligan to elect at this time which remedy he takes.

"*The Court:* Under the ruling of the cases you should elect which remedy you seek to recover.

"*Mr. Milligan:* Of course to save the record, while your honor is going to rule against the survival act here applicable, I claim under the survival act; but, if not, I will claim under the death act.

"*Mr. Brennan:* He cannot play fast and loose; he has to elect. I think he has to make a positive statement on the record, which remedy he is going to pursue. * * *

"*The Court:* You must make your election now.

"*Mr. Milligan:* The only case—

"*The Court:* Never mind the argument, when I rule I rule.

"*Mr. Milligan:* Well, then, I will rely upon the death act.

"*Mr. Brennan:* I then ask for the direction of a verdict.

"*The Court:* Why?

"*Mr. Brennan:* I would like the jury excused.

"(Jury excused.)

"*The Court:* Was this brought by the estate?

"*Mr. Brennan:* Yes, and my contention is under the showing in this case there is no one legally dependent upon or entitled to support from Henry Austin. The only heirs of Henry Austin were a married daughter and a son, living West, and both of them having attained their majority. Under the case of *Rouse* v. *Railway* [128 Mich. 149], I claim that the presence of a person legally entitled to support is not present in this case.

"(Argument by Mr. Brennan.)

"*The Court:* I will hear from the other side.

"*Mr. Milligan:* Your honor has ruled I have to elect my count. Now upon that proposition—

"*The Court:* After I ruled I will not hear it. I have thought of that ahead, and I have looked it up, and there is no use of taking time upon it.

"*Mr. Milligan:* Then I can have an exception to the refusal to permit me to be heard upon that.

"*The Court:* Well, you have your ruling. There would not be anything but pain and suffering for 15 minutes, and the fact is that they are not conscious of pain that way.

"*Mr. Milligan:* Your honor, I want an exception to that.

"(At this point Mr. Brennan consented that a verdict be directed against the Detroit, Monroe & Toledo Short Line for the amount of funeral expenses paid by the administratrix.)"

A verdict was directed in accordance with defendants' motion, and plaintiff has brought the record to this court for review upon writ of error.

Among the errors assigned and relied upon for a reversal are the following:

"The court erred in holding that recovery could not be had under the 'survival act,' so called.

"The court erred in holding that plaintiff's intestate did not survive within the meaning of the statutes.

"The court erred in holding that plaintiff must elect under which act he would go to the jury before defendant had sworn a witness or put in its case or any part of its defense. * * *

"The court erred in compelling plaintiff to elect his remedy under the death act.

"The court erred in holding that the death act alone applied to the case."

Counsel for defendant contend that plaintiff unequivocally elected to stand upon the death act, and, if not, there was no error in the rulings of the court, since the survival act does not apply to the facts shown, and there was no liability for damages under the death act. It is also claimed that no exception was taken to the ruling of

the court compelling an election. It is apparent from the colloquy between court and counsel that counsel only elected to go to the jury upon the death act because the court had expressed the opinion that there was no case under the survival act, and we think the exception to the later ruling of the court should be held to apply to the previous ruling upon substantially the same subject. The ruling of the court requiring plaintiff to elect was erroneous. *Carbary* v. *Railway*, 157 Mich. 683 (122 N. W. 367).

We are also of the opinion that it cannot be said, as a matter of law, upon this record, that the survival act did not apply. This case does not fall within the principle of the case of *West* v. *Railway*, 159 Mich. 269 (123 N. W. 1101). In that case the direct cause of death continued to operate directly upon the injured person until life was extinct. In the present case the direct cause of death did not operate continuously, but ceased with the first blow, and plaintiff survived the original injury from 10 minutes to perhaps a half hour. In our opinion, the facts disclosed by this record bring the case within the principle of *Olivier* v. *Railway Co.*, 134 Mich. 367 (96 N. W. 434, 104 Am. St. Rep. 607).

The judgment is reversed, and a new trial granted.

BIRD, C. J., and MCALVAY, BROOKE, and STONE, JJ., concurred.

ZASTROW *v.* ZASTROW.

DIVORCE—ALIMONY—AMOUNT.

An award of $1,500 as alimony in a suit for divorce in which the wife was given a decree of divorce is insufficient and should be increased to $2,000 as against the defendant who has property worth $6,000, both parties being in poor health.

Appeal from Lapeer; Law, J., presiding. Submitted June 13, 1910. (Docket No. 45.) Decided July 14, 1910.

Bill by Martha Zastrow against Arnold Zastrow for a divorce. From a decree for complainant awarding an insufficient amount of alimony, she appeals. Modified and affirmed.

B. F. Reed, for complainant.

Geer, Williams & Halpin, for defendant.

BROOKE, J. This is a divorce case in which a decree was entered for complainant upon the ground of extreme cruelty, and the sum of $1,500 was awarded her as permanent alimony. Complainant appeals for the simple purpose of securing an increase in the allowance made by the circuit court.

The parties were married in 1899, and lived together 9½ years. There are no children. At the time of the marriage the court found that complainant had about $100, which she gave to defendant, and defendant $2,450. At the time of the separation, the court fixed the value of defendant's real estate at $4,000, and his personal estate (exclusive of household furniture) at $1,100. Much testimony was taken as to the value of the farm, and, as is usually the case, it was contradictory in character; but there would seem to be no question that the farm is fairly worth $4,500, inasmuch as that sum was offered for it by

one witness of conceded financial ability while upon the stand. Defendant himself, who gave the only testimony as to the value of the personal property, fixed that value at $1,194.80. The household furniture, not included, is worth between $200 and $300, so that the net estate of defendant is nearly, if not quite, $6,000. The record discloses the fact that defendant is not in good health; but it likewise shows that complainant is broken in health and not able to do hard work.

While we do not desire to encourage appeals where the amount involved is trivial, we are, nevertheless, of the opinion that, in view of the relative ability of the parties to produce an income in the future, the allowance made by the learned circuit judge was too low.

A decree will be entered in this court for the sum of $2,000 as permanent alimony; but no costs will be allowed complainant upon this appeal, for the reason that an allowance has already been made in this court covering the expense to complainant for counsel fees and disbursements, which has been paid by defendant.

Modified as above indicated, the decree of the court below is affirmed.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

BUCKEYE BREWING CO. *v.* EYMER.

ACCOUNT STATED — COMPROMISE AND SETTLEMENT — PAROL EVIDENCE RULE.

Where it appeared that plaintiff at different times presented statements of account in writing to the defendant, who signed them, but upon the trial testified that it had been previously agreed to compromise his claim against the plaintiff for damaged goods, by allowing him a credit of a stated amount upon which future purchases should apply, evidence was admissible to prove the compromise, notwithstanding the signed statements, which presented a question for the jury, whether they were intended as mere memoranda of goods furnished or as final statements of account.

Error to Saginaw; Gage, J. Submitted June 14, 1910. (Docket No. 58.) Decided July 14, 1910.

Assumpsit by the Buckeye Brewing Company against Andrew Eymer upon an account stated. A judgment for plaintiff for an insufficient amount is reviewed by it on writ of error. Affirmed.

Miles J. Purcell and *Henry E. Naegely*, for appellant.

E. L. Beach, for appellee.

HOOKER, J. The defendant was a retailer of beer, doing business at Saginaw, and for many years purchased the beer that he sold from the plaintiff, a brewing company at Toledo, Ohio. During this time—a period of more than 25 years—there was an open account between them, except as this statement may be affected by transactions which, plaintiff's counsel contend, amounted to settlements and statements of account. It was customary for plaintiff's representative to call upon defendant several times each year, with statements of the account, when

differences would be talked over, adjustments made, and money paid and other allowances indorsed as credits, a balance struck, whereupon the defendant would sign the paper. According to the plaintiff's contention, these statements show a balance due it of $3,261.83, at the time of the trial. The defendant claims that prior to 1893 he suffered damage in his trade, from the furnishing of a poor quality of beer, and that an agreement was made between the parties adjusting said damages at $3,200. It was agreed, however, that he continue to buy beer of the plaintiff and should receive no part of said damages until an allowance of 25 cents a barrel upon his purchases of beer to be made thereafter should amount to that sum, viz., $3,200. Statements continued to be made and settled as before, but it was in contemplation of such allowance and application upon his account, when sufficient beer should have been purchased. The case was submitted to the jury who found a verdict for plaintiff of $67.90 after allowing defendant's claim of $3,200. The plaintiff appealed from the judgment entered upon the verdict.

Counsel for plaintiff say that the three assignments of error are all based on the proposition that these accounts stated preclude the interposition of a defense that there was a different understanding than that shown by the statements of account. In short, we understand plaintiff's counsel to contend that these statements of account being in writing and signed by the defendant cannot be varied by parol testimony. This cause was before us at the June term of last year, and is reported in 157 Mich. 518 (122 N. W. 124). The same questions were raised upon that record as upon this, and also some questions arising upon the instruction based on the pleadings, and upon the exclusion of evidence offered by the plaintiff. The decision was made to rest upon the latter, and no allusion is made in the opinion to the question of the right of defendant to question the statement of account. Moreover, we cannot say that the determination of such question was involved. Neither expressly nor by necessary implication

does that opinion sustain plaintiff's contention on that hearing.

We are of the opinion that the plaintiff's contention cannot be sustained. The parties do not agree upon the circumstances attending the making and signing of the statements. Defendant produced testimony that the first one made was accompanied by an agreement which, if established, showed that it was no more than an agreed memorandum of account of beer furnished, and of cash and some other credits allowed. It contained no express statement that it was a final account, nor any express promise to pay, while any implication of these is precluded by the express condition shown, viz., that it was subject to a conditional credit to be given later, and this testimony affects all subsequent statements. This raised a question for a jury. See 1 Cyc. pp. 381, 398; *Spellman* v. *Muehlfeld*, 166 N. Y. 245 (59 N. E. 817); *Valley Lumber Co.* v. *Smith*, 71 Wis. 304 (37 N. W. 412, 5 Am. St. Rep. 216); *Charlotte Oil & Fertilizer Co.* v. *Hartog*, 85 Fed. 150 (29 C. C. A. 56); *Batson* v. *Findley*, 52 W. Va. 343 (43 S. E. 142); *McCormick* v. *Railway Co.*, 154 Mo. 191 (55 S. W. 252); 1 Am. & Eng. Enc. Law (2d Ed.), p. 446 and note; *Harris* v. *Woodard*, 40 Mich. 408; *McColl* v. *Jackson Iron Co.*, 98 Mich. 482 (57 N. W. 578). See, also, 1 Cyc. pp. 368, 369, 375, 380; 11 Current Law, p. 22.

The judgment is affirmed.

OSTRANDER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

MICHIGAN SAVINGS BANK *v.* DIME SAVINGS BANK.

1. TRADE-NAMES—CORPORATIONS—BANKS AND BANKING.
   In a suit in equity to enjoin the use by a corporation of a name similar to the name of another corporation carrying on business of the same character, relief may be granted if the public is misled, and the corporation first established is defrauded on account of the similarity.

2. SAME—GEOGRAPHICAL TERMS—WORDS AND PHRASES—FRAUD—INJUNCTION.
   The use of properly descriptive geographical words in a business name will not be enjoined in the absence of estoppel, actual fraud or misleading of the public.

3. SAME—CORPORATIONS—STATUTES.
   In enforcing a statute intended to prevent such results (Act No. 232, Pub. Acts 1903), it must be made to appear that they will follow the use of the name sought to be enjoined.

4. SAME—WORDS AND PHRASES—INJUNCTION.
   The proposed use by a bank, subsequently organized, of the name "Bank of Michigan," in the absence of evidence of fraud or estoppel, or of actual injury, will not be enjoined as an infringement upon the rights of a corporation called the "Michigan Savings Bank," doing business in the same place; but the complainant will be left to its remedy if actual injury and confusion result.

Appeal from Wayne; Rohnert, J. Submitted June 14, 1910. (Docket No. 57.) Decided July 14, 1910.

Bill by the Michigan Savings Bank of Detroit against the Dime Savings Bank and others to enjoin a proposed change in the name of defendant bank. From a decree for complainant, defendant bank appeals. Reversed, and bill dismissed.

Stellwagen & MacKay, for appellant.

Wilkinson, Post & Oxtoby, for appellee.

OSTRANDER, J. The complainant has for more than 30 years conducted a general banking business in the city of Detroit under the name and style "Michigan Savings Bank," its corporate name being "Michigan Savings Bank of Detroit, Mich." The defendant bank has also conducted a general banking business in the same city since the year 1884, its corporate name being "The Dime Savings Bank of Detroit, Mich." The Dime Savings Bank acquired the business of the Citizens' Savings Bank of the same city and thereupon elected and determined to change its name to "The Bank of Michigan," and for that purpose resolved to amend its articles of association. This action was taken, notwithstanding protests from officers of the Michigan Savings Bank, which, in consequence, filed its bill in the circuit court for the county of Wayne, in chancery, against the Dime Savings Bank, the county clerk of Wayne county, the secretary of State and the commissioner of banking, praying that the defendant bank be enjoined from using the name "The Bank of Michigan" or any other name similar in any material respect to the name of defendant, from executing a certificate setting forth that it has amended its articles of association by changing its corporate name as aforesaid, and from recording the same either in the office of the county clerk, the commissioner of banking, or the secretary of State, and that the attempted action of its stockholders with reference to the change of its corporate name be declared to be of no effect. There were appropriate prayers for relief as to the other defendants. The bill was answered by the defendant bank, testimony was taken, and a decree was entered in accordance with the prayer of the bill. The Dime Savings Bank has appealed.

It is not claimed that the defendant bank has any fraudulent purpose—a design to mislead the public or to injure complainant—in changing its corporate name. No director of one bank is also a director of the other, no contract relations between the two institutions are relied upon by the complainant, and defendant bank is not estopped to

use the name. But it is claimed that if two banks, with offices upon the same street, in the same city, use names so similar, confusion and injury will result; that the statute forbids the defendant bank to assume a name so similar to that of complainant bank, and that equitable principles support the decree appealed from.

The banking law, 2 Comp. Laws, § 6091, requires persons associating to organize a bank to specify in the articles of association, among other things,—

"The name assumed by such bank, which shall be, in no material respect, similar to the name of any other bank organized under the laws of this State."

So Act No. 232, Pub. Acts 1903, in section 2 thereof, relating to names to be assumed by corporations, contains the proviso that—

"No name shall be assumed already in use by any other existing corporation of this State, or corporation lawfully carrying on business in this State, or so nearly similar as to lead to uncertainty or confusion."

Courts of equity are frequently called upon to remedy conditions which grow out of the use by a corporation of a name similar to the name of another corporation, carrying on a business of the same character. In such cases it is usually, if not always, true that relief is granted because experience has demonstrated that the public is misled, and the corporation first established is defrauded on account of the similarity of the names. We assume that the statutes referred to were intended to prevent, to some extent, the conditions which in such cases, when they arise, make a resort to the courts necessary. In this view of the legislation, in its enforcement by the courts as a preventive measure, it is necessary to consider, in advance of a demonstration based upon experience, and in a case where neither corporation has, or can acquire, the general right to an exclusive use of the words employed in the name, whether it is likely that the public will be misled, and whether the complaining corporation

is likely to be injured. It is evident that experience, not in the particular case, but in other cases, must still be employed in determining the fact, and that mere conjecture that some confusion may result is not ground for granting equitable relief. We may also consider that if relief is refused and conjecture is in actual experience made fact, the complaining corporation may have its remedy.

We are not impressed that the testimony introduced on the part of complainant supports even the conjecture that the public, using ordinary care, will be misled by the alleged similarity of the names of these corporations. If it is true, and we assume that it is, that the public is apt to sieze upon some part of the corporate name and use it as descriptive of the whole and as designating the particular bank, we may also assume that the words "Michigan Savings" in one case, and "the Michigan" in the other, will be apt to be used and will be properly and sufficiently distinctive. It is the general rule that when they are properly descriptive, the use of geographical words in a business name will not be enjoined, in the absence of estoppel or of actual fraud, or public misleading. In enforcing a statute intended to prevent some of these results, it must be made to appear that it is reasonably certain they will follow the use of the name sought to be enjoined. The principle is the same in either case.

The decree is reversed, and a decree will be entered in this court dismissing the bill, with costs of both courts to the defendant bank. It may be stated in the decree that it is without prejudice to the right of complainant to relief, if actual injury and confusion shall result from defendant's use of the proposed corporate name.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

JOHNSON *v.* LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO.

1. MASTER AND SERVANT—FELLOW-SERVANT—INCOMPETENCY.
   A question for the jury, relative to the defendant's negligence in retaining in its employ an incompetent servant, is presented by a showing that a fellow-servant of plaintiff, while under the influence of intoxicating liquor, permitted a box to fall on plaintiff's foot, that the intoxicated employé was in the habit of drinking and had previously promised defendant's superintendent to amend, but continued to drink liquor to excess.[1]

2. SAME—INTOXICATION.
   The defendant could not be said to have performed its duty, though after receiving his promise to amend it did not discover the servant intoxicated while on duty, it appearing that his habit of using liquor to excess was notorious with those who associated with him.

3. SAME—PROXIMATE CAUSE.
   Notwithstanding that a sober employé might have caused a similar injury, it could not be held as a matter of law that the intoxication of the fellow-servant was not the cause of the accident, since he would be less competent to perform his duties while under the influence of liquor.

4. SAME—CONTRIBUTORY NEGLIGENCE.
   The question of plaintiff's contributory negligence in the exercise of care after discovering his associate's condition was properly left to the jury.

Error to Jackson; Parkinson, J. Submitted June 16, 1910. (Docket No. 67.) Decided July 14, 1910.

Case by Curtis P. Johnson against the Lake Shore & Michigan Southern Railway Company for personal injuries. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

[1] As to master's duty with respect to employment of servants and continuing them in employment, see note to *Smith* v. *Railway Co.* (Mo.), 48 L. R. A. 368.

Boudeman, Adams & Weston, for appellant.

Richard Price, for appellee.

OSTRANDER, J. Plaintiff was for upwards of 13 years prior to November 6, 1907, the agent of defendant at its station at Brooklyn, Mich. On that day a car, a portion of a freight train running between Ypsilanti and Hillsdale, in charge of Conductor Charles A. Mills, was brought alongside of the station platform at Brooklyn, for the purpose of unloading some freight. Conductor Mills and one or more other employés of defendant went into the car to remove the freight, and, as was the custom, plaintiff with the waybills entered and remained in the car to check the articles called for by said bills. It was dark enough so that lanterns were used. In removing a box, which he partly supported and rolled or turned from corner to corner in his progress from the end of the car to the open door in the center of the side of the car, Conductor Mills let the box fall upon plaintiff's foot. To recover damages for the injury to his foot so occasioned, plaintiff brought this suit, and in his declaration alleged that Conductor Mills was a person addicted to the use of intoxicating liquors and in the habit of getting drunk; that he was upon the particular occasion under the influence of intoxicating liquor; that his condition made him unfit to perform his duties as conductor, and was the reason why he failed to properly handle and move the box which fell on plaintiff's foot; that defendant knew, or should have known, of the habits of said conductor; and that he had before that time been under the influence of liquor and intoxicated while in the performance of his duties as conductor; that it was negligence on the part of defendant to keep him in its employ. Plaintiff recovered a substantial judgment, which defendant seeks to reverse upon the ground that it was error for the trial court to refuse to direct a verdict for defendant; it being contended:

(1) That the testimony fails to show any negligent conduct on the part of Mills.

(2) That it fails to show any negligence on the part of defendant in employing Mills and retaining him in employment.

(3) That it was not proved that the intoxication of Mills, if he was intoxicated, was the cause of the falling of the box.

(4) That plaintiff was not free from negligence contributing to his injury.

It is stated in the brief for appellant that if it shall be determined that the case was one for a jury, the judgment should be affirmed.

It is admitted that in October, 1905, it was reported to a division superintendent of defendant that Mills had been drinking the day before, that Mills was interrogated upon the subject, admitted that he had drunk beer, denied that he was in the habit of drinking, and promised to amend. Defendant's trainmaster also knew of this fact and testified that thereafter he observed Mills at various times when he was on duty, and did not discover that he had been using liquor. He had the matter in mind and knew of Mills' promise to "cut it out." The testimony tends to prove that he did not amend his conduct, and that before and after October, 1905, his habit of drinking liquor to excess when off duty was notorious in and about the places he frequented, and the city where he lived. It is said that the officers of defendant had the right to accept the promise of Mills and if he was not thereafter discovered under the influence of liquor, when on duty, it was not called upon to learn how he conducted himself when not on duty. The case is ruled, upon this point, by *Hilts* v. *Railway*, 55 Mich. 437 (21 N. W. 878).

There is some testimony tending to prove that Mills was under the influence of liquor upon the occasion in question. It is not very convincing, but the question of its weight is not before us. It is undoubtedly true that sober men, moving boxes, often lose control of them and let them fall. It may be assumed, however, that an intoxicated workman is less competent to manage even so small an affair as moving a box, than the same workman

would be if sober. The extent to which he is intoxicated must always be considered in determining his competency to do a particular thing, and whether the consequences of his actions are due to accident or to his condition. To the extent that his condition was discovered by a fellow workman, the duty to act with reference to that condition would ordinarily be imposed. It is apparent that both the question of the cause of the injury and the one of the care to be exercised by plaintiff, under the circumstances, were questions of fact.

We are satisfied that we can determine none of appellant's contentions as matter of law, and the judgment is therefore affirmed.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

COOPER *v.* COOPER.

1. INCOMPETENCY—EVIDENCE.
   Preference of a part of decedent's children by the execution of a deed and its delivery in escrow, although the act was unwise and unnatural, is *held* not to establish his incompetency where he expressed a reason for it, sufficient in his opinion, and did not act under a delusion.

2. ESCROWS—DEEDS—DELIVERY.
   In delivering conveyances to a third party in escrow with a direction to keep them until the grantees call for them, the grantor is presumed to have intended an irrevocable delivery, creating a present interest in the property transferred.

3. HOMESTEAD—SIGNATURE OF WIFE—SELECTION.
   Without the wife's signature, a deed by the husband of the homestead on which both parties live, consisting of a quarter of a

section of land, is invalid as to the portion to which the wife has a homestead right, although no actual selection of a homestead has been made by the grantor.

Appeal from Ottawa; Padgham, J. Submitted June 16, 1910. (Docket No. 70.) Decided July 14, 1910.

Bill by Frank R. Cooper and others against Herbert D. Cooper and others for the cancellation of certain deeds. From a decree for complainants, defendants appeal. Modified.

George A. Farr, for complainants.

Walter I. Lillie, for defendants.

HOOKER, J. In September, 1908, Fitch D. Cooper committed suicide, first shooting and killing his wife. By a former wife he had three children and by his second wife four. All survived him. At the time of his death he was in possession of both real and personal property. In June, 1908, he caused to be drawn a deed of substantially all of his real estate, and a bill of sale of his personal property, to his two sons, Herbert and Earl, aged respectively 17 and 15 years, sons of his second wife, omitting any provision for their sisters, Minnie, aged 19, and Velma, aged 10 years, except a fraternal policy of $2,000, which was payable to the children of the second marriage. The property covered by the deed and bill of sale amounted to about $18,000. On his way home from the scrivener he stopped at the home of a friend, one William Mines, and handed him an envelope, sealed, and said:

"Keep those papers until the boys call for them."

The names "Herbert" and "Earl" were upon the envelope. After the suicide the sheriff found and delivered a letter addressed to Mines:

"I wish you would take those papers and have them recorded immediately. By doing so you will greatly oblige."

Mines did as requested—*i. e.*, caused the deeds to be recorded. All of the other children by both marriages joined in this suit against Herbert and Earl, to cancel the instruments. The court found that Cooper was not incompetent, but that the instruments were never delivered. A decree was made in accordance with the prayer of the bill.

An appeal was taken in accordance with the following stipulation:

"In this cause all parties desiring to appeal upon the whole record, and desiring to save expense, it is agreed that but one appeal shall be made, which shall be considered as the appeal of all the parties, and shall take up the entire record for consideration. The complainants to pay one-half of the costs of the stenographer's minutes and of printing the record, and of the clerk of the Supreme Court; that there shall be no costs in the Supreme Court except solicitor fees and for printing briefs, and that said cause may be considered by the Supreme Court as though both parties had separately appealed.

"Dated January 15, 1910."

Incompetency. We have examined the testimony relating to the grantor's mental condition at the time he made the deeds, and conclude that the charge of incompetency is not sustained. In this we are in accord with the learned circuit judge who heard the testimony from the lips of the witnesses. On the surface it would seem that the action of the grantor was unwise and unnatural, but he had, and expressed, a reason for it, which was sufficient in his opinion, and which shows that he considered and settled the question according to his judgment, such as it was. This clearly appears, in contradistinction to a condition of mind preventing his mental ability to understand, and ability to resist a delusion.

Delivery of the Deeds. The testimony regarding the deposit of the deeds is, in a nutshell: After executing them, he placed them in an envelope indorsed with the names of the grantees, and left it with a friend with the direction:

"Keep those papers until the boys call for them."

This instruction was sufficient in itself to create a presumption that he intended his act to be irrevocable. We have many cases that hold that such a delivery conveys a present interest to the grantees, and conveys full title on the delivery as directed.

In the early case of *Hosley* v. *Holmes*, 27 Mich. 416, we held:

"A delivery of a deed to a third person for the benefit of the grantee, in the absence of anything conveying a different intent, is as much a delivery as if made to the grantee himself; and when papers show upon their face that they are intended to take effect and operate from their execution, it will not be presumed that their delivery to a third person, to be afterwards delivered to the parties, was merely as an escrow, and that they were not to take effect until such subsequent delivery."

See note to this case. *Ellis* v. *Secor*, 31 Mich. 185 (18 Am. Rep. 178); *Wallace* v. *Harris*, 32 Mich. 380, and note; *Thatcher* v. *St. Andrew's Church*, 37 Mich. 264, and note; *Latham* v. *Udell*, 38 Mich. 238; *Taft* v. *Taft*, 59 Mich. 185 (26 N. W. 426, 60 Am. Rep. 291).

In *Pennington* v. *Pennington*, 75 Mich. 600 (42 N. W. 985), it was held that—

"Until a deed is delivered to a grantee to become presently operative, the grantor retains the right to recall it."

But in that case it was found that the deed was deposited for safekeeping, and therefore was not beyond recall. *Hitchcock* v. *Simpkins*, 99 Mich. 198 (58 N. W. 47), was a case bearing upon the question of the conveyance of a present interest, as, also, is the case of *Culy* v. *Upham*, 135 Mich. 131 (97 N. W. 405, 106 Am. St. Rep. 388). *Jenkinson* v. *Brooks*, 119 Mich. 108 (77 N. W. 640), *Fulton* v. *Priddy*, 123 Mich. 298 (82 N. W. 65, 81 Am. St. Rep. 201), and *Roup* v. *Roup*, 136 Mich. 385 (99 N. W. 389), recognized the doctrine, but turned on the question of fact as to intent, and the same may be said of *Cole* v. *Cole*, 144 Mich. 676 (108 N. W. 101);

Leonard v. *Leonard*, 145 Mich. 566 (108 N. W. 985), and *Young* v. *Young*, 157 Mich. 80 (121 N. W. 264).

The direction in this case was unequivocal and contained no indication of an intention to retain a control of the deeds. The letter found upon the person of the grantor was not inconsistent with an irrevocable deposit. It was but a later direction to deliver to the boys at once, in another way, without waiting for them to call for the deeds. The will, made some time before, made other provisions, but the conveyancer who drew the deeds gave testimony accounting for his change of mind, and showing that he did not overlook the necessities of his younger children, and his duty toward them. We may question his judgment in this matter, but that will not justify setting aside his action, and it is possible that he knew the situation and exigency best. It is a question of intent, and we are unable to find circumstances overcoming the presumption arising from his act and instruction.

The question is whether it can be said that the delivery was such as to convey a present interest. The subject is considered and numerous authorities cited in an exhaustive note to the case of *Munro* v. *Bowles*, 187 Ill. 346 (58 N. E. 331, 54 L. R. A. 865).

Homestead. At the time these deeds were made the premises described therein were occupied as a homestead. The bill alleges that the N. E. ¼ of section 10 (160 acres) was the homestead of Cooper and his wife at the time the deeds were made. They certainly lived there and apparently had no other land. It is contended that the husband had not selected a homestead, and that none can be selected for him now. At the time these deeds were made these parties resided on these premises. The wife might assert a homestead right, and this did not depend on her husband's selection before that time. His attempt to convey it was futile, and the deeds were void as to such interest, and they could not afterwards be made valid by the death of one or both. The title to the homestead remained in the husband. *Wallace* v. *Harris*, 32 Mich.

380; *Stevenson* v. *Jackson*, 40 Mich. 702. This homestead involved an undefined tract, and the value is limited to $1,500. Complainants' rights can be protected however. See *Beecher* v. *Baldy*, 7 Mich. 488; *Dye* v. *Mann*, 10 Mich. 291; *Wallace* v. *Harris*, *supra*; *Stevenson* v. *Jackson*, 40 Mich. 702. To this extent the deed must be canceled.

We do not lose sight of the case of *Sammon* v. *Wood*, 107 Mich. 510 (65 N. W. 529), where it was said that—

"It may be impossible to locate it (the homestead), and in such case the title (*i. e.*, deed) to the entire farm must fail."

If this was more than a *dictum*, it does not appear whether the subsequent proceedings involved the carrying out of that suggestion. In any event, we doubt the propriety of applying such a rule here. That statement is based on *Engle* v. *White*, 104 Mich. 15 (62 N. W. 154), and that in turn upon *Phillips* v. *Stauch*, 20 Mich. 369, and *Hall* v. *Loomis*, 63 Mich. 709 (30 N. W. 374), all of which were cases where the right to specific performance only was denied. See *Walker* v. *Kelly*, 91 Mich. 217 (51 N. W. 934), where specific performance was enforced in a somewhat similar case.

We are unable upon this record to ascertain the situation of the estate, or who is entitled to the homestead or its value, in view of the will that has already been admitted to probate. We therefore direct a decree of cancellation so far as the homestead interest is concerned, only denying relief as to the remainder of the premises. The complainants will recover costs. This is without prejudice to such further proceedings in this court or cause, or any other proper tribunal, if any, by the complainants, as may be proper to determine and enforce their rights to such portion of said homestead interest as they may be entitled to.

OSTRANDER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

HAXER *v.* GRIESSEL.

1. NEGLIGENCE—PERSONAL INJURIES—EMPLOYÉS OF INDEPENDENT CONTRACTORS—USE OF LADDER.

   After having been warned to take his ladder down when he had finished certain work, as it was getting windy, the alleged negligence of a painter in leaving his ladder resting on the freshly-painted surface of the house, so that it could and did blow down and injure the employé of another contractor, was a question for the jury.[1]

2. SAME—MASTER AND SERVANT—FELLOW-SERVANT.

   The employé of a contractor engaged in painting a house is not the fellow-servant of a carpenter employed by a different contractor.

3. SAME—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

   The injured employé cannot be held to have been guilty of contributory negligence, as a matter of law, for failing to protect himself from the danger, which, it appeared, he had not observed or appreciated.

Error to Wayne; Murphy, J. Submitted June 16, 1910. (Docket No. 65.) Decided July 14, 1910.

Case by Frank Haxer against Adam G. Griessel and J. Henry Leuzen, copartners as Griessel & Leuzen, for personal injuries. A judgment for defendants on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

James H. Bayne (*George P. Palmer*, of counsel), for appellant.

James H. Pound, for appellees.

The appellant, a carpenter 69 years of age, was injured by falling from a scaffold which was broken down by a

[1] As to liability of master to servants of independent contractor, see note to *Bright* v. *Barnet & Record Co.* (Wis.), 26 L. R. A. 524.

falling ladder. The scaffold upon which he was working at the time of his injury was built by himself and his fellow workmen; it was only six or seven feet high, and was of sufficient strength to sustain the weight of two men. Appellant was alone upon it when injured. The scaffold was standing close to the wall of the building, and appellant was engaged in completing the finishing work under a bay window, easily within his reach when standing upon the scaffold. Defendants were independent contractors, having the contract for the painting of the building upon which appellant was working as a carpenter for a different master, the carpenter contractor. Appellant was working at one side of the bay window, when defendants' servant, Bishop, placed a 20-foot ladder against the building upon the other side of the window, one upright of the ladder resting against the wall, and the other against the edge of the roof of the bay window, which, at the point of contact, was but seven-eighths of an inch thick. At about 4 o'clock in the afternoon, defendant Griessel called at the building, and found Bishop on the ladder at work. He told Bishop to take his brush and finish a certain portion of the work and then to take his ladder down, as it was getting windy. This order made it necessary for Bishop to change his paint and use a different color. To accomplish this he descended from the ladder and went into the building, where he kept the different paints. While he was absent a gust of wind caught the unprotected ladder, causing it to fall. In falling it struck the scaffold upon which appellant was standing, broke it, and appellant was precipitated to the cement walk and injured. Plaintiff's testimony was to the effect that the ladder struck him on the head. There was testimony tending to show that the edge of the bay-window roof, against which one side of the ladder rested, was newly painted, and therefore slippery. A verdict was directed for defendants upon two grounds, *first*, that no negligence had been shown on the part of the defendants, and, *second*, that appellant had assumed the risk of

a danger clearly as obvious to him as to Bishop, the painter. Appellant has removed the case to this court for review by writ of error.

BROOKE, J. (*after stating the facts*). A careful reading of the record impels us to the conclusion, that the question of defendants' negligence should have been submitted to the jury. While the placing of the ladder in the position in which it stood at the time of the accident, and its use by Bishop while in that position, may be said to indicate reasonable care upon his part, or at least to afford no evidence of negligence, we are still of the opinion that his leaving it, even for the time necessary for him to change his paints, leaning against the freshly-painted, slippery edge of the roof of the bay window, under the weather conditions which prevailed and to which his attention had been at that moment called by his master, was such an act as to warrant the court in taking the verdict of the jury as to its character. *Barnowsky* v. *Helson*, 89 Mich. 523 (50 N. W. 989, 15 L. R. A. 33); *Detzur* v. *Brewing Co.*, 119 Mich. 282 (77 N. W. 948, 44 L. R. A. 500); *Lauer* v. *Palms*, 129 Mich. 671 (89 N. W. 694, 58 L. R. A. 67). Towards this appellant Bishop owed the duty of reasonable care. They were not fellow-servants, and, if his act in leaving the ladder unattended in the position and under the weather conditions disclosed by the record amounted to negligence, the defendants, his masters, were liable.

Appellant testified that, while he saw Bishop painting the bricks and the other bay window, he paid no attention to the position of the ladder before it fell; that he did not look at it, or at the painter upon it; that he was busy with his own duties. Whether, under all the circumstances, he should have noticed, appreciated, and protected himself against the danger which caused his injury, was a question of fact for the determination of the jury. Upon this question reasonable minds might draw different conclusions. He cannot be held guilty of contributory neg-

ligence as a matter of law. *Detroit, etc., R. Co.* v. *Van Steinburg*, 17 Mich. 99; *Grand Rapids, etc., R. Co.* v. *Martin*, 41 Mich. 667 (3 N. W. 173); *Teipel* v. *Hilsendegen*, 44 Mich. 461 (7 N. W. 82); *Adams* v. *Iron Cliffs Co.*, 78 Mich. 271 (44 N. W. 270, 18 Am. St. Rep. 441); *Briant* v. *Railroad Co.*, 104 Mich. 307 (62 N. W. 365); *Becker* v. *Railway Co.*, 121 Mich. 580 (80 N. W. 581); *Graham* v. *Evening Press Co.*, 135 Mich. 298 (97 N. W. 697).

The judgment is reversed, and a new trial ordered.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

MUELLER *v.* DETROIT UNITED RAILWAY.

DAMAGES—PLEADING—SUFFICIENCY OF DECLARATION.

Evidence of uterine trouble, caused to plaintiff, a passenger, by the derailment of a street car, is admissible, under a declaration which alleges bodily and internal injuries, a bruised side, derangement of her nervous system, and permanent injuries.

Error to Wayne; Hosmer, J. Submitted June 14, 1910. (Docket No. 59.) Decided July 14, 1910.

Case by Anna Mueller against the Detroit United Railway and another for personal injuries. A judgment for plaintiff is reviewed by defendant Detroit United Railway on writ of error. Affirmed.

Brennan Donnelly & Van De Mark, for appellant.

Sellers & Sellers (*Cassius Hollenbeck*, of counsel), for appellee.

MOORE, J. From a judgment obtained by plaintiff for injuries received while she was a passenger on one of the cars of defendant, the case is brought here by writ of error. The record shows plaintiff was injured by a derailed car colliding with a building, throwing her from her seat. There is testimony to the effect that the car was running about 30 miles an hour; it left the broken track on Michigan avenue, ran across the pavement, over the curb, against and breaking off a sound telegraph pole, across the sidewalk, through a brick wall, and several feet into the building, throwing the rear end of the car around and the car over on its side, tearing its roof off and smashing the car. The shock rendered plaintiff unconscious, and she was in that condition when removed from the wreck.

It is claimed by appellant that the declaration is insufficient to admit testimony of uterine trouble. The sufficiency of the declaration to permit this testimony is the only question presented by the brief. So much of the declaration as is necessary to present the issue reads as follows:

"That plaintiff's body, back, limbs, arms, sides, and chest were then thereby greatly bruised, mangled, and lacerated and plaintiff's right shoulder was dislocated, and she was hurt internally, and her right side was greatly bruised and injured, and also one of her hips was bruised and wounded, and plaintiff thereby suffered great and excruciating pain of body and mind, and by reason of the premises the said plaintiff's nervous system was thereby greatly shocked, deranged and weakened, and by reason of the premises the said plaintiff then and there suffered severe and permanent internal injuries and was confined to her bed for a long space of time, * * * and by reason of the premises this plaintiff then and there became, and still is, and during the remainder of her natural life will be, * * * permanently disabled and injured."

The averments of the declaration permitted the admission of the testimony under the following authorities: *Leslie* v. *Traction Co.*, 134 Mich. 518 (96 N. W. 580), and the many cases therein cited; *Renders* v. *Railroad Co.*, 144 Mich. 387 (108 N. W. 368); *Groat* v. *Railway*, 153 Mich. 165 (116 N. W. 1081).

Judgment is affirmed.

OSTRANDER, HOOKER, MCALVAY, and BROOKE, JJ., concurred.

TRADERS' BANK OF CANADA *v.* FRASER.

1. EQUITY—EFFECT OF DEMURRER.
   A demurrer in equity admits the truth of the averments of the bill of complaint.

2. TRUSTS — EQUITY — ADEQUATE REMEDY AT LAW — BANKS AND BANKING—FRAUD.
   Equity has jurisdiction of a bill of complaint, notwithstanding a possible remedy by an action at law and garnishment proceedings, where it is averred that the defendant by fraudulent representations obtained money deposited with complainant in the name of her deceased husband, that she took the money to another bank, which is made a defendant, and deposited it in her own name, that complainant is liable for the amount of the fund to the estate of her husband, that the wife is insolvent, and has no authority to receive the money, as administratrix or otherwise, and that unless protected by an injunction, as prayed, the complainant will lose the fund, and that the same is a trust fund in the hands of defendant.

Appeal from St. Clair; Tappan, J. Submitted June 16, 1910. (Docket No. 71.) Decided July 14, 1910.

Bill by the Traders' Bank of Canada against Margaret Fraser and the First National Exchange Bank of Port Huron to enjoin the dissipation of an alleged trust fund. From an order overruling a demurrer, defendant Fraser appeals. Affirmed.

Joseph Walsh, for complainant.

B. D. Cady (*W. L. Jenks*, of counsel), for appellant.

MOORE, J. Complainant filed its bill of complaint, which, after the formal part, averred in substance that November 1, 1907, William A. Fraser of Port Huron deposited in its branch bank at Embro, Ontario, $1,606, for which a passbook was issued to him; that November 19, 1907, Margaret Fraser presented to the cashier of said bank said passbook and obtained the full amount of said deposit, $1,500 of which she deposited on the 23d of November in a bank at Sarnia; that December 7, 1907, she withdrew $1,490 of said money and deposited the same in defendant bank, December 10, 1907, "where she has kept the fund intact up to and including this date." Then follow averments which it is not necessary to set out. Then comes the following:

"That prior to the obtaining of said money by said Margaret Fraser, the said William A. Fraser had died; that said Margaret Fraser, his wife, fraudulently obtained from your orator the whole amount of money deposited as aforesaid; that at the time of procuring said money she falsely and fraudulently represented to the officers of said bank that when said money was deposited in said branch bank it was placed in said bank in the name of both the said William A. Fraser and the said Margaret Fraser and under an arrangement and in such a manner that both or either of them could legally draw it out; and, also, that she was duly authorized to demand and receive said money and was entitled to the same. Your orator avers that all of said representations were false and fraudulent and made with the intent and purpose of deceiving your orator and obtaining said money, and that the said Margaret Fraser was not entitled to receive said money and was not authorized so to do, and said money had not

been placed in said bank in her name or so that she could draw the same, and the officers of your orator's said branch bank were deceived and defrauded by said false and fraudulent representations and by mistake, and relying upon such false and fraudulent representations paid to the said Margaret Fraser the whole amount of said deposit on the date hereinbefore mentioned. * * *

"Petitioner therefore alleges that the said moneys so deposited and subsequently paid to said Margaret Fraser and now on deposit in the First National Exchange Bank of Port Huron, Mich., was a trust fund as it verily believes, and that if wrongfully paid to the said Margaret Fraser by the said bank as alleged, or otherwise wrongfully paid as claimed, then the same will be wholly lost to this complainant, unless protected by the writ hereinafter prayed to be issued out of this court.

"*Fifth.* Petitioner alleges that the said Margaret Fraser presented no letters of administration or probate or other legal authority to the said bank as evidence of her legal right to receive the said money, and that said petitioner now seeks to protect itself by having this court come to its aid in preventing the said Margaret Fraser from dissipating this fund until her legal right to receive, have, and control the same is established, and to that end petitioner alleges that the said fund should be returned to it and be held until the said Margaret Fraser has been determined by a court of competent authority to be the person legally entitled to receive the same from your petitioner.

"Your orator avers that it is legally indebted and liable to the said William A. Fraser's estate for the full amount of said deposit; that it will be compelled to pay such sum of money to the estate; that said Margaret Fraser is financially irresponsible, and no judgment can be collected against her; that she has no property out of which an execution can be collected, and unless the fund so placed by her in the First National Exchange Bank of Port Huron, Mich., as above mentioned, is held to be the property of and belonging to your orator and is caused to be turned over to your orator, your orator will entirely lose the amount of the same and will lose all the money so paid to her as aforesaid."

Then followed a prayer for an injunction and a general prayer for relief. A demurrer was interposed, and from

an order overruling the demurrer the case is brought here for review.

The claim of defendant Fraser is stated in the brief as follows:

"Complainant could obtain all of the relief to which it could possibly be entitled by bringing its suit at law against Margaret Fraser, and taking garnishment proceedings against the defendant bank, the fund, if there were any, belonging to defendant, to be held pending the trial, so that, if the decision of the court and jury was that the money did belong to the bank, its remedy would be perfect, and its right to the money in the defendant bank fixed. In other words, every issue involved in this suit could be completely and satisfactorily disposed of in a suit at law, and the questions of fact involved are those which the defendant Margaret Fraser has the right to ask to be determined in such a court and by a jury."

To this contention it is replied that the remedy might or might not be adequate.

"It may be that there are garnishments against this fund, or the fund may have been assigned to other parties. If we had resorted to a suit at law and garnishment, we might have found that an assignment of this money had been made to some other creditor of Mrs. Fraser, who, in such action, would be entitled to a preference of the fund. We submit that we have the right to follow the fund itself, and not to run the danger of having other claims made on it that might have precedence over our claim."

The demurrer admits the truth of the averments of the bill of complaint. We think the action of the circuit judge in overruling the demurrer is supported by 1 Pomeroy's Equity Jurisprudence (3d Ed.), § 278; 3 Pomeroy's Equity Jurisprudence (3d Ed.), § 1047, and the authorities cited in the notes. See, also, *H. Stern, Jr., & Bros. Co.* v. *Wing*, 135 Mich. 331 (97 N. W. 791).

The decree is affirmed, with costs.

OSTRANDER, HOOKER, MCALVAY, and BROOKE, JJ., concurred.

STONE v. STONE.

1. DIVORCE—DISMISSAL FOR WANT OF PROSECUTION.
   The dismissal of a bill for divorce for want of prosecution is warranted, where the complainant, after obtaining an order for temporary alimony and a solicitor's fee, and after receiving the alimony for about four months, made no further progress in the case; and defendant, after several years, obtained a divorce in another State on the ground of desertion, and remarried, but continued to contribute to the support of complainant's daughter, who was permitted to visit him, and the complainant knowing of the remarriage, made no demand for the unpaid solicitor's fee and alimony for thirteen years, when she threatened to proceed to enforce collection.

2. SAME—CONTEMPT—ALIMONY.
   An allowance of temporary alimony is not intended to extend over a period of thirteen years, and in the absence of a demand for its payment during that period, the defendant is not in contempt so as to affect his right to have the bill dismissed for want of prosecution.

Appeal from Wayne; Hosmer, J. Submitted June 17, 1910. (Docket No. 81.) Decided July 14, 1910.

Bill by Flora H. Stone against Forrist P. Stone for a divorce: On petition of defendant to dismiss the bill for want of prosecution. From a decree for petitioner, complainant appeals. Affirmed.

Hunt & Altland, for complainant.

Frank C. Cook, for defendant.

BROOKE, J. Complainant appeals from a decree dismissing her bill of complaint.

The parties were married in the year 1885. Complainant filed a bill of complaint for divorce, upon the ground of nonsupport, on June 21, 1895. Defendant filed his appearance, and on July 1, 1895, an order for alimony and

solicitor's fee was made, fixing the alimony, pending the cause, at $5 per week, and the solicitor's fee at $25. Defendant paid the alimony for 16 weeks, but did not pay the solicitor's fee. At the time the bill was filed, the parties had one child, a girl, three years of age. This child is now between 18 and 19 years old. Defendant moved from Detroit to Cleveland shortly after the bill was filed, and paid a portion of the alimony from that city. After paying temporary alimony for four months he ceased, and for a period of about three years heard nothing from complainant. He claims he then made inquiries as to the whereabouts of his wife, and the condition of the suit; that he learned that complainant had left Detroit, but could not learn her whereabouts, and found that she had not proceeded with her suit for divorce. He thereupon, believing that she had abandoned her suit, filed a bill for divorce upon the ground of desertion, in Cuyahoga county, Ohio, and on May 25, 1898, was granted a decree; service upon defendant having been obtained by publication. In that year he remarried in the State of New York, and has ever since lived with his second wife. Complainant knew of this divorce and remarriage in 1899 or 1900, and since that time has permitted her daughter to pay frequent and lengthy visits to her father, defendant herein. Defendant claims, and complainant does not deny, that since the year 1900 he has contributed largely to the support of their daughter. In the year 1908, complainant, through her counsel, made a demand upon defendant for the unpaid temporary alimony, then in arrears for about 13 years, and amounting to more than $3,000, and threatened to take proceedings for its collection.

Whereupon defendant, in May, 1908, filed his petition in this cause, praying that complainant's bill be dismissed for want of prosecution. This petition was answered by affidavit of complainant in November, 1909, but the material facts set out in the petition were not denied. The only reason offered by complainant for her failure to proceed seasonably with her suit was that defendant had not

paid the $25 solicitor's fee ordered by the court, and her solicitor refused to prosecute her cause to decree until said fee was paid. It is her claim that she was herself financially unable to pay said fee. The record does not show that she made any demand on defendant at any time to pay it, but, on the contrary, it does appear affirmatively that she allowed her case to slumber for nearly 13 years, during 8 of which, at least, she knew that defendant had secured a divorce in Ohio, and that, relying thereon, another woman had entered into marital relations with him.

Can she be heard at this late day, and under this state of facts, to object to the dismissal of her bill of complaint upon the ground of gross laches in failing to seasonably prosecute her suit to final decree? We are of opinion, that it would be inequitable and against sound public policy to permit her to do so. Had she been ignorant during all these years of her husband's whereabouts, and of his acts relative to their marriage, and to his new status, a different situation would be presented. But with full knowledge of his acts, she voluntarily elected to stand aloof, and permit another woman to sustain the relationship of wife towards the man, who, if her present position is tenable, is still her husband. Equity will not lend its aid to those who are not diligent in protecting their own rights. The original controversy between the parties has become stale, the facts remote, and the witnesses, doubtless, dispersed. It would, at this late day, be extremely difficult to arrive at the truth, and no court should undertake to do so. As was said by this court in *Zoellner* v. *Zoellner*, 46 Mich. 511 (9 N. W. 831):

"The proceeding is consequently subject to the proposition that the public peace and good order are concerned in withholding the assistance of equity from those who grossly neglect to take care of their own rights."

See, also, *Reed* v. *Reed*, 52 Mich. 117 (17 N. W. 720, 50 Am. Rep. 247), and cases cited therein.

It is urged that inasmuch as defendant is in default in

payment of alimony, he is in contempt, and therefore in no position to demand favors from a court of equity. *McClung* v. *McClung*, 40 Mich. 493. As before pointed out, no demand was made upon defendant for 13 years. It can scarcely be claimed that the demand made in 1908 was such a demand as is required to be made for *temporary alimony*. Such an allowance, as its name indicates, means an allowance for such temporary period as is reasonably necessary to permit the cause to proceed to a final decree. It is not contemplated that such an order shall be extended over a period of years. To meet such a situation the rights of the parties should be fixed by decree. But we are disposed to view the demand of defendant herein not as a favor, but as a matter of strict right.

The case of *Abe Stein Co.* v. *Wood*, 151 Mich. 657 (115 N. W. 1046), relied upon by complainant, is not in point. In that case and in those cases cited therein, the cause was at issue, and either party might have noticed it for trial. In the case under consideration there was neither answer nor replication, defendant of his own motion could not have brought it on for hearing, while complainant, upon taking his default, could have, at any time, proceeded to decree.

The decree is affirmed, but without costs.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

McBROOM *v.* CHEBOYGAN BREWING & MALTING CO.

1. Trial—Findings of Fact and Law—Amendments.
   The refusal to amend findings of fact made by the trial court, without the aid of a jury, is not reviewable in the Supreme Court, where the findings are supported by the evidence.

2. Corporations—Contracts—Authority to Execute.
   A guaranty of the rent of a dwelling house and business building, to be occupied by a saloon keeper, who makes no agreement to buy liquors exclusively of, or to do any other act for the benefit of the guarantor, and who offers no other inducement, is not within the authority of the secretary of the brewing company who executes the guaranty, and who is not its manager, when it was not expressly authorized by the board of directors, and the time of the lease extended far beyond his term of office.

3. Same—Principal and Agent—Holding Out—Estoppel.
   Estoppel is the basis of the doctrine that a principal is bound to third persons who have relied in good faith on the apparent authority of an agent.

4. Same.
   Matters occurring subsequently to the execution of the guaranty are not evidence tending to show that the plaintiff was thereby induced to rely on the authority of the agent.

Error to Cheboygan; Shepherd, J. Submitted June 20, 1910. (Docket No. 108.) Decided July 14, 1910.

Assumpsit by Mollie E. McBroom against the Cheboygan Brewing & Malting Company on a contract of guaranty. A judgment for defendant is reviewed by plaintiff on writ of error. Affirmed.

James F. Shepherd, for appellant.

Frost & Sprague, for appellee.

Stone, J. This is an action of assumpsit brought upon a guaranty of lease bearing date March 30, 1905. At that

date the plaintiff was the owner of a business building on Main street, in Cheboygan, and a dwelling house immediately back of the same, fronting on Water street. Max Schoenith was a saloon keeper, who, prior to March 30, 1905, had occupied the business building for a saloon and the house back of it for a residence. On that day he and the plaintiff executed a lease from her to him of the premises in question for five years from the date, under which the rent reserved for both properties was $44 per month. One of the conditions of the execution of the lease was that the rent should be guaranteed. Schoenith at the time he executed the lease was a customer of defendant, buying his beer from it. The defendant is a Michigan corporation, organized for the purpose of manufacturing and selling lager beer and malt. On the same day and soon after the execution of the lease, the plaintiff's agent took the lease, with the contract guaranteeing the payment of the rent printed thereon, to the office of the defendant, and the guaranty was signed "Cheboygan Brg. & Malting Co., per S. Wilhartz, Mgr." It was later signed by William H. Craig as a co-surety, but he was not served with process. The contract of guaranty reads as follows:

"In consideration of the letting of the premises in the foregoing instrument described, and for the sum of one dollar, to them paid, they do hereby become surety for the punctual payment of the rent and performance of the covenants in said instrument mentioned, to be paid and performed by the second party therein named; that if any default shall at any time be made therein, they do hereby promise and agree to pay unto the said party of the first part named in said instrument, the said rents and arrears thereof that may be due, and fully satisfy the conditions of said instrument, all damages that may occur by reason of the nonfulfillment thereof, without requiring notice or proof of the demand being made.

"Witness their hands and seals this 30th day of March, 1905.

"CHEBOYGAN BRG. & MALTING CO.,
"Per S. WILHARTZ, Mgr. [L. S.]
"WILLIAM H. CRAIG."

The case was heard before the court without a jury, and the following findings of facts and of law were filed, before judgment:

"Finding of Facts.

"(1) The plaintiff in this case sues upon the obligation covered by the lease and the guaranty set out in the declaration as Exhibit A.

"(2) Prior to the time of making Exhibit A, Mr. Max Schoenith, the lessee, in Exhibit A, had been renting the saloon building from the plaintiff, paying therefor $30 a month. At the time of making this lease, Exhibit A, he rented the saloon building, which had been previously occupied by him as a saloon, and was thereafter similarly occupied by him, and also the house on Water street immediately adjoining the same piece of property. The saloon is on lot 17, the first described property in said lease, the house is on lot 18, the second described piece of real estate. The agreed price at that time was $9 for the house and $35 for the saloon building. The amounts were not separately stated in the written contract but each of the lots is described, and it appears from the face of the lease that the property was to be occupied 'for a retail liquor business and residence of his family.'

"(2½) The defendant, Cheboygan Brewing & Malting Company, is a Michigan corporation, organized, as stated in its articles of association, for the purpose of the manufacture and sale of lager beer and malt.

"(3) The defendant company changed its list of stockholders completely on February 1, 1905. On that day Mr. Moloney and the old stockholders held their last meeting and adjourned to Minneapolis, and on the same day transferred their stock to new purchasers who held a meeting in Minneapolis on February 7, 1905, and elected their board of directors, who in turn, on the same day, elected Mr. Barnum as president, Mr. Rutherford as treasurer and assistant secretary, and Mr. Wilhartz as secretary. Special authority was given to Mr. Rutherford to collect all moneys and deposit them in the bank and to check against same, evidently in the name of the company, and a resolution was passed authorizing Mr. Rutherford to create a special fund of $1,000 against which Mr. Wilhartz could check. Mr. Wilhartz was not elected general manager and was not expressly given any such powers; on the contrary his specified powers were limited even as secretary.

"(4) The testimony shows that Mr. Barnum, the president, spent much of the first year in Cheboygan. He had the power to, and did, draw checks, as did also Mr. Rutherford.

"(5) Mr. Wilhartz was never authorized by the defendant company to make the contract sued on in this case, or any one similar to it. The making of this contract was never known to any of the officers, directors, or stockholders of said company, neither were any of the alleged conversations or acts, if any, of Mr. Wilhartz which were subsequently done through Mr. Harpster, or Mr. Schoenith, or Mr. Moloney, known to any of the stockholders, officers, or directors.

"(6) Mr. Schoenith bought beer of the company previous to the making of this contract and subsequent thereto. There is no testimony of any kind of any agreement between Mr. Schoenith and the company or Mr. Wilhartz that if the company or Mr. Wilhartz would sign the guaranty lease Mr. Schoenith would buy of them his beer, and there is no testimony of any benefit contemplated or received by the company by virtue of the undertaking sued on.

"(7) It appears that at the time of the making of the lease one Alexander Grieve was acting as the agent of the plaintiff in renting the property. After Mr. Wilhartz signed the guaranty Mr. Grieve took Exhibit A to Mr. Craig who signed. There is no evidence of any notification by Mrs. McBroom or any one for or in her behalf given to the defendant company of her acceptance of the arrangement created by the signing of the instrument by the defendant company, except the evidence of Mr. Grieve as to his agency, and that he took the paper to Mr. Wilhartz who signed, and thereafter he, Grieve, took the same away for Mr. Craig's signature.

"(8) The testimony shows that Mr. Wilhartz never signed, either before or afterwards, the company's name to any similar guaranty to that shown by Exhibit A. The testimony also shows that previous to the making of this lease he never indorsed any of the company notes, though at a later date his authority was increased to include the indorsement of company notes of purchase. Mr. Wilhartz drew checks previous to the making of Exhibit A as well as afterwards. He was the officer of the company coming most in contact with the public and most active in making sales.

"(9) Mr. Schoenith was not joined as a defendant.

"(10) The lease in question, the guaranty of which was sued upon, covered rent for the term of five years from and after the 1st day of May, 1905, for the premises to be occupied by Mr. Schoenith in his business, and also for the house which he and his family occupied.

"(11) There is no evidence that the plaintiff or any one acting for or in her behalf either saw, knew of, or relied upon any acts of Mr. Wilhartz indicating that the company were holding him out as having authority to execute such a guaranty. Neither plaintiff nor her agent gives any such testimony.

"Findings of Law.

"(1) The failure to join Schoenith in the proceeding may not be taken advantage of under the general issue here pleaded.

"(2) Acceptance by plaintiff by her agent, Grieve, is sufficiently proved.

"(3) The contract sued on is not *ultra vires* the corporation.

"(4) Mr. Wilhartz was the manager of defendant corporation, having charge of its office and authorized, through the holding out by the defendant, to make such contracts as may be presumed to be made by a general agent; however, the extension of a guaranty for so long a term beyond the saloon year would be beyond the power of any general agent aside from the board of directors, and perhaps even them.

"(5) There was nothing in such holding out of Mr. Wilhartz's authority as would warrant any one, without inquiry, to accept his authority to execute the contract sued upon.

"(6) Judgment shall be entered in favor of defendant of no cause of action."

The plaintiff brings error. The first 11 assignments of error relate to rulings of the court in the admission of evidence. We have examined them with care, and find no error. There would be no profit in discussing them at length.

The 12th and 13th assignments of error deal with the refusal of the court to amend the findings of fact as proposed by plaintiff. This court held in *Beal* v. *Polhemus*, 67

Mich. 130 (34 N. W. 532), that the refusal to allow amendments to findings of fact is not a subject of review in this court, where, as in this case, the findings are supported by the evidence.

The 14th assignment of error is based upon the refusal to strike out in findings of law No. 4 all after the word "agent" in the fourth line, and insert:

"The defendant's secretary and general manager, Mr. Wilhartz, as general agent, had the authority to execute the lease in question. It was in the promotion of the corporate purposes of the defendant."

The 15th and 16th assignments of error relate to the judgment entered.

It will not be necessary to discuss the first three findings of law more than to say that the evidence in the case does not bring it within the ruling in *Timm* v. *Brewing Co.*, 160 Mich. 371 (125 N. W. 357). The record here fails to show any agreement to buy beer exclusively or otherwise by Schoenith from the defendant, or any agreement that would tend to benefit the defendant, or did benefit it; or any inducement held out to defendant; and the guaranty related to the rent of the dwelling house as well as the saloon

Referring to the 14th assignment of error relating to the fourth finding of law, it should be stated that Mr. Wilhartz became secretary of the defendant on February 8, 1905. It is undisputed that at the time of the signing of the guaranty he was secretary of the company, but was not its manager. As a matter of fact, he did not have authority to sign the instrument sued upon, or to do any similar act. No such authority had been conferred upon him by the board of directors. It was an unusual and extraordinary act. We have held that such an officer would not have implied power to sign commercial paper, or pledge the credit of the company to the payment of a debt of a third party. Here he assumed to guarantee the payment by a third party of rent for a period of five years, and far beyond his term of office. He had no express au-

thority. *New York Iron Mine* v. *First Nat. Bank of Negaunee*, 39 Mich. 644; *Ruppe* v. *Edwards*, 52 Mich. 411 (18 N. W. 193); *McLellan* v. *Detroit File Works*, 56 Mich. 583 (23 N. W. 321); *Stilwell-Bierce & Smith-Vaile Co.* v. *Paper Mill Co.*, 115 Mich. 35 (72 N. W. 1107); *Gould* v. *W. J. Gould & Co.*, 134 Mich. 515 (96 N. W. 576, 104 Am. St. Rep. 624). We are of opinion, also, that under the doctrine of the case of *Laird* v. *Lubricator Co.*, 153 Mich. 52 (116 N. W. 534, 17 L. R. A. [N. S.] 177), Mr. Wilhartz had no such authority.

It only remains to consider whether Mr. Wilhartz was, by defendant, clothed with apparent authority—whether he was "held out" by the defendant as having authority to sign this guaranty. Plaintiff can only bring to her support such "holding out," and clothing with apparent authority, as was had and done before the execution of the instrument sued on, and upon which plaintiff relied. Estoppel is the basis, and the principle is that the other party must have been induced to act upon the "holding out." The principal is bound to third persons *who have relied thereon* in good faith by the apparent authority he has given to the agent. 31 Cyc. p. 1331 *et seq.;* 1 Am. & Eng. Enc. Law (2d Ed.), pp. 989, 990; Mechem on Agency (Ed. of 1889), § 84; *Jewett* v. *Bryant*, 159 Mich. 345 (123 N. W. 1097); *Davis* v. *Kneale*, 97 Mich. 72 (56 N. W. 220); *Wierman* v. *Sugar Co.*, 142 Mich. 422 (106 N. W. 75). In the case last cited, Justice Grant said:

"The apparent power of the agent is to be determined by the acts of the principal, and not by the acts of the agent."

See, also, *Heffron* v. *Armsby*, 61 Mich. 505 (28 N. W. 672); *Barry* v. *Insurance Co.*, 62 Mich. 424 (29 N. W. 31); *Verdine* v. *Olney*, 77 Mich. 310 (43 N. W. 975); *Leo Austrian & Co.* v. *Springer*, 94 Mich. 343 (54 N. W. 50, 34 Am. St. Rep. 350); *Hirschmann* v. *Railroad Co.*, 97 Mich. 397 (56 N. W. 842). See language of

Justice HOOKER in *Clark* v. *Dillman*, 108 Mich. 627 (66 N. W. 570).

We are unable to find in this record any "holding out" by the defendant which was relied upon by the plaintiff when or before the guaranty was signed. The plaintiff was not a witness, and her agent does not testify to any such act. Practically all of the testimony as to the "holding out," relates to matters subsequent to the signing of the guaranty. Certainly, such matters did not induce the plaintiff to rely upon the apparent authority of Mr. Wilhartz.

Plaintiff cites *Constantine* v. *Sugar Co.*, 132 Mich. 487 (93 N. W. 1088). The case is readily distinguishable. There the manager and secretary was held to be clothed with the power to make a reasonable contract for the benefit of the company's legitimate business. Here the secretary sought to bind the company as surety for a third person.

We think that there was no prejudicial error in the case, and that the circuit judge reached the correct conclusion.

The judgment below is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and BLAIR, JJ., concurred.

HOAG *v.* BOEHMER.

HIGHWAYS—REMOVAL OF OBSTRUCTIONS—NOTICE—STATUTES.

Where proceedings for laying out a highway were regular, and a notice was duly served by the highway commissioner, after April 1st, to remove a fence in the highway, within thirty days, the notice was sufficient and a substantial compliance with the statute requiring a notice of not less than sixty days, and providing that the removal shall not be required between April 1st and November 1st, the commissioner having taken no action until after November 1st.

Error to Calhoun; North, J. Submitted June 20, 1910. (Docket No. 115.) Decided July 14, 1910.

Trespass *quare clausum fregit* by William Hoag against Hugh Boehmer and others. A judgment for defendants on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Winsor & Miller, for appellant.

Jesse M. Hatch, for appellees.

STONE, J. This is an action of trespass *quare clausum fregit* to recover for removing a certain fence in the township of Lee, Calhoun county. The defendants sought to justify under the claimed statutory authority of the defendant Stultz, a commissioner of highways, to remove the fence as an obstruction of a public highway.

The proceedings, in laying out this road, by said officer, were conceded to be regular, and that question was settled by the recent case of *Page* v. *Boehmer*, 154 Mich. 693 (118 N. W. 602). It is also conceded that the fence taken down here covered 240 rods, between lands owned by Page and the plaintiff.

The only question raised upon this record is whether proper notice to remove this fence was given, or waived. The circuit judge held that such notice was given, and directed a verdict for defendants. The plaintiff brings error. The plaintiff admits that he received a notice, in fact, the same notice that was served on Page in the former case.

The order and notice served on plaintiff April 12, 1907, were as follows:

"COUNTY OF CALHOUN,

"Township of Lee.

"The undersigned commissioner of highways of the township of Lee, county of Calhoun, having ascertained that the public highway in said township, running east and west between sections twenty-one (21) and twenty-eight (28) is encroached upon the east, and where said

highway intersects highway running north and south upon the north side thereof along the lands in the occupation of Jim Page, or L. A. Page, by a barn or building and a fence erected by the present or former occupant of the same, and having ascertained the within bounds or limits thereof to be upon and according to the following line beginning at a highway running north and south, and running west between sections twenty-one (21) and twenty-eight (28), and having ascertained that all that narrow strip or piece of land which lies under said obstruction or all that strip of highway is a part of said highway, it is therefore ordered by said commissioner of highways that said obstruction be removed, so that the said highway shall be open and unobstructed and of the width originally intended, which was 4 rods.

"Given under my hand this 12th day of April, 1907.

"FRANK STULTZ,
"Commissioner of highways, Lee."

Notice (copy served April 12, 1907):

"To Mr. .....:

"Take notice that an order, a copy of which is herewith served upon you, has been made by me, and you are required according to the statute in such case made and provided, to remove the obstruction therein mentioned within 30 days after service upon you of a copy of said order.

"Dated this 12th day of April, 1907.

"FRANK STULTZ,
"Commissioner of highways, Lee township."

It appears, therefore, that the plaintiff had notice on April 12, 1907, of the intention of the commissioner to open the road for public travel, yet no action was taken by that officer to remove the fence until November 11, 1907.

The statute, section 4059, 2 Comp. Laws, which authorized a notice, does not give the form of notice. It provides that whenever compensation for any damages that may have been awarded, shall have been paid, or tendered to the person entitled thereto, pursuant to the statute, the commissioner may give notice to the owner or occupant, and require him, within such time as he shall deem rea-

sonable, not less than 60 days after giving such notice, and after the time when it shall have been determined to open such highway, to remove his fence or fences, and in case such owner or occupant shall neglect or refuse to remove the same within the time specified in such notice, the commissioner or other proper officer shall have full power, and it shall be their duty, to enter upon the premises and remove such fence or fences, and open such highway without delay, *except* that in townships such removal shall not be required between the 1st day of April and the 1st day of November.

It appeared that the plaintiff was supervisor, and signed the petition for the road; that he at that time owned adjacent land, and received $30 damages or compensation for the same and took it; and that his grantor of the premises in question was allowed $50, which he accepted.

The principal claim of the plaintiff is that the notice served was insufficient, in that the order and notice could not run between the 1st day of April and the 1st day of November, and that they were wholly void, for the reason that they required him to remove such fence between those times. The plaintiff quotes from, and relies upon, *Kellar* v. *Earl*, 98 Wis. 488 (74 N. W. 364), and the cases there cited, which, in construing a similar statute, seem to support his position.

It will be noticed, also, that the notice in this case required the obstruction to be removed within 30 days after service, instead of 60 days after giving such notice, as required by the statute. In this case the fence was not removed until about seven months after the notice was given. The notice was sufficient to inform the plaintiff that the highway commissioner desired the road opened, and the plaintiff had ample time to remove his fence before the commissioner, with the other defendants, proceeded to open it.

The fact that the notice was for removal within 30 days would make no difference, if the commissioner waited a sufficient length of time after giving the notice before he

removed the fence, as he did in this case. We think that the same rule should govern in this case as in a notice to quit, given by a landlord to his tenant.

This court has held that a notice to quit in 14 days is as good as a three months' notice, if no proceedings were instituted until the end of the three months. *Chamberlin* v. *Brown*, 2 Doug. (Mich.) 120, note; *Hart* v. *Lindley*, 50 Mich. 20 (14 N. W. 682); *Shaw* v. *Hoffman*, 25 Mich. 163; *Hogsett* v. *Ellis*, 17 Mich. 366. We can see no distinction in principle here. We therefore are not inclined to follow the Wisconsin rule, but to adhere to our own, which has been the law of the State for more than 60 years.

We are of the opinion that the trial judge reached the correct conclusion, and the judgment below is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and BLAIR, JJ., concurred.

WOOD *v.* SMITH.

1. BROKERS—COMMISSIONS—CONTRACTS—EVIDENCE.
   Disputed testimony that the plaintiff, a real estate man, interviewed defendant as to the price of his house, and obtained the refusal of it, at two per cent. commission, no price being fixed, that he arranged for an inspection of the house by a prospective purchaser, who subsequently purchased the property directly from the vendor, presents a question of fact for the jury as to the procuring cause of the sale and the broker's right to a commission.

2. SAME.
   In order to recover commissions the broker must show that he was the procuring cause of the sale, that the purchaser

learned of the property through him, and bought the property because of his efforts, which must be shown to have been more than a mere introduction of the vendor and vendee.[1]

Error to Wayne; Rohnert, J. Submitted June 20, 1910. (Docket No. 92.) Decided July 14, 1910.

Assumpsit by Ira L. Wood against Joseph N. Smith for commissions on the sale of real estate. A judgment for defendant is reviewed by plaintiff on writ of error. Affirmed.

Stanton Clarke and *Arthur D. Prosser*, for appellant.

Bowen, Douglas & Eaman, for appellee.

STONE, J. This is an action of assumpsit to recover a commission claimed to be due the plaintiff upon a sale of real estate alleged to have been brought about by him for the defendant. The case was submitted to the jury, and the defendant had a verdict. The plaintiff brings error. The assignments of error are based upon the exclusion of testimony, the refusal to give plaintiff's requests to charge, and upon the charge as given; but the meritorious question is whether the plaintiff was the procuring cause of the sale to one Mrs. Moore, the purchaser.

The plaintiff, a real estate broker, testified that, learning that Mrs. Moore wanted a house, he went to defendant the latter part of May, 1907, to find out if his house was for sale, and if he (plaintiff) could have the refusal of it, and told defendant that he had a customer for the property, and gave the name of Mrs. Moore; that defendant gave plaintiff the refusal of it; that defendant asked what his commission was, and plaintiff replied 3 per cent; that defendant said others had offered to do it for 2 per cent., and that he would not pay 3; that plaintiff made an appointment with Mrs. Moore to see the house the next day;

[1] As to when a real estate broker is considered the procuring cause of a sale or exchange, see *Hoadley* v. *Savings Bank of Danbury* (Conn.), 44 L. R. A. 321.

that the next morning plaintiff went to defendant's house and told him that Mrs. Moore wanted to see the house that afternoon, and that defendant said: "I want you to put her off two or three days; tell her the family is away from home, and that she cannot see it; it will look better after it is decorated;" that plaintiff saw Mrs. Moore, and told her it would be impossible for her to see the property for a day or two; that he said to her: "Mr. Smith will call me up and let me know when you can see the property;" that plaintiff waited two or three days and then called up defendant, who said that Mrs. Moore had made an appointment to see him that afternoon; that plaintiff called up Mrs. Moore, who said she was going up there that afternoon; that plaintiff saw her again that night or the next morning, and she said: "I will give Mr. Smith $13,000 for that place;" that plaintiff said, "That is cheap for it," and she said, "You can go ahead. I will take it at that; he is hard up, I suppose, and he needs the money. You can get the place for me, he wants to sell it bad;" that plaintiff submitted the $13,000 offer to defendant, and he said, "No, I cannot take it, but you go ahead, and if you are any good you can work her up to the price and sell it to her;" that defendant gave it to him at $17,000; that after this interview plaintiff was calling up or seeing Mrs. Moore or defendant often; that Mrs. Moore went to look at the house about June 3d; and that from that time on plaintiff was talking with her and defendant as late as August 2d; at that time he called up Mrs. Moore and asked her if she had found anything yet, and she said "No;" that he then called up defendant, and he said she had bought; that a few days after August 10th plaintiff met Mrs. Moore, and she told him she had closed the deal—had bought the Smith property. Then he called up defendant and asked for his commission.

When defendant said the house was for sale at $17,000, he put no restrictions on the selling price or sale, he simply gave the place to plaintiff to sell it; plaintiff had

no contract in writing, nor power of attorney; that defendant did not reserve the right to sell the place himself at a less price than $17,000, and made no reservation; that defendant swore in justice's court that he sold the place for $14,500; that defendant did not tell plaintiff that the place was in the hands of other real estate men; he said others had offered to do it for 2 per cent. Mrs. Moore never offered plaintiff more than $13,000 for the place. Defendant never authorized plaintiff to sell for less than $17,000; that plaintiff had been at Mrs. Moore's house on other deals. Plaintiff did not take Mrs. Moore to defendant except in name. She was considering other houses all of the time. All plaintiff did was to do telephoning and go and see them. He claimed that he got the two parties together, and that they closed the deal when he was working and talking between them; that defendant testified in justice's court that plaintiff was the only one that ever mentioned Mrs. Moore to him; that the property was not at any time withdrawn from his list.

On behalf of defendant, Mrs. Moore testified that plaintiff never came to her house; that the first time she ever heard from plaintiff concerning the sale of defendant's house was over the phone; he asked her if she had seen the house, and she replied she had; that she first heard of defendant's house being for sale through Mr. and Mrs. Candler; Mr. Hunter asked her if she had seen it; plaintiff never called at her house personally to sell her the defendant's house; that the only time he was there he never mentioned it; that she never offered him a cent for this house, because she was negotiating with Mr. Hannan for a house on Ferry avenue; she had offered $13,000 for that house, but could not get it for that, and she agreed to pay $15,000, and close the deal; that was the Hayes house, and she thought she had bought it. After she thought she had closed that deal, she never carried on any negotiations with defendant for his house. In her negotiations with defendant she did not remember who took the initia-

tive. It was some time in the latter part of July that she decided to go and see the house again. When she first saw the house defendant did not show her the whole house, and she went to the house again. Before plaintiff said anything to her about the Smith house she had seen it, but not all of it, so she went up and had defendant show her the whole house.

Some time in July she wrote defendant and asked him if his house was still for sale, and if so to come and see her. He came down and she offered him this amount for it. He wanted $17,000, and she was not willing to pay that much. The first time she went there she thought he asked her $17,500. She let him know that she had no idea of purchasing for that. In the deal in July with defendant, she never mentioned plaintiff in the transaction. She had no reason to. She would not have purchased the property through plaintiff. She did not want it then. She decided later that she would take it. The plaintiff never took her to see the property; he never went over to see defendant at all. He did telephone her about the Hayes house; he wanted to try and sell that. She told him that he could not sell it; that he had no right to do it; that he could not get a commission; that Mr. Hannan and she were negotiating about that, and he said that he would look out for the commission; that she need not worry about that. She did not remember anything of the kind; that he was telephoning her, only about—he never told her about the Smith house, but he telephoned her about the Hayes house. She could not tell when she first learned that the deal on the Hayes house had fallen through. Mr. Smith and she came to an agreement with regard to this place the latter part of July; he wanted $17,000. She first offered him $14,500; that was the only offer she ever made. She told him if he could not take that, all right; if he would take it he might have it. Later on he informed her that he accepted that offer; that was the only offer she ever made him. On the occasion of her only interview with defendant relative to this

property, they did not agree to conceal the fact that they had made a contract and the terms of it. She told him she did not want—he need not say what she paid for it. Nothing was said about commission. She did not remember whether the plaintiff mentioned the Smith house to her except when, subsequently to the sale, he asked her if she had bought a house. He never tried to sell her the Smith house. He told her about it. She said she had seen it and did not want it. He did not try to sell it to her; just mentioned it to her. He did not ask her what price she would give for it.

The defendant testified that he advertised the house for sale, and that the plaintiff was among the number that spoke about it. He wanted defendant to allow him to sell the place and defendant asked him what commission, and he said 3 per cent.; that defendant said he would not pay it, and he wanted to know why, and defendant told him that several others had offered to take it at 2 per cent. Defendant told plaintiff the house was in the hands of no person in particular, and would not be; that there was no exclusive agent; that the party that sold the place, did the business, and closed the deal would be the party that would get the commission, and that defendant would pay but one person. Mr. Wood telephoned Mrs. Moore's name after that, but not at that time. He never brought her to look at the place; he never introduced her to defendant; he never made a sale of the house. Defendant asked $17,000 for it. Plaintiff never communicated any offer from anybody to defendant. He did communicate an offer of $13,000 from Mrs. Moore for the house. Defendant saw plaintiff but once, and that was when he came to defendant's office; that was the last of him. He did communicate with defendant in some form about Mrs. Moore; he wanted to make an appointment for her to call. She did not come. She had been to defendant's house before that—before this transaction. Defendant next heard from Mrs. Moore in connection with the sale of the house; it must have been the latter part of July that he received

a letter. She wrote him about the house, asking if it was still for sale. He called her by phone and made an appointment to see her, and saw her. Later on the house was sold to her for $14,500. The sale must have been between the middle and latter part of July. The transaction was closed on August 14th.

It is not true that plaintiff was continually telephoning defendant, and working between him and Mrs. Moore during June and July. Defendant remembers that plaintiff came to see him once; plaintiff phoned defendant once about Mrs. Moore's offer of $13,000. That was early in June. It was soon after the first call, probably a week or ten days, and that was the last he heard from him. At no time did Mr. Wood bring Mrs. Moore to defendant, he never brought her to look at the house, and never made a sale for defendant at all. When defendant refused to take the $13,000 Mr. Wood urged defendant to let him have another trial to see if he could not get a better offer, and defendant asked him how long he would want, and he said he would do it right away, and defendant said if he would take care of it in a day or two, he could go right ahead, and defendant never heard any more of it. After that it is not true that Mr. Wood frequently communicated with defendant by phone with regard to negotiations concerning this place. He does not know that Mr. Wood telephoned him after that. Mr. Wood was the first agent with whom defendant had placed the property to bring Mrs. Moore to defendant's attention as a buyer. Mrs. Moore did not come to see defendant's property by appointment made with Mr. Wood. She saw the property two or three weeks, perhaps longer, prior to the time the offer of $13,000 was made. Mr. Wood phoned it to defendant. Defendant did not tell Mr. Wood that he (the defendant) reserved the right to sell the place at less than $17,000 to anybody that he might bring. There was no appreciation in the value of the place from the time defendant authorized Mr. Wood to sell it, until it was sold, and defendant does not state that there was any depreciа-

tion. When Mr. Wood conveyed the $13,000 offer to defendant he gave him a day or two in which to get a better offer. That was all there was to it, except that defendant told him that, if he could not do any better than that, to drop the deal, and plaintiff said he would like the privilege of making another offer, or getting Mrs. Moore to make another offer; defendant told him if he would take the matter up right away, within a day or two, and secure another offer, defendant would give him the opportunity.

We have made this extended extract from the testimony to show that there was a question of fact for the jury, and that it would have been error had the court directed a verdict as requested by the plaintiff. We find no error in the rulings of the court upon the admission of evidence.

We have already said the meritorious question is whether the plaintiff was the procuring cause of the sale to Mrs. Moore. This was clearly a question for the jury under the evidence. We have examined the assignments of error based on the refusal of the court to give plaintiff's requests to charge. The court did not err in refusing the requests.

The 18th assignment of error is based upon the following summary of the charge:

"Now, gentlemen, to summarize the proposition again: In order to find for the plaintiff, you must find that he was the procuring cause. It is necessary for the plaintiff to show you, either that he introduced Mrs. Moore to this property, or, in other words, he was the first to call Mrs. Moore's attention to this property; that Mrs. Moore was his customer, and that he initiated the negotiations, and that by reason of that negotiation and that introduction the negotiations were acted upon; the introduction was acted upon by Mrs. Moore and the negotiations were brought by reason of that introduction as a procuring cause to a successful and satisfactory conclusion between Mrs. Moore and Mr. Smith. Or, he must show you, if he did not introduce Mrs. Moore, that it was through his active negotiations that final satisfactory arrangement was

reached between Mrs. Moore and Mr. Smith. Now, by active negotiations is meant, not a single introduction, not a single calling attention to, but carrying back and forth propositions, etc., which would result in a conclusion satisfactory to both parties. If he did not introduce Mrs. Moore to this property, but Mrs. Moore's attention had been called to the property before that, and was not active in carrying back and forth propositions, and in inducing Mrs. Moore to purchase this property by such negotiations, then he cannot be said to be the procuring cause. If it should appear to you that Mrs. Moore had been introduced to this property before Mr. Wood was known in the transaction, and had her attention called to it as a purchaser, and that incidentally Mr. Wood had called her attention to it; that she had authorized the proposition; he carried that proposition and that then the negotiations ended; and that afterwards Mrs. Moore, after the interval of a time Mrs. Moore went back and conducted her own negotiations for the purchase of the property—then Mr. Wood would not be the procuring cause."

We find no error in the charge, but that it correctly states the law and is supported by our own decisions. The first proposition, that, in order to recover, the plaintiff must show that he was the procuring cause of the sale; that the purchaser learned of the property through him; and that through his efforts a sale was made—finds support in the cases of *Thuner* v. *Kanter*, 102 Mich. 59 (60 N. W. 299); *Douville* v. *Comstock*, 110 Mich. 693 (69 N. W. 79); *Brooks* v. *Leathers*, 112 Mich. 463 (70 N. W. 1099); *Antisdel* v. *Canfield*, 119 Mich. 229 (77 N. W. 944).

We cite in support of the charge the following cases: *Scribner* v. *Hazeltine*, 79 Mich. 370 (44 N. W. 618); *Hannan* v. *Fisher*, 82 Mich. 208 (46 N. W. 225); *Kelso* v. *Woodruff*, 88 Mich. 299 (50 N. W. 249); *Young* v. *Hubbard*, 154 Mich. 218 (117 N. W. 632); *Heenan* v. *Harris*, 157 Mich. 187 (121 N. W. 741).

We have examined the following cases cited by plaintiff: *Heaton* v. *Edwards*, 90 Mich. 500 (51 N. W. 544); *Decker* v. *Widdicomb*, 137 Mich. 331 (100 N. W. 573); *McGovern* v. *Bennett*, 146 Mich. 558 (109 N. W. 1055);

Reade v. *Haak*, 147 Mich. 42 (110 N. W. 130). In our opinion, these cases are not applicable, under the evidence in this case.

We find no error in the record, and the judgment of the circuit court is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and BLAIR, JJ., concurred.

ANDERSON v. ANDERSON.

CANCELLATION OF INSTRUMENTS—FRAUD.

The validity of deeds given by a mother to her sons, whom the bill of complaint charged with fraud, is *held*, as a matter of fact, to be sustained by the testimony.

Appeal from Muskegon; Sessions, J. Submitted June 17, 1910. (Docket No. 77.) Decided July 14, 1910.

Bill by Lydia Anderson against Roy Anderson and Irving Anderson for the cancellation of certain deeds on the ground of fraud. From a decree dismissing the bill, complainant appeals. Affirmed.

Turner & Turner, for complainant.

Alex. Sutherland, for defendants.

HOOKER, J. The bill in this cause prays the cancellation of some deeds, given by a mother to her two sons, on the ground of fraud. The only question raised is one of fact. We have examined the testimony and find an absence of anything like fraud on the part of the defend-

ants. It is like many other cases where a parent conveys her property to children, and dissatisfaction, discontent, and quarrels follow. Happily the complainant has reserved to herself a life estate in the premises from which she gets rent, so that the case is not one where the property has been dissipated and the parent neglected.

We think the decree dismissing the bill was right, and it is affirmed, with costs.

OSTRANDER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

CHAMBERS *v.* CITY OF GRAND LEDGE.

MUNICIPAL CORPORATIONS—BRIDGES—TOWNSHIPS—JOINT MUNICIPAL CONTROL—CONSTITUTIONAL LAW.

The charter of the city of Grand Ledge provides that the bridge across Grand river in that city shall be maintained, repaired and rebuilt, when necessary, by the city and the township in which it is located, jointly. No provision is made for the levy and collection of taxes for such purpose by the township, or for adjusting any disagreement which might arise between the municipalities. Nor does the title of the act (Act No. 322, Local Acts 1893) indicate the purpose to burden the township with the expense of maintaining the bridge. The city proceeded to construct a new bridge without requesting the township to participate. *Held*, that an injunction at the instance of a taxpayer of the city would not lie, and that the provision of the charter imposing a liability on the township is without force.

Appeal from Eaton; Smith, J. Submitted June 21, 1910. (Docket No. 21.) Decided July 14, 1910.

Bill by Lorenzo Chambers against the city of Grand

Ledge and others to enjoin the construction of a bridge. From a decree dismissing the bill, complainant appeals. Affirmed.

Osmond H. Tower, for complainant.

Raymond A. Latting, for defendants.

OSTRANDER, J. The city of Grand Ledge, by the action of the council and of the qualified voters of the city, issued its bonds to defray the cost of a bridge over Grand river, in said city, in place of an existing bridge, and later entered into a contract for the construction of the new bridge. The work of construction is going on—or was until this suit was begun—and something more than $15,000 of the contract price of $50,000 has been paid to the contractor. The bill in this cause was filed by a resident qualified voter and taxpayer of the city, owning real estate therein, against the said city and the treasurer and clerk thereof, and it is charged that since the passage of Act No. 215 of the Public Acts of 1895 (1 Comp. Laws, chap. 88), the city has had no right to operate under the special charter incorporating said city in the year 1893, and is without authority under said special charter of 1893 (Act No. 322, Local Acts 1893) to construct said bridge except in conjunction with the township of Oneida, out of the territory of which the said city was carved and erected. It is prayed that the clerk and treasurer of the city may be enjoined from issuing and paying further warrants for money in favor of said contractor. Defendants filed a joint answer, the complainant replied. It was stipulated by counsel that the facts are as stated in the bill and answer, and that the cause might be heard upon the pleadings. The bill was dismissed, and the complainant has appealed.

The meritorious question, and the only one debated in this court, arises out of facts now to be stated. In 1893 an act was passed, entitled:

"An act to incorporate the city of Grand Ledge, in the

county of Eaton, and to repeal act number two hundred and sixty of the session laws of eighteen hundred and seventy-one, and all acts amendatory thereof."

The act was ordered to take immediate effect and was approved March 27, 1893. Since that time the city has operated under the charter. The community had previously been an incorporated village. Sections 1 and 3 of chapter 17 of the city charter reads as follows:

"SECTION 1. The council shall have supervision and control of all public highways, bridges, streets, avenues, alleys, sidewalks and public grounds within the city, and shall cause the same to be kept in repair, and free from nuisance, except as herein otherwise provided: *Provided*, That the present Bridge street bridge crossing Grand river within the limits of the said city of Grand Ledge, being located in a highway leading into and through said city, and which was laid out by the commissioner of highways of the township of Oneida, shall be maintained, controlled, kept in repair, and rebuilt when necessary by the township of Oneida and the city of Grand Ledge jointly, according to the assessed valuation of the said township and city, the same as if said city were not incorporated, and all other bridges in said city shall be built, controlled and kept in repair by the said city.

"SEC. 3. The present bridge across and over the Grand river within the limits of said city, shall be maintained, kept in repair and rebuilt when necessary at the joint expense of the city of Grand Ledge and the township of Oneida *pro rata* according to the assessed valuation of said city and township, but other bridges shall be constructed and kept in repair at the expense of the city."

The bridge in question is the bridge mentioned in these sections of the charter, is unsafe, is the only way for public traffic across Grand river for many miles in either direction, and is between the business portion of the city and the railroad station. The river divides, or did divide when the charter was enacted, the two wards of the city. The city is proceeding alone to rebuild it and proposes to pay the entire expense thereof. It does not appear that the township was requested to join the city in rebuilding the bridge.

The city contends:

First. That if the provisions of the charter which have been referred to are given any effect the law will embrace more than one object.

Second. That as the charter makes no further or other reference to the subject the provision for joint liability of the city and township is wholly inoperative.

Third. That these provisions may be eliminated, and the charter will remain a valid and effective law.

The legislation is most singular and can be accounted for only by supposing that it was understood that the particular bridge had greatly served and would continue to serve the inhabitants of the township, which is divided by the river, as distinguished from the inhabitants of the city, and that it would be only fair that they should contribute to its maintenance and to its rebuilding. Whatever the reason which prompted the legislation may have been, it is manifest that the law is not only incomplete, but that the purpose which is expressed involves, and would involve, under any method for carrying it into effect, the levy and collection of taxes in the township of Oneida. The law is not complete because it does not specify in what manner joint control of the bridge by two distinct municipalities may be exercised, nor upon what initiative, in case of disagreement as to necessity for or the form or cost of repairs or replacement, such repairs or replacement may be effected and contribution to the expense thereof compelled. In what way, for example, may the township authorities discharge the duty to keep the bridge in repair? See *Township of Summit* v. *City of Jackson*, 154 Mich. 37 (117 N. W. 545). Indeed, unless the charter provision is held to expressly confer the power upon the township of Oneida to levy taxes to maintain a structure erected in another municipality, and subject, in part at least, to the control of another municipality, there is no power to levy taxes, or to disburse the money of the township, to maintain or to replace this bridge. There are insuperable difficulties in the way of working out the

apparent legislative purpose, in the absence of a legislative method.

Does the act embrace more than one object? Almost any provision germane to the purposes of community government, and not prohibited by the Constitution, may be proper in an act to incorporate a city. But there is no apparent connection between the subject of erecting a city and the one of burdening a township in the same or some other county. The inhabitants of Oneida township would not be apt to read the charter of the city of Grand Ledge to discover the purposes for which township taxes might be laid, or to learn what duties were imposed by law upon the township officers. What was said by this court in *Wilcox* v. *Paddock*, 65 Mich. 23, 28 (31 N. W. 609), is applicable.

In *City of Lansing* v. *Board of State Auditors*, 111 Mich. 327 (69 N. W. 723), it appeared that in an act to reincorporate the city of Lansing there was a provision which required the city to afford fire and police protection to property owned by the State, etc., and that the State board of auditors should allow the city a sum of money therefor, to be ascertained in a manner pointed out. It was held that this provision of the charter was without force because no such object was expressed in the title of the act. The reasoning of the majority of the Justices is applicable here. And in this case, as in that, the provision may be wholly eliminated and the act sustained. We find no want of power on the part of the city of Grand Ledge to build bridges over Grand river, and have no doubt that it might, if necessity required it, construct the identical bridge by the side of the bridge referred to in the act of incorporation.

The decree of the court below is affirmed, but without costs to either party.

BIRD, C. J., and HOOKER, BLAIR, and STONE, JJ., concurred.

BEGROW *v.* BEGROW.

DIVORCE—EXTREME CRUELTY—IMPROPER CONDUCT.

For a wife to call her husband a "dirty dog," "street angel," "house devil," and like names, to associate with other men, drink intoxicants in a public house, remain out all night without satisfactory reasons, and neglect her household duties, constitutes extreme cruelty.

Appeal from Wayne; Donovan, J. Submitted June 20, 1910. (Docket No. 96.) Decided July 14, 1910.

Bill by August A. Begrow against Anna R. Begrow for a divorce. From a decree dismissing the bill, complainant appeals. Reversed, and a decree entered for complainant.

Lehman, Riggs & Lehman, for complainant.

Robert M. Brownson and *Denton Guinness*, for defendant.

OSTRANDER, J. The bill in this cause was filed for a divorce from the bonds of matrimony, and it is alleged therein that the parties were married February 21, 1898, in the city of Detroit, where they have since resided, and where they lived and cohabited together as husband and wife until September 16, 1908. One child was born, which died. The charge is that defendant has been guilty of extreme cruelty, which began soon after the marriage, and the particulars are that defendant began to "nag" and annoy complainant by her exhibitions of jealousy of women who had occasion to go to complainant's drug store to make purchases, and would make remarks which gave offense to customers who happened to be in the store; that her jealousy had no foundation in fact, had a tendency to drive away business, and did actually cause complainant to lose customers; that during the

summer of 1907 complainant threatened to procure a divorce from defendant; and that thereupon the defendant, who has a most violent temper, "raised a chair and threatened to brain your orator, and he believes he would have suffered great bodily harm had he not succeeded in grasping said chair as the defendant was about to strike him over the head with it." He also charges that defendant has, in the company of men, frequented cafés and other places where intoxicating liquors are sold, has remained out until late hours at night, and on one occasion remained away from home all night without informing complainant of her intention to do so or offering any satisfactory explanation of her absence; that during the winter of 1907–08 she refused to prepare breakfast for complainant. Defendant answered, denying each and every of these charges of cruelty. There was a replication, a hearing in open court, and a decree dismissing the bill of complaint.

The testimony discloses that the parties to this suit were acquainted with each other for two years before they were married, during a portion of which time complainant boarded at defendant's home. A short time before the marriage, complainant, who is a druggist, failed in business and was adjudged a bankrupt. He began business again with very small capital, and for some time his wife was the reputed owner of his stock of goods. Defendant was a milliner and continued her business for some time after the marriage. They have always lived in rented apartments, and he has done and is doing business in a rented store. Doing a small business, and obliged to keep his store open evenings, complainant has not spent much time in the society of his wife and has not often visited with her places of public or of private entertainment. The defendant testified that he neglected her during practically all of their married life. There is testimony tending to prove occurrences which amounted to some interference with and loss to his business; but whether her conduct was the result of jealousy or was a

display of temper is not so clear. It is proved that she called him, upon occasion, such names as "a dirty dog," "a street angel," and "a house devil." The conduct which finally determined complainant to separate from her was her association with other men. It is not claimed that she was guilty of any crime; but it is proved that upon one occasion, shortly before the separation, at 9 o'clock in the evening, she was seen by her husband with her sister, another woman, and some men, who were strangers to the husband, coming from a café where liquors were served and where the party had gone, not to eat, but to drink. He, also, at about the same time, saw her riding in an automobile with men, or a man and other women. She admits that upon one occasion—he says it was four or five years after the marriage, she that it was before the marriage—she was at a roadhouse on Jefferson avenue with another woman and two men, "drummers," drinking, and that the men became so familiar in their behavior that she was obliged to escape from them. She admits that after the bill was filed in this cause she passed him on the street, and he stepped one side without speaking to her, when she said: "Oh, Gus! How can you be such a dirty dog?" There was an occasion when she remained away from home all night, without notifying her husband of her intention to do so, returning about 10 o'clock in the morning. There was then a quarrel. She offers an explanation, it is true; but her husband says it is not the one she offered at the time. She does not deny that during a portion, at least, of two winters, she refused to get breakfast for complainant, and offers no excuse for not doing so. There have been frequent quarrels.

However innocent defendant's behavior may have been, such conduct is not calculated to inspire the confidence of the husband or to insure domestic tranquility. The epithets she bestowed upon him are not approved expressions of respect or of affection. Such expressions made to him and such conduct away from him are calculated to

induce the feeling that she cared nothing for him and but little for her reputation, to excite his distrust and anxiety. Self-respecting men do not submit to such treatment unless they are by circumstances obliged to do so. The law does not compel them. There are no children to be considered here. No question of permanent alimony is involved. We are of opinion that complainant is entitled to a divorce upon the ground of extreme cruelty. The decree below is reversed, and one will be entered in this court dissolving the marriage.

Defendant's motion in this court for an allowance for expenses of the appeal has been considered. Costs of defendant were taxed below at $93.90, including a solicitor's fee of $30. After the bill was dismissed, defendant obtained an order, at the circuit, that complainant pay to her $3 a week during the pendency of the appeal and a solicitor's fee of $25. It is our understanding that this order for solicitor's fee was made in view of the requirement that defendant must be to the expense of preparing a brief on appeal. These sums have been paid, the allowance from and after November 29, 1909. Defendant lives in an eight-room house, the rent of which is $18 a month, and has installed a telephone, a convenience the parties did not have when they lived together. She has possession of all the household furniture. Complainant pays for his room rent $1.50 a week. He does business in a one-story wooden structure situated some three miles from the business center of Detroit, and he is paid $300 per annum as postmaster. The figures are not before us; but it is said that in the court below the complainant exhibited a statement of his resources, after which the order for temporary alimony was entered.

An order may be entered that appellant pay to appellee the sum of $50 in addition to the allowance made by the circuit court.

BIRD, C. J., and HOOKER, BLAIR, and STONE, JJ., concurred.

ORTH v. SAGINAW VALLEY TRACTION CO.

1. EVIDENCE—JUDICIAL NOTICE—STREET RAILWAYS.
   The court will take judicial notice of the fact that in the operation of street cars, conductors are in control of and may cause them to be stopped at any time or place, if circumstances require it.

2. CARRIERS—BOARDING CAR—NEGLIGENCE.
   A conductor who knows that a passenger is in the act of boarding a car should neither direct the starting of a standing car nor direct the acceleration of speed of a car in motion.

3. SAME.
   Testimony that the conductor signaled the motorman to proceed while plaintiff was boarding a car, after it had stopped, before crossing a railroad track, and that the resulting increase in speed threw plaintiff to the ground, presents a case for the jury, notwithstanding that it was not a customary place for the taking on of passengers.

4. SAME—CONTRIBUTORY NEGLIGENCE OF PASSENGER.
   It cannot be said as a matter of law that plaintiff was guilty of contributory negligence in boarding the car while it was in motion; the evidence failing to show conclusively that the rate of speed was six miles an hour, and testimony being introduced to prove that the conductor gave the signal knowing the danger to plaintiff.[1]

5. SAME—BOARDING CAR.
   An instruction to the jury that plaintiff did not assume the risk of the accelerated speed was correct.

6. SAME—EVIDENCE.
   Testimony as to the experience of witnesses relative to the jerking of defendant's cars when the power was increased, was competent in connection with defendant's claim and testimony in support thereof that a device in use on its cars prevented jerking.

[1] As to negligence in getting on or off a moving street car, see note to *Jagger* v. *Street Ry. Co.* (Pa.), 38 L. R. A. 786.

Error to Saginaw; Gage (Chauncey H.), J. Submitted June 20 1910. (Docket No. 97.) Decided July 14, 1910.

Case by George Orth against the Saginaw Valley Traction Company for personal injuries. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Weadock & Duffy, for appellant.

F. E. Emerick, for appellee.

HOOKER, J. The defendant's street car line on Bristol street, in the city of Saginaw, crosses the Michigan Central Railroad. It is the rule that the cars must come to a stop before crossing the steam road, and proceed across the track only after the conductor has alighted from the car, gone to the railroad and ascertained that no train is approaching, and signaled the motorman to proceed. This rule was duly observed on the occasion of plaintiff's injury. At the crossing plaintiff attempted to board the car, following the conductor, but fell or was thrown from the running board to the pavement and injured. This action is based upon the alleged negligence of the conductor in ringing two bells, causing the motorman to understand that the conductor was again upon the car, and to turn on the current and accelerate the speed of the car, causing plaintiff to fall or be thrown from the car. The court submitted these questions, and that of contributory negligence, to the jury, and a verdict and judgment for $500 followed. Defendant has appealed.

1. **Refusal to Direct a Verdict.** Counsel for defendant assign error upon the refusal of the trial judge to direct a verdict for defendant, contending, *first*, that there was no testimony tending to show that the conductor's act in ringing the bell was the cause of the accident. It is said that the signal was not to direct the motorman to increase speed, which was a matter for him to decide for himself,

inasmuch as it was not proper for him to stop the car upon the crossing, after he had started to cross it, and that it does not appear that an increase of speed at that time and place was not necessary, as the car was running very slowly; power being shut off as it descended the hill.

We are of the opinion that we should take judicial notice of the fact that conductors are in control of street cars, and may cause them to be stopped at any time or place if circumstances require it, and that, having knowledge that one is in the act of boarding a car or with his consent about to do so, should neither direct the starting of a stationary car, nor the acceleration of speed of a car in motion, nor what might amount to the same thing, give the two-bell signal, if the same would be understood by the motorman to mean that there was no longer reason for not putting on the power, which would have the effect to start or increase the speed of the car.

If the plaintiff testified to the truth, he told the conductor of his intention to board the car at that place, and signaled the motorman, and was given reason to believe that the conductor acquiesced. If so, the conductor owed him the duty of protecting him, by omitting the signal which might result in action by the motorman, until plaintiff was in a place of safety. We do not understand what counsel mean by the suggestion that there was no proof that it was not necessary to put on the power at that juncture, unless it is that the car was not in a safe place for stopping, and should not have been allowed to stop there. The circumstances indicate no danger on that occasion, and had the car even come to a standstill on the track (of which there was little danger, as it was running from two to six miles an hour), it would have been better than to injure a passenger. There is a reasonable inference that the motorman, knowing that his conductor was on the ground, would not apply power until he was apprised by the signal that he was ready to have him do so, and, under the circumstances stated by the plaintiff, there was evidence from which the jury might reasonably find negli-

gence on the part of the conductor in giving the signal, and the case so made was well within the declaration.

It is said to have been assumed by the judge that the conductor could have controlled the operation of the car over the road by withholding the signal. The instructions to the jury were that neither conductor nor motorman had a right to stop the car upon the crossing for a passenger, and that the latter was not obliged to retard its speed, and that only in case the acceleration of speed was in consequence of the signal, could plaintiff recover, and the judge expressly said that—

"If you find from the evidence in the case that the bell signal which the plaintiff claims the conductor gave to the motorman when the conductor boarded defendant's car, as the car was crossing the railroad tracks, was taken by the motorman to mean that the conductor had boarded the car after making the crossing, and that the speed of the car was not increased in response to any such signal, your verdict then would be for the defendant. That is, if the motorman did not, as a matter of fact, increase the speed of the car after the bell was rung, so as to produce a jerk or motion of the car that threw the plaintiff to the ground, but simply considered the bell evidence to him that the conductor was on the car, the plaintiff would not be entitled to recover. It is a question of fact for you to determine from all the evidence in the case whether he did or did not increase the speed, and the increasing speed produce a jerking motion of the car."

This instruction is at variance with such an assumption.

2. **That Contributory Negligence was Conclusively Proved.** It must be admitted that an attempt by a man 62 years old, weighing 200 pounds, to board a street car going six miles an hour, may well be called negligent, and a jury would be justified in so finding. But in the first place it is not conclusively shown that the car was going six miles an hour, and, moreover, the conductor was apprised of plaintiff's intention to board the car in motion, and therefore of the danger, and rang his bell with full knowledge of the situation, according to some of the testimony. We are of the opinion that these were questions

for the jury, and we cannot say as matter of law that plaintiff was precluded from recovering a verdict. Booth on Street Railways, § 336; 27 Am. & Eng. Enc. Law (2d Ed.), p. 67.

3. **That the Plaintiff Assumed the Risk.** The learned trial judge instructed the jury that he assumed the risk of attempting to board the car, but not of the negligence in accelerating speed. We think this correct.

4. **The Starting or Jerking of the Car.** Much is said in the briefs of counsel about the "jerking of the car." Every one knows that the sudden application of brakes, or of power, has a tendency to disturb the equilibrium of one standing in the car or on the running board. It matters not whether the increased motion be a jerk or merely an increase of speed. It is described both ways in the declaration and testimony. Apparently plaintiff's fall was due to the inertia of his body as the car started up. Exception was taken to the testimony of some witnesses as to their experience while riding on other cars of the defendant. This testimony would have been inadmissible but for the fact that defendant sought to prove that their large cars, including the one in question, had a device upon them that effectually precluded jerking. As it was, it was proper in rebuttal. It is contended that Miller's testimony conclusively showed that he fell forward, and hence that it was obvious that it was caused by the brake. This testimony was not important, and, in our judgment, cannot have injured defendant. The cause was submitted by an exceptionally good charge, and we find nothing in the proceedings of which defendant can reasonably complain.

The judgment is affirmed.

BIRD, C. J., and OSTRANDER, BLAIR, and STONE, JJ., concurred.

MEVES *v.* SCHRIVER.

IRWIN *v.* SCHRIVER.

ELECTIONS — CHARTER COMMISSION — MUNICIPAL CORPORATIONS — PRIMARY NOMINATIONS.

In proceding to nominate members of a charter commission of the city of Grand Rapids, under Act No. 279, Pub. Acts 1909, the candidate must file a petition signed by not less than two per cent. of the voters for secretary of State at the preceding election, as in the case of the nomination of city and ward officers, notwithstanding a resolution of the common council providing a different method. Act No. 281, Pub. Acts 1909.

Separate petitions for mandamus by Ehlert A. Meves and Robert W. Irwin to compel James Schriver, clerk of the city of Grand Rapids, to place their respective names upon an official ballot. Submitted June 21, 1910. (Calendar Nos. 24,090, 24,091.) Writs denied July 14, 1910.

Henry T. Heald, Benjamin P. Merrick, and *Elvin Swarthout*, for relators.

Moses Taggart, Raymond M. Ferguson, and *Clark E. Higbee*, for respondent.

BLAIR, J. The city of Grand Rapids is organized under a special act of the legislature (Act No. 593 of the Local Acts of 1905), entitled:

"An act to revise the charter of the city of Grand Rapids, including therein also as part of such charter the acts controlling the board of education and the board of library commissioners," as amended.

At the general city election upon the 4th day of April, 1910, the electors of the city of Grand Rapids, by a majority vote, declared in favor of a general revision of the

charter of said city under and pursuant to the provisions of Act No. 279 of the Public Acts of 1909, entitled:

"An act to provide for the incorporation of cities and for changing their boundaries."

On the 23d of May, 1910, the common council of the city of Grand Rapids in regular session passed and adopted a resolution ordering a special election to be held in said city for the purpose of electing a charter commission and designating the 6th day of September, 1910, for the date of said election. Among other things, the resolution prescribed the method by which candidates for office of member of the charter commission shall be placed in nomination, and the manner in which the official ballots for use at said election shall be prepared. In the case of candidates for the charter commission from the several wards of the city, the resolution provides that nomination shall be by petition signed by not less than 20 qualified electors of said city, irrespective of party, residing in the same ward in which resides the candidate named in said petition, and provides that the petition shall be filed with the city clerk not less than 10 days before the date of said election. Relator tendered to the city clerk of said city a petition nominating him as candidate for member of the charter commission from the Twelfth ward of said city, and requesting that his name be placed upon the official ballot. The petition was signed by 20 qualified electors of the city, irrespective of party, residing in the Twelfth ward, the same ward in which resides the relator, the candidate named in the petition. Relator has the qualifications required by law for candidates. The petition was tendered to the city clerk on the 31st day of May, 1910. The city clerk refused to receive and file the petition, and on June 3d served on relator his reasons in writing for the refusal, claiming:

First. That the method of nomination does not comply with section 18 of Act No. 279 of the Public Acts of 1909.

Second. That it does not comply "as near as may be"

with the law for the nomination of city and ward officers in the city of Grand Rapids as provided in said Act No. 279.

Third. That it does not comply with Act No. 281 of the Laws of 1909, nor with section 27 of said act.

Fourth. That the common council of the city of Grand Rapids cannot change the method of nomination so far as defined in the home rule act.

Petition for the issuance of a writ of mandamus was filed in this court on the 7th day of June, 1910, commanding James Schriver, clerk of the city of Grand Rapids, to receive and file the petition heretofore tendered to him nominating Ehlert A. Meves as a candidate for the office of member of the charter commission of the said city of Grand Rapids from the Twelfth ward of said city. On June 10, 1910, an order to show cause was issued from this court, returnable June 21, 1910, in accordance with the prayer of the petition, and the respondent has filed his answer to said petition. In and by the said answer the respondent admits the allegations of fact hereinbefore stated to be true, and admits the nominating petition of relator is in conformity with the requirements of the resolution adopted by the common council. Respondent does not admit that it was, in form and substance, in conformity with the requirements of Act No. 279 of the Public Acts of 1909, entitled:

"An act to provide for the incorporation of cities and for changing their boundaries."

He does not admit that it was his duty, as city clerk of the city of Grand Rapids, to receive and file the said petition. He claims that the council had no authority to pass the resolution, and that candidates for the charter commission cannot be nominated in accordance with the resolution. He claims that candidates for the charter commission must be nominated under the primary law of 1909 (Act No. 281, Pub. Acts 1909), entitled:

"An act relative to the nomination of party candidates for public office and delegates to political conventions, to

regulate primary elections and to prescribe penalties for violations of its provisions, and to provide for the printing upon election ballots of the names of candidates nominated under the terms of this act, and to repeal Act No. 4 of the Public Acts of the Extra Session of the year 1907, and all local primary election acts contravening the provisions of this act, except as in this act otherwise provided."

Section 18 of Act No. 279, Pub. Acts 1909, provides for the election of a charter commission to make a general revision of the city charter,—

"Consisting of one elector from each ward and three electors at large, having a residence of at least three years in the municipality; no city officer or employé whether elected or appointed shall be eligible to a place upon said commission; the names of all candidates who have been duly nominated as hereinafter provided shall be placed upon a separate ballot at the election designated to be held for the election of a charter commission and without their party affiliations designated; the candidate having the greatest number of votes in each ward shall be declared elected, and the three candidates at large having the greatest number of votes cast in the city shall be declared elected; the nomination and election of the members of such commission except as herein specified, shall be conducted as near as may be as now provided by law for the nomination and election of city and ward officers in the respective cities of this State."

We find no serious difficulty in interpreting this section. The language, "the names of all candidates who have been duly nominated as hereinafter provided," clearly refers to the later provision of the same section that such nominations shall, "except as herein specified," be conducted, "as near as may be," in accordance with the then existing law.

Act No. 281 of the Public Acts of 1909, approved on the same day as Act No. 279, in its provisions for the nomination of city and ward officers, applies to the city of Grand Rapids. By section 17 of this act, every city in the State having a population of 70,000 or more is brought within the provisions of the act. Section 27 of this act reads in part as follows:

"To obtain the printing of the name of any candidate of any political party for a city office on the official primary election ballots for use in such city, there shall be filed with the city clerk of such city such nominating petitions signed by a number of enrolled voters of such political party and who reside in such city, equal to not less than two *per centum* nor more than four *per centum* of the number of votes that such political party cast therein for secretary of State at the last preceding November election."

Respondent's answer, paragraph 10 of the *Meves Case*, and section 11 of the *Irwin Case*, gives the number of votes of the leading political parties cast at the last general State election for secretary of State. For the two leading parties it would require to nominate a candidate at large a minimum of 207 signers for the Republican petition, and 174 for the Democratic, with a comparatively small number for the others.

It is contended by relator that the words, "except as herein provided," in section 18, refer back to the provisions of section 15 relating to the incorporation of new cities, providing, as to the election of a charter commission, as follows:

"And such county clerk shall also prepare a separate ballot and place upon the same without party designation, under the heading 'Candidates for members of the charter commission,' the names of all electors, having the qualifications required by this act for members of charter commissions, who shall file a petition signed by twenty qualified electors residing in the territory proposed to be incorporated, asking that such name be placed upon the ballot."

We are of the opinion that the exception relates to the designation upon the ballot, "without their party affiliations," and not to the provisions of section 15, which relate solely to the incorporation of new cities.

Relator further contends that unless his construction of the words, "except as herein specified," be adopted, the provision of section 18 that the nomination and election shall be conducted "as near as may be," etc., is unconsti-

tutional as contravening the provisions of article 8, § 20, and article 5, § 30, of the State Constitution (1909).

We do not find it necessary to consider the constitutionality of the method provided in section 18 for the nomination and election of members of the charter commission, since, in our opinion, it is the only method provided for the purpose, and, not having been followed by relator, he is not entitled to the writ prayed for.

This opinion also disposes of the companion case of *Irwin* v. *Schriver*, and the petitions in both cases are denied.

BIRD, C. J., and OSTRANDER, HOOKER, and STONE, JJ., concurred.

D'ARCY *v.* ADAMS EXPRESS CO.

CARRIERS—NEGLIGENCE—LIMITATION OF LIABILITY.

A shipper who delivers to a carrier goods worth more than $50, and fills out a receipt in which is a clause providing that the rate of charge shall be fixed by the valuation stated, which is agreed to be $50 unless a larger sum shall be declared, may recover only $50 for the loss of the goods where he neglects to declare the value.

Error to Kalamazoo; Knappen, J. Submitted June 22, 1910. (Docket No. 120.) Decided July 14, 1910.

Case by Frank P. D'Arcy against the Adams Express Company for the loss of a parcel intrusted to defendant for delivery. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed.

Harry C. Howard, for appellant.

Alfred J. Mills, for appellee.

BLAIR, J. This case was tried by the court without a jury and the court made the following findings of fact and of law:

"On July 27, 1906, the plaintiff, a jeweler and manufacturer at the city of Kalamazoo, shipped by the defendant express company a small package addressed to 'David Ullman & Co., New York City,' containing a quantity of valuable opals. Upon the package was the plaintiff's address, as well as the address of the consignee and also the word 'Opals.' The plaintiff had been in the habit of shipping articles and merchandise by the defendant express company, and defendant had furnished him with a book of receipts to facilitate such shipments. The plaintiff himself filled out the receipt covering the shipment in question in this case and a copy of the same is attached to these findings. The plaintiff delivered the package in question to one of the defendant's drivers, who called at his store for the same and signed the receipt. Plaintiff testified that he thought, but was not positive, that he informed the driver that the package contained opals. The charges were not paid in advance by plaintiff, but were to be collected of the consignee upon delivery. The defendant lost the package in shipment and same was never delivered to the consignee. The plaintiff on or about November 15, 1906, made a claim as against the defendant for the value of the opals, but defendant denied its liability, except in the amount of fifty dollars ($50), and some time in March, 1907, and before the commencement of this suit, made a tender to plaintiff of fifty dollars ($50) in full of its liability in the matter, which plaintiff declined to accept. The package contained 33 opals of 2 karats in size; 44, 1½ karats in size, and 54, 1 karat in size. I find from the testimony that these opals were fairly worth two dollars ($2) per karat at the city of Kalamazoo at the date of said shipment, and as a whole, the sum of three hundred and seventy-two dollars ($372).

"Findings of Law.

"Under the facts, as above found, the plaintiff is entitled to recover the full amount of his loss, and is not limited to the amount of fifty dollars ($50). The opals were received by the defendant with notice and knowledge that the package contained valuable opals. The defendant made no inquiry as to their special value, and the

limit of liability expressed in the receipt was waived. * * * The plaintiff is entitled to a judgment as against the defendant for the sum of three hundred and seventy-two dollars ($372) the fair market value of the opals at the date of shipment, with interest at five (5) per cent. per annum from that date, namely, fifty-one and 51–100 ($51.51) dollars. Judgment will be entered in favor of the plaintiff and against the defendant for the sum of four hundred and twenty-four ($424) dollars, with costs of suit to be taxed."

A portion of the copy of the receipt attached to the findings of fact is as follows:

"(COPY OF RECEIPT.)

"The Company's Charge is Based upon the Value of the Property, which must be Declared by the Shipper.

"ADAMS EXPRESS COMPANY

"[NOT NEGOTIABLE.]

"Received from F. P. D'Arcy the following articles, subject to the Contract printed below.

DATE	ARTICLE	VALUE	CONSIGNEE	DESTINATION	REC'D FOR THE COMPANY
7/27	1 Pack opals.		David Ullman & Co.	N. Y.	Huelser

"1. In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

By the terms of the receipt filled out by plaintiff, the duty of fixing a valuation upon the package of opals was imposed upon plaintiff. He did not discharge this duty, and was, therefore, bound by his agreement that the company should not be liable for more than $50. *Smith* v. *Express Co.*, 108 Mich. 572 (66 N. W. 479).

The judgment is reversed, and a new trial granted.

BIRD, C. J., and OSTRANDER, HOOKER, and STONE, JJ., concurred.

MORTON *v.* HANES.

1. LANDLORD AND TENANT — COVENANTS — FRAUD — ACTION FOR RENT.

In the absence of fraud there is no implied covenant that premises are fit for the purpose for which they are leased.

2. SAME—FRAUD AND DECEIT—RECOUPMENT.

Where the landlord makes false or fraudulent representations as to material facts not obvious to the lessee, or, knowing such facts, of which the lessee is excusably ignorant, and which would seriously impair the value of the lease, conceals them, he may be held liable to the lessee for damages incurred in consequence thereof in an action for fraud and deceit, or the lessee may recoup damages in the landlord's suit for rent.

3. SAME—LEASE—DAMAGES—CONDITION OF PREMISES.

While the tenant, by remaining in possession, waives the right to rescind the lease, he does not waive his claim for damages for the fraud and deceit whereby he was induced to enter into the lease.

Error to Washtenaw; Kinne, J. Submitted June 23, 1910. (Docket No. 54.) Decided July 14, 1910.

Assumpsit by Hudson T. Morton against Laura A. Hanes for rent. A judgment for plaintiff on a verdict directed by the court is reviewed by defendant on writ of error. Reversed.

George J. Burke (*M. J. Cavanaugh*, of counsel), for appellant.

Blum & Sample (*Arthur Brown*, of counsel), for appellee.

BLAIR, J. This is an action of assumpsit upon a lease, executed March 16, 1907, containing, among other provisions, the following:

"Witnesseth, that the said party of the first part has agreed to let, and does hereby let to the said party of the second part, and the said party of the second part has agreed to take, and hereby does take, from the said party of the first part the following described premises situated in the city of Ann Arbor, county of Washtenaw and State of Michigan, to wit, the house and premises known as number 611 Church street in the city of Ann Arbor, State of Michigan, to be occupied as a residence by said second party with the privilege of keeping roomers and boarders. On this lease all moneys that are due or to become due shall be deposited in the State Savings Bank of Ann Arbor, Michigan, to the credit of Hudson T. Morton. For the term of three years (with the privilege of making it five) to commence on the first day of September, 1907."

Defendant gave notice under her plea of the general issue that she would prove that at the time she rented the house the defendant falsely and fraudulently represented to her that the house could be properly heated by the furnace then in the house, and that, in reliance upon these representations, she went to great expense in fitting up the house to accommodate student roomers and suffered great damages, in consequence of the failure of the furnace to properly heat the house, which she would claim by way of recoupment.

Defendant occupied the house for 10 months and was finally ousted by summary proceedings, and this action was brought to recover the balance of the rent reserved in the lease.

In the course of the cross-examination of plaintiff, the following occurred:

"*Mr. Burke:* The defense is that under this lease there is a purpose for which this house was leased, that it was unfit for that purpose and Mr. Morton made certain representations. We have given notice in our plea that he made these representations. The lease was made with the privilege of keeping roomers. We expect to show that it was not only the privilege, but the purpose of the renter in accepting the contract. I think we have the right to show what the intent and purpose of the lease or contract is. This is not an attempt to change or vary the terms of the written agreement in any sense.

"*The Court:* What do you say to that?

"*Mr. Brown:* I think the arrangement was finally merged in the written instrument and that shows.

"*Mr. Burke:* We ought to be able to show any legal defect in those premises which was known to the plaintiff, but could not be known to the defendant, and which would entirely change the consideration of the lease.

"*The Court:* The language of this lease is that it was with the privilege of keeping roomers and boarders. If you are seeking to show that the house was not suitable by reason of this poor heating plant it is my impression that it is not competent evidence, and that you cannot show it. You are not entitled to show that the house was not properly heated, that the heating arrangements would not heat the house properly. This case was tried once before and that testimony was admitted, but on reflection I am satisfied that was not competent. My present view is that I ought not to admit it."

Defendant testified in her own behalf:

"The first thing I asked him (Morton) on the 15th day of March was whether the house would heat.

"*Mr. Brown:* I object to any conversation at this time for the reason that it was merged in the written contract.

"*The Court:* I am inclined to think if you seek to show the heating plant of this house was inadequate to heat the rooms properly you are not entitled to show that under this lease. That is not a defense to an action on this lease. If the heating plant was inadequate she was under no obligation to remain there, but if she did she is bound by it, and it would be no defense to an action for rent to show that that house was not properly heated.

"*Mr. Burke:* We take exception to the ruling of the court. Do I understand that the fact that the defendant had relied upon the representations of Mr. Morton, and had purchased furniture and moved there with the idea of keeping roomers, and she found she could not do so (because of the imperfect heating) that that defense could not be interposed to avoid payment of rent?

"*The Court:* Yes. Somewhat reluctantly I came to that conclusion, but I am satisfied that there is no implied guaranty that the apparatus is sufficient to heat according to her notion.

"*Mr. Burke:* We take exception to the ruling of the court. The case turns upon whether or not the defect in

the heating plant can be shown in defense on this action. We have no further testimony."

The court directed a verdict for plaintiff, and defendant brings the record to this court for review.

The position of defendant is shown by the following extract from the brief:

"We contend that the failure of the heating plant to operate in a manner suitable for the purpose for which the house was rented caused the consideration for which the defendant was to pay rent, to utterly fail.

"'The law will not imply any covenant or warranty * * * with regard to the physical condition of the premises at the time of the letting, that they are in a tenantable condition.'

"This is the general rule as laid down in 18 Am. & Eng. Enc. Law (2d Ed.), p. 613. But, where the lease limits the use of the premises to certain specified purposes without showing any intent on the part of the parties that the lessee should fit them for such purposes, there is an implied stipulation that the premises are fit for the specified purposes. This is identically the case in the lease under consideration. 1 Taylor on Landlord and Tenant (9th Ed.), p. 481. This rule is followed by the case of *Young* v. *Collett*, 63 Mich. 331 (29 N. W. 850), which is the leading case on this question arising upon a lease."

The general rule undoubtedly is that, in the absence of fraud, there is no implied covenant that premises are fit for the purpose for which they are leased. *Doyle* v. *Railway Co.*, 147 U. S. 413 (13 Sup. Ct. 333); *Jaffe* v. *Harteau*, 56 N. Y. 398 (15 Am. Rep. 438); *Clark* v. *Babcock*, 23 Mich. 164; *Rhoades* v. *Seidel*, 139 Mich. 608 (102 N. W. 1025).

In *Young* v. *Collett*, 63 Mich. 331 (29 N. W. 850), upon which defendant relies, it is said:

"When a landlord rents a building, and in the lease, as in this case, limits its use to a certain specified purpose, and the tenant agrees to do no more than keep the same in as good repair as when taken, it is evident that the landlord recommends the building as suitable for that purpose in the condition it then is, if there are no modify-

ing clauses to the contrary contained in the lease, and it should be so held; otherwise there would be no consideration for the tenant's agreement to pay rent. *Tyler* v. *Disbrow*, 40 Mich. 415; *Smith* v. *Marrable*, 11 Mees. & W. 5; *West Side Sav. Bank* v. *Newton*, 76 N. Y. 616; *Salisbury* v. *Marshal*, 4 Car. & P. 65."

This language was unnecessary to the determination of the case. The defendants had given up the room to the plaintiff for repairs, and he had taken possession for that purpose and taken up the floor of the lodgeroom, rendering the room untenantable,—

"And it was while in this situation the defendants were unable to get the landlord to make the needed change and repairs. This neglect to make the change and repairs necessary was, under all the circumstances, an eviction by the landlord."

Where, however, the landlord makes false or fraudulent representations as to material facts not obvious to the lessee, or, knowing such facts, of which the lessee is excusably ignorant, and which would seriously impair the value of the lease, conceals them, he may be held liable to the lessee for damages incurred in consequence thereof, in an action for fraud and deceit, or the lessee may recoup such damages in the landlord's suit for rent. *Steefel* v. *Rothschild*, 179 N. Y. 273 (72 N. E. 112); *Pryor* v. *Foster*, 1 N. Y. Supp. 774; *Norris* v. *McFadden*, 159 Mich. 424 (124 N. W. 54).

While the tenant, by remaining in possession, waives the right to rescind the lease, he does not waive his claim for damages for the fraud and deceit whereby he was induced to enter into the lease. *Pryor* v. *Foster*, *supra*.

We are therefore of the opinion that the court erred in refusing to permit defendant to show the alleged false and fraudulent representations as to the furnace set up in her notice.

The judgment is reversed and a new trial granted.

BIRD, C. J., and OSTRANDER, HOOKER, and STONE, JJ., concurred.

PEOPLE v. ADAMS.

1. SEDUCTION—CHASTITY—REFORMATION—CRIMINAL LAW.
   Under evidence tending to support the theory that the complaining witness was seduced by respondent in Michigan, and if improper relations had existed between them in Ohio, where they had been immediately previous to the commission of the offense charged, she had reformed and intended to cohabit with respondent as his lawful wife, but was deceived by false representations and a fraudulent marriage, it was not error to instruct the jury that they might find respondent guilty of seduction if she had reformed and had been subsequently induced by artifice to yield to the respondent.

2. SAME—EVIDENCE—PREGNANCY.
   The admission of evidence of the witness' pregnancy and of her chaste character did not constitute prejudicial error.

3. SAME—COMMON-LAW MARRIAGE—DEFENSES.
   It is not sufficient, to establish a common-law marriage, that the respondent promised to marry the witness when they should arrive at Detroit, that he attempted to convince her by false papers that they were lawfully wedded, that he made no present promise to take her as his wife, but avoided such an agreement, and that on learning in a day or two of the falsity of his statements she discontinued their relations.

4. SAME—PROOF OF PREVIOUS MARRIAGE—EVIDENCE.
   Admissions of respondent are competent to show a previous marriage, in a prosecution for seduction.

5. SAME—EVIDENCE—LETTERS AND CORRESPONDENCE.
   Letters and telegrams purporting to come from respondent at a place where he stated he intended to go, sent in accordance with a previous arrangement to the mother of the prosecutrix, and containing references to matters previously discussed between them, were admissible in evidence without identifying the handwriting.

6. EVIDENCE—DEPOSITIONS—FALSE TESTIMONY.
   Testimony showing that respondent procured witnesses to make false depositions was admissible, in a prosecution for seduction, in connection with the depositions themselves, as was also expert testimony that the several signatures of ostensibly different deponents were in one handwriting.

7. SAME—CROSS-EXAMINATION.

No error was committed in refusing to permit a question on cross-examination of a witness for the people, who testified that respondent told him certain facts and procured him to depose to the same of his own knowledge, and who was asked if he had not heard other members of the household make similar statements.

8. SAME—HEARSAY—CURING ERROR.

Hearsay evidence is harmless where the same facts are shown by competent proof.

9. CRIMINAL LAW—SENTENCE.

The order recommitting a respondent who has served a portion of his sentence and has secured an order admitting him to bail will require him to serve the remaining portion of the sentence.

Error to recorder's court of Detroit; Connolly, J. Submitted June 24, 1910. (Docket No. 140.) Decided July 14, 1910.

John A. Adams was convicted of seduction, and sentenced to imprisonment for not less than 2½ nor more than 5 years in the branch of the State prison at Marquette. Affirmed.

Frank F. Bumps and *M. H. Bishop*, for appellant.

Philip T. Van Zile, Prosecuting Attorney, for the people.

HOOKER, J. The complaining witness, a girl 18 years of age at the time of the transactions detailed in her testimony, was the daughter of well-to-do German people in the city of Louisville, Ky. Her testimony shows that her attention was caught by an advertisement in the matrimonial column of a Cincinnati paper. It read as follows:

"Business man of means, refined, 36, wishes acquaintance of congenial young lady, eighteen to twenty-five; fond of amusements; correspondence strictly confidential; give description. 'K9 Inquirer."

She wrote to the address mentioned, this letter:

"LOUISVILLE, KY., Sept. 21, 1908.

"*Dear Sir:* I seen your ad. in the Cincinnati Enquirer, and take the pleasure to answer it. I am a congenial, respectable, honest, young lady, 18 years of age. And I would like acquaintance of a business gentleman your age. I have blond hair, blue eyes, fair complexion, 5 feet 4 in. tall, weigh 120 lbs. And I am German-American. If you think you would like further acquaintance, I would be pleased to hear from you.

"Yours truly,

"Miss ROSA RENZ,

"1531 W. Ormsby Ave., Louisville, Ky."

"LOUISVILLE, KY., Sept. 25, 1908.

"Mr. A. J. ADAMS.

"*Dear Friend:* I take the pleasure to answer your welcome letter which I rec'd. And I am very much pleased with your description. I would also like to meet you. I have no photo of myself at present, but I will have some taken. Then I will give you one. You say you would like for me to make an appointment with you. I surely will and hope it will be a suited one to you. I would like very much for you to come down to Louisville this coming Sunday (October 4). I will meet you at the depot. Let me know what time you will come. And to which depot you will come in. And how you will be dressed. I will also write and let you know how I will be dressed. Then there will be no danger of us missing each other. Or you may come any day you wish as I am mostly always at home. I hope you will come, and I will make everything just as pleasant for you as I can. I live at home with my parents and two brothers. My father died when I was a very small child, but I have a stepfather. I will close for this time. Hoping to hear from you soon, I remain,

"Very respectfully,

"ROSA RENZ,

"1531 W. Ormsby Ave., Louisville, Ky."

"LOUISVILLE, KY., Sept. 30.

"Mr. A. J. ADAMS.

"*Dear Friend:* Your letter received. Was pleased to hear from you. My brothers are 16 and 9 years of age. I never told my mother yet of me corresponding with you. I would like to come up to Cincinnati, but my mother knows that I have no acquaintance there. And that is the

reason I could not get the money from her to come up on. But if you will send me a ticket I will come up. I will tell her I am going to spend a day with a young lady friend of mine. And then she will have no thought of me going to Cincinnati. I could come any day. And if you have honorable intention, I surely will come. I will close for this time, hoping to hear from you soon.

"Yours truly,

"ROSA RENZ,

"1531 W. Ormsby Ave., Louisville, Ky."

Defendant's letters were generally destroyed when read, as he requested. She went to Cincinnati at his request, and while there, he asked her to get married there but she refused, and went home the same day. She promised to marry him, however. He said he was obliged to go to Columbus on business and asked her if she would go up there if he should send her a ticket, and said they would get married there, and asked her to write him as soon as she got home. She did so and told him she would do so, and he sent her transportation to Columbus.

He wrote as follows:

"COLUMBUS, OHIO, November 5, 1908.

"*My Dearest Rosa:* I received your two letters, the one at the hotel, and also the one at the general delivery. The last one I got last night, and the first one I got yesterday morning. I went out at once yesterday and found out the best way for you to come. I think it is over the B. & O. to Cincinnati, and from Cincinnati over the Big Four to Columbus. It goes out of the same station that the B. & O. comes into Cincinnati. You will have about 30 minutes to wait in Cincinnati, but there is eight trains that leave there for Columbus every day, and you can get one every hour or two; so in case you miss one you can take the next one on the B. & O. from Cincinnati to Columbus. (Col. for Columbus.) There is only two or three trains all day, so you see it is best to go over the Big Four from Cincinnati to Columbus, but remember you take the B. & O. to Cincinnati, and from there the Big Four. I have telegraphed you two tickets. One you can get in the Louisville B. & O. office, and the other you get as soon as you get to Cincinnati. Right at the depot where you come into Cincinnati, that is the Big Four—

the Big Four and the B. & O. have the same depot in Cincinnati. I think you will understand now, and all you have to do is to ask for a ticket for Miss Rosa Renz that was telegraphed there for you by me. If there is anything you do not understand, or should have any trouble, all you have to do is to telegraph me. If so, address No. 46 North Third street, and I will see to it at once. But, my dearest, there is no danger at all, as the tickets are paid for and will be delivered to you as soon as you call for them. Write me as soon as you receive this, and let me know what time you will leave Louisville so that I can meet you at the depot. Trains leave Louisville at 2:30 and 8:10 in the morning and 2:10 and 5:45 in the afternoon. They will make good connection in Cincinnati with the Big Four in Columbus. Address letter care of general delivery, as that is open until about 9 p. m., but if you telegraph, address 46 North Third street. Well, my dearest Love, I will close for this time. Hoping to see you soon, with best wishes and a great many loving kisses, I remain, your ever loving

"ANTONY.

"P. S. I did not send ticket to your house, as it must be used the same day it is dated, with stamp on the back, so you see the other way is the better."

She arrived there Saturday. He took her to his boarding house, kept by a Mrs. Familton, and got her a room, and one for himself. He told her that a marriage license could not be obtained on Saturday afternoon or Sunday; so they would get married on Monday, and while there he would call her his niece. He was a man about 45 years old. On Monday he made an excuse for not getting married, but said they would go to Cleveland and be married there. On the following Saturday they left for Cleveland. On the way he proposed to pass her off as his wife, but she refused to allow this. They went to the Wayside Inn, kept by Mr. and Mrs. Kingsbury, and he obtained a separate room for her there. He made further excuses for not marrying her at Cleveland, but said they would be married in Detroit the same day that they should arrive there, and on Thursday night, November 19th, they went by boat to Detroit. They went to the

Cadillac and he again wanted to register her as his wife and he said he would get the license that day. She told him she would not pass off as his wife until she was married. He then took some rooms at a Mrs. Morse's and left her there, while he went out to get the license. Her testimony continued as follows:

"This was No. 55 Elizabeth street, west, a rooming house kept by a Mrs. Morse. We each had a room by ourselves, a front and back parlor. He then went to get the license, and he came back with the license, and he asked me my people's name, and I gave them, and he told me to sign my name to the bottom of the paper, which I did; and then he told me he would take it back and bring the certificate; and then he brought three papers and I signed my name to them, and he told me then we were married. I asked him if we didn't need a preacher to marry us, and he told me, 'No.' I told him they did down in Kentucky, and he said: 'You must remember that you are not in Kentucky—you are in Michigan.' I believed him and he put the certificate then in his trunk, and I thought it was all right. Exhibit D is what he brought back to me as the license, and Exhibit E is one of the certificates of marriage, and Exhibit F the other. He signed his name and then I signed my name to Exhibit D in his presence. He said that was necessary. Then he said Exhibit D would be filed. After I signed the license I signed the certificate. He said I would have to sign them—to sign my name. He showed me how to sign. * * * He said in Michigan we need three papers. I asked him if we did not have to have a preacher to marry us, and he said, 'No.' * * * And he says that was the reason they had the three papers in Michigan. I believed that we were married at that time, and if I hadn't I would never have lived with him. Up to that time from the 20th on, I had never had connection with a man before in my life, and I had connection with him because I thought I was his wife, and I lived with him from Novem- 20th until the 28th. * * * About Wednesday he told me if I told anybody we were married he would pull up his trunk and leave me. I had been watching the papers to see if I could see the notice, and I couldn't; and he wanted me to tell the people I was his sister, and I suspected that we were not married; so on Friday I went to the county building to find out about the license; and

when I came back to Mrs. Morse's house I told him I had been to the county building and had found that no licenses were taken out; and he said there was, and he had paid a large amount to keep it secret; and he says I should place more confidence in him than that; and I told him: 'Well, if I was wrong, I was sorry,' and he said he would bring a man to prove that we were legally married. Then I had a talk with Mrs. Morse, and Detectives High and Larkins were sent for, and they came over in about an hour and took us both to headquarters."

Copies of these papers are here inserted.

"AFFIDAVIT FOR LICENSE TO MARRY.

"STATE OF MICHIGAN, } ss:
"County of Wayne. }

"November 20, 1908.

"John Antony Adams, as applicant for license for marriage between himself and Rosa Mary Renz, being duly sworn, deposes and says that he is acquainted with the laws of Michigan relative to marriage, as printed upon the back of this blank; that there is no legal impediment to the marriage of himself and the other person named, and that to the best of his knowledge and belief, the following statements are true:

"Full name—John Antony Adams.
"Age at last birthday—26 years.
"White, Black, Mulatto, Indian—White.
"Residence—Detroit.
"Birthplace—New York.
"Occupation—Physician.
"Father's name—John L. Adams.
"Mother's maiden name—Clara Houseman.
"Number of times previously married.

"FEMALE.

"Full name—Rosa Mary Renz.
"Age at last birthday—18 years.
"White, Black, Indian—White.
"Residence—Detroit.
"Birthplace—Louisville, Kentucky.
"Occupation—Housework.
"Father's name—Frederick.
"Mother's maiden name—Mary Phloor.
"Number of times previously married.....
"Maiden name of bride, if widow .....

"Subscribed and sworn to before me, S. C. Wilson, clerk, in and for Wayne county, Michigan, 20th day of November, 1908.

[Signed] "JOHN ANTONY ADAMS.
"ROSA MARY RENZ."

"CERTIFICATE OF MARRIAGE.

"I, Samuel P. Stinger, of the city of Detroit, in the county of Wayne, State of Michigan, do hereby certify that on the 20th day of November, in the year A. D. 1908, John Antony Adams, of Detroit, in Wayne county, Michigan, and Rosa Mary Renz, of Detroit, in the county of Wayne, Michigan, were united by me in the bonds of matrimony, in the city of Detroit, in the county of Wayne, State of Michigan, according to the laws of said State, the license, authorizing the marriage of said parties, having been by them delivered to me as required by law, and that there were present, as witnesses, John Antony Adams, of Detroit, and Rosa Mary Renz, of Detroit.

"Dated, November 20th, 1908.

[Signed] "JOHN ANTONY ADAMS,
"ROSA MARY RENZ."

"MARRIAGE CERTIFICATE.

"This is to certify that John Antony Adams, of Detroit, and Rosa Mary Renz, of Detroit, were by me joined together in Holy Matrimony, according to the usages of the Church, and the law of the State of Michigan, on the 20th day of November, in the year of Our Lord, 1908.

[Signed] "SAMUEL STINGER.

"Witnesses:
"S. C. WILSON.
"S. P. SNYDER."

The outline of facts hereinbefore given is taken from the testimony of Rosa Renz, the complainant. As the defendant was not a witness, much of it stands uncontradicted on the record, except as it may be affected by circumstances testified to by other witnesses. There was some corroborating testimony, however, and some of the questions raised relate to it.

By way of defense, defendant caused some depositions to be filed in the case under a stipulation that he might take them in the absence of the prosecuting attorney. He

also called some witnesses, the apparent purpose being to prove that he cohabited with Rosa Renz in Columbus and Cleveland, and that Rosa Renz was a girl of dissolute habits at home.

Upon the argument, his counsel's main contentions were that he could not be guilty of the offense charged, for the reason that he had cohabited with her in Ohio the week before, and, second, that the transaction showed a common-law marriage between the parties in Detroit. These two questions will be discussed first because they are the most important.

Unchastity. The learned circuit judge refused to give the following request offered by defendant's counsel:

"(a) If you believe from the evidence that Rosa Renz had carnal intercourse with this defendant while said parties were stopping at No. 16 North Third street, Columbus, Ohio, or while they were stopping at the Wayside Inn, at Cleveland, Ohio, then I charge you that the said Rosa Renz was not a previously chaste woman, as required by law to be in order to be seduced; that no sufficient time had elapsed for her to reform before the act complained of in Detroit, Mich., and therefore that the act of carnal intercourse complained of as taking place in the city of Detroit, on the 20th day of November, 1908, and relied on in the information in the case, was not seduction, and the defendant must be acquitted."

He instructed the jury that:

"It is a part of the claim of the defense, on the other hand, that on the day in question that the complainant was not a chaste girl, and was not thus fraudulently deceived into yielding her virtue, but on the other hand, she had pursued a course of continued cohabitation with the defendant in Cleveland and Columbus, Ohio. I charge you, gentlemen of the jury, that the defendant at the bar cannot be convicted upon the charge in this court for any seduction which took place in Ohio; this court not having jurisdiction of such offense. It is not, however, true, as a legal proposition, that because a woman once submits to sexual embraces of the man, he cannot thereafter seduce her. The law does not contemplate that only virgins may be seduced, but the language of the statute is unmarried

women. If a woman has submitted to the sexual embraces of a man, and thereafter has reformed and returned to the path of virtue, she may again be seduced by the same man, although the burden of proving such reformation would be upon the prosecution.

"Every woman is presumed by law to be chaste until the contrary is shown. If, however, the evidence proved that she has departed from the path of virtue and it is sought to establish the seduction of her by the same man, her reformation and return to a chaste and virtuous character must be proven by the prosecution. So that, gentlemen of the jury, even though previous sexual intercourse between a woman and a man might be shown, yet, if the jury is satisfied that at the time of the alleged seduction she was of chaste and virtuous character, and was living a chaste and virtuous life, and was drawn therefrom by some artifice or inducement of the man, her second seduction would be as criminal as the first.

"I do not wish to be understood as intimating to you, gentlemen, in any way, that the court is of the opinion that the complainant, Rosa Renz, had sexual intercourse with the respondent before coming to Detroit. That is a fact for you to determine. If you are satisfied beyond a reasonable doubt that it was not so, and that on the 20th day of November, A. D. 1908, she was a virgin, as she claims upon the witness stand to have been, and that she yielded up her virginity to the defendant by reason of the promise, artifices, and inducements practiced upon her by him, which caused her to believe that she was his wife, wherefore, she submitted to his sexual embraces and without which she would have not submitted to his sexual embraces, you must find him guilty.

"In addition thereto, even though she had previously submitted to his sexual embraces, yet had reformed and was again chaste and virtuous, if she yielded by reason of those artifices, promises, and inducements, this, too, would constitute the crime of seduction. In the first case that I have indicated to you, as well as the last, you must be satisfied of the chaste and virtuous character of the complainant, and that she was turned aside from the path of virtue and inveigled into submitting to the carnal intercourse with the defendant by reason of artifices, promises, or inducements, without which she would not have otherwise submitted to him."

We understand this to be a correct statement of the

law, and though the jury should have found that the complainant yielded to him in Ohio, they may also have found that she had seen her error, and determined to do differently thereafter, considering all of the circumstances. We understand that defendant's counsel do not dispute the general rule, but contend that there was no testimony indicating a reformation—citing the case of *People* v. *Bressler*, 131 Mich. 390 (91 N. W. 639), where the circumstances were such that we were unable to say that there was a presumption of reformation. In the present case the court left the question to the jury with the instruction that the burden of proving it rested upon the prosecution. Under the testimony it would not be an unreasonable conclusion. The instruction was appropriate and it was correct.

In this connection we refer to some testimony, taken under objection, upon which error is assigned. It is this: The complainant testified that she became pregnant, and that she never had sexual relations with any other man, at any place or time. This testimony was competent, though perhaps of little importance. If the two facts were true, it was cogent evidence of a completed sexual act, but being wholly dependent on the truthfulness of Rosa Renz, it was probably no more convincing than her statement that they had sexual intercourse. It was not error to admit this testimony.

Marriage. The defendant's counsel offered a large number of requests in relation to their claim that the defendant and complainant were lawfully married in Detroit. If they were, this defendant was improperly convicted. The judge made no allusion to the subject in his charge, further than to say that the jury must find that she was an unmarried woman in order to convict defendant. The claim that the transaction in Detroit amounted to a valid common-law marriage seems to have been overlooked or ignored. Counsel for the State seeks to justify this upon the ground that there is no testimony in the case tending to prove the agreement necessary to

such a marriage. If we can say that such is the fact, no error was committed; otherwise the question should have gone to the jury.

We have examined the testimony and we find testimony tending to show—

(*a*) A promise to marry when they should arrive at Detroit.

(*b*) An effort to convince the complainant by false instruments which they both signed that they were thereby married.

(*c*) Defendant's statement to her that such was their effect.

(*d*) An utter absence of any suggestion of a present promise by one to the other, especially by him, that they would and did then take each other as husband and wife, and would live together as such thenceforward; but, on the other hand, most convincing evidence that he avoided any such promise, and that he had no intention to enter into the marriage relation with her.

(*e*) Cohabitation afterwards for a day or two, and until the complainant ascertained the falsity of his statements.

If this situation is one in which the law requires us to say that the parties made a valid contract of marriage, the question should have gone to the jury. If, on the other hand, the trial judge could properly say that there was no testimony tending to show a valid marriage between these parties, there was no error in the omission. Cases involving the proof of marriage arise in many ways, and common-law marriages are inferred from circumstances of greater or less significance, where the legitimacy of alleged heirs is concerned. Again there are cases where, as between an innocent woman and her seducer, it is held that promises and conduct may estop him from denying the marriage, although he had an actual intent not to be a party to a valid marriage. In a case like the present, where it is clear that the man not only intended to avoid a marriage which should bind him, and avoided making or having the woman make a present promise that they took each other as husband and wife, to be such thence-

forward, he should not be permitted to escape the consequences of his wrong by such a claim.

The cases of *People* v. *Loomis*, 106 Mich. 250 (64 N. W. 18), and *Judson* v. *Judson*, 147 Mich. 518 (111 N. W. 78), cited by counsel, are readily distinguishable from this case. In the former there was a clear, present promise, the very thing that is lacking here. In the latter, the bill was dismissed for the lack of the present promise to take each other for husband and wife. This is not a civil case arising years after a transaction, characterized by long years of cohabitation and conduct consistent with marriage, but one arising at once, depending upon the nature of the alleged promise of marriage, where the facts show that the minds of the parties did not meet in a common understanding of, and consent to, the present and future existence of the relation of husband and wife between them. The unrighteousness of the proposition that, one caught red-handed may lawfully set up the claim that the alleged contract, which he did not agree to, became nevertheless a valid marriage, binding upon both, because the woman acted in good faith and in the belief that she was married, cannot be sustained, where it affirmatively appears that it lacked the essential promise; if it can, where the duplicity has been carried so far as to make the promise, is a question we need not decide. We are of the opinion that the learned circuit judge did not err in denying these requests, and in omitting to confuse the jury by this question of marriage.

Another question arose in this connection. It was claimed by the prosecution that the defendant was a married man at the time of his relations with Rosa Renz, and if so it would be an end to the claim of the alleged common-law marriage. Counsel attempted to prove it by defendant's admissions, and error is assigned upon the admission of this testimony; it being contended that marriage cannot be so proved in criminal cases, and cited the cases of *People* v. *Lambert*, 5 Mich. 349 (72 Am. Dec. 49), and *People* v. *Loomis*, *supra*. The former was a

bigamy case. The latter was a seduction case, and hardly raises the question before us, as we merely held that a witness not qualified would not be allowed to prove the provisions of law in force in Canada. The *Lambert Case*, however, does hold that a defendant should not be convicted of bigamy, where the only evidence of the first marriage is proof of cohabitation and statements of the parties. It is true that the English courts have held that admissions of marriage are not sufficient to warrant a conviction in a bigamy case, or to prove marriage in a crim. con. case, following Lord Mansfield's holding in two cases, viz.: *Morris* v. *Miller*, 4 Burr. 2057, and *Birt* v. *Barlow*, 1 Doug. 174, cases often said to have been departures from the existing rule, and cases that have been severely criticised. The rule was carefully limited to these two classes of cases, and is at variance with the general rule of law pertaining to other criminal cases, with no very good reason.

But this is neither a bigamy nor a crim. con. case and we are not disposed to extend the rule, as a few courts have done. This testimony was admissible both to prove that defendant had a wife, and also as characterizing his acts in making the alleged contract. For a discussion of this question, see 3 Wigmore on Evidence, § 2084 *et seq.*

In this connection we refer to a question which arose upon the introduction of two letters and two telegrams claimed to have been sent by the defendant to Mrs. Heye, complainant's mother. She testified to one or more interviews with the defendant, after his arrest, in which he sought to induce her to go to Detroit. She stated that he came to Louisville and pretended to her to be a detective. He afterwards confessed that he was not a detective, but was defendant's brother, and at last admitted that he was the defendant; that he had done wrong; that he was married, but would soon get a divorce. He succeeded in inducing Mrs. Heye to say that she thought she would go to Detroit. He agreed to await her at Cincinnati. The letters and telegrams purporting to come from there later,

by mail and wire, bore his name (Adams), and contained allusions to the subject theretofore discussed between them. We think that they were competent evidence, although it was not shown that he signed or sent them, in any other way than through the connection that they intrinsically showed to the previous conversation and the arrangement that he should write. This furnished some evidence of their genuineness, which thus became a question for the jury. See *People* v. *Hammond*, 132 Mich. 427 (93 N. W. 1084); 17 Cyc. 411.

Depositions. In making the people's case the prosecutor called witnesses who confessed to making false depositions at the instigation of said defendant, and gave their conversations with defendant in relation thereto. These depositions were then offered in evidence to show the things that defendant had sought to prove in this way. We have already alluded to the defense that he sought to make. This testimony was admissible. It is always competent to show a defendant's complicity in obtaining or attempting to obtain false testimony to be used in his defense, and the fact that he does not use it is unimportant. It was also competent to show by expert witnesses that several different names, ostensibly of different deponents, signed to a deposition, were in the same handwriting.

It was not error to admit the examination of witnesses called by the people, in relation to the contents of their depositions, without first reading them to the witnesses. Doubtless this should have been done had they desired it; but apparently they did not. These depositions were not withheld from defendant's counsel, and were ultimately put in evidence against the strenuous protest of defendant's counsel. Referring to the witness Myers, who testified to statements which he said were false, and alleged facts which he did not know of his own knowledge, but were told him by defendant, counsel sought to show, on cross-examination, that he had heard other inmates of the

house make similar statements regarding the conduct of Rosa Renz. While it would have been proper to cross-examine this witness for the purpose of showing his knowledge, or that Adams did not make the alleged statements, proof that he heard others make them was unimportant. It was not substantive proof of the facts, being hearsay, and it was not inconsistent with the statement that Adams told him that. There was no error in this ruling.

The remaining assignments of error relate to unimportant matters, as the testimony stood, and we think that no injury resulted to the defendant from the rulings on which they were based; for example, the deposition of Crandall was not substantive proof in the case; hence it was not important whether he was at Wayside Inn in November, nor whether the Kingsburys said that he was or was not. The same result follows as to the proof about holes in the door and the sufficiency of the alleged test. The testimony of Larkins was harmless in regard to the statements of Familton, because he admitted the same fact practically.

We find no error in the record, and the conviction and judgment are affirmed.

Defendant's sentence was imposed before his appeal was taken and he had served a portion of his time when its execution was interrupted by an order admitting him to bail, and he was released by the warden of the State's prison. He is now subject to imprisonment under the sentence for the unexpired period thereof remaining at the time of his said release. The cause will be remanded to the recorder's court of Detroit with directions to issue a new commitment to the sheriff of Wayne county and said warden, commanding said sheriff to forthwith apprehend said defendant and deliver him to the said warden, and commanding him, the said warden, to receive and safely keep the said defendant for a period equivalent to said unexpired portion of said sentence, in accordance with the command of said original commitment.

OSTRANDER, MCALVAY, and STONE, JJ., concurred.

BLAIR, J. (*concurring*). I think the evidence discloses a common-law marriage, which would have been legal and binding in its effect as well as in form, except for the previous subsisting marriage of defendant. It does not follow, however, that because defendant was guilty of bigamy he could not be convicted upon the same facts of seduction. In my opinion, the facts would support a conviction for either offense and the prosecution were at liberty to select either. *People* v. *Gibbs*, 70 Mich. 432 (38 N. W. 257); *People* v. *Smith*, 132 Mich. 58 (92 N. W. 776); *Greenman* v. *O'Riley*, 144 Mich. 534 (108 N. W. 421, 115 Am. St. Rep. 466); *People* v. *Bristol*, 23 Mich. 118.

I therefore concur in the result.

ZART *v.* SINGER SEWING MACHINE CO.

1. PRINCIPAL AND AGENT — LIABILITY FOR TORTS OF AGENT — SCOPE OF AUTHORITY.

Evidence that plaintiff went to a branch store of defendant for repairs on her sewing machine; that the managing salesman arranged to call and get her machine, and did so, bringing afterwards another machine to use pending its return; that the substituted machine was apparently second-hand and he told her he wanted to sell it because he was about to be married; that plaintiff bought it, paying part down, and, on her refusal to pay the balance until he should return the old machine, he and another during business hours committed an assault in attempting to remove the second machine, presents a question of fact whether he was acting within the scope of his authority or for his personal benefit, upon a showing by the defendant company that the machine did not belong to it, and it received no benefit from the sale.[1]

[1] As to liability of master for assault by servant, see note to *Davis* v. *Houghtelin* (Neb.), 14 L. R. A. 737.

2. EVIDENCE—CONFLICT—JURY.

The jury is entitled to consider the reasonableness of testimony, and are not bound to believe a witness whose testimony is inconsistent with the circumstances, although no other testimony bears on the question.

3. PRINCIPAL AND AGENT—DECLARATIONS—RES GESTÆ.

Declarations of an agent and declarations made in his presence at the time of doing an act within the scope of his authority, and relating to the subject-matter of the act, are admissible in evidence as part of the *res gestæ*.

Error to Wayne; Wisner, J., presiding. Submitted June 23, 1910. (Docket No. 150.) Decided July 14, 1910.

Trespass *vi et armis* by Minnie Zart against Andrew J. Brandau and the Singer Sewing Machine Company. A judgment for plaintiff is reviewed by defendant company on writ of error. Affirmed.

Lodge & Brown, for appellant.

William Look and *Lehman, Riggs & Lehman*, for appellee.

STONE, J. The plaintiff brought an action in trespass against the defendants to recover damages for an alleged assault committed upon her by the defendant Andrew J. Brandau, while, it was claimed by the plaintiff, he was engaged in the business of the other defendant, the sewing machine company. The plaintiff recovered a substantial verdict and judgment, and the defendant the sewing machine company has brought error.

(1) It claims that the court erred in denying defendant's motion to direct a verdict for it, because it appeared from the undisputed testimony that Brandau and his companion, were not, at the time of the alleged assault complained of, engaged upon the business of the Singer Sewing Machine Company, but were engaged in the private enterprise of the defendant Brandau.

(2) That the court erred in denying defendant's motion

to direct a verdict for it, because it appeared by the undisputed testimony that at the time of the assault complained of Brandau and his companions were not acting within the scope of their employment by the said sewing machine company.

(3) That the court erred in denying defendant's motion for a new trial upon the grounds above stated; and also because the verdict was against the weight of evidence.

After reading the record we are unable to agree with defendant's counsel that the evidence was undisputed upon the points stated in the assignments of error. There was a conflict in the evidence. The plaintiff offered evidence tending to show that on September 6, 1906, before noon, she went to the branch store of the sewing machine company, at the corner of Chene street and Gratiot avenue, Detroit, to have some repairs made on her sewing machine. There she met defendant Brandau, who was managing salesman for the company at that store, and arranged with him to call at her house and get the machine. Brandau went to plaintiff's house about 1 o'clock p. m. and took away the old machine, saying that he would bring it back right away. The agreed price of repairs was $4.

That same evening, about 6 or 7 o'clock, Brandau came a second time to plaintiff's house, and brought another machine for her use, while her own machine was being repaired. He told her that he wanted to sell this machine because he and his girl wanted to get married. The machine was apparently second-hand. After some negotiations the plaintiff agreed to buy this machine for $24, paying $15 down and taking from Brandau the following receipt:

"9/6/'06.

"Received from Mrs. C. Zart $15, balance of $9 to be paid September 7, 1906.

"A. J. BRANDAU, M. S."

No further writing was made or passed, nor would there be in a cash sale any written contract. Brandau called the third time on September 8th, in the afternoon,

to collect the $9 balance. Plaintiff refused to pay until he brought back her old machine. On October 16th Brandau called again with a Mr. Berg, her neighbor, who was an employé of said company. Berg said to the plaintiff:

"Mrs. Zart, you must pay the $9. Mr. Brandau is the agent. You must pay that money to the company."

She refused to pay, claiming that he had sold her machine. He finally brought back what he claimed was her old machine. She claimed it was not hers.

On October 23d, in the morning, Brandau came to the plaintiff's house with one Wood, an employé of the sewing machine company. Brandau came in the front door and Wood in the back door. When they came in, Wood said: "I am the boss from Chicago," and he showed papers, which he had in his pocket. He said: "I am boss; I take the machine," and then he took it. Wood and Brandau then picked up the new machine and started away with it. In the melée which ensued plaintiff claims to have been kicked and injured by Brandau, and brought this action. Plaintiff's daughter testified that Brandau came with a wagon that day which had on it the name of the Singer Sewing Machine. It was undisputed that Brandau was the manager of the sewing machine company at the time he had the dealings with the plaintiff, and that the letters "M. S." added to his name meant "Managing Salesman;" that he hired Wood and paid him, and that he had agents under him, and that he had charge of the entire business that came through the store; that there was no one above him there. The defendant Brandau testified that he took Wood along to get the money or the machine. That if a machine was not paid for, he looked after taking it back or seeing that the company's rights were protected. That was in his line of business.

On the part of the defendant it was claimed, and it gave evidence tending to show, that the machine which had been sold to the plaintiff, was received at appellant's store

on March 30, 1906; that it was on trial at the house of an Italian on Rivard street, where a fire occurred on May 6, 1906; that the machine became so smoked and burned by the fire as to be of no further value to appellant; that appellant collected the insurance thereon, dropped the machine from stock, and gave the store credit therefor; that appellant never sold this machine again, and received no money for it from anybody; that appellant's books show no sale of any machine to plaintiff, nor any business transaction with her whatever during the months of September and October, 1906; that during 1906 Brandau had built a partition in appellant's store, and had paid for the repairs personally; that after the machine was damaged and dropped from stock, appellant gave it to Brandau to reimburse him for these repairs, to do whatever he pleased with it; that Brandau had the machine refinished and overhauled, and took it to his house, where it stood for a month or two until he sold it to the plaintiff; that appellant did not know that Brandau had sold this machine to plaintiff, or that any trouble had occurred, until the early part of 1907, when this suit was begun; that Brandau and Wood have standing instructions never to use force to obtain possession of a machine, and, if unable to obtain peaceable possession, to commence replevin proceedings. The appellant contends that the above claims were undisputed, and entitled it to a directed verdict. The record shows that there were many points in dispute.

It does appear that the plaintiff never knew Brandau except as manager of the business of the Singer Sewing Machine Company. She went to the company's store to do business with the company. She made arrangement with the company's manager to repair her old machine, and it was taken to the company's store for repairs. There is no evidence that Brandau ever told her that the machine was his own property, and not that of the company. The testimony is conclusive that Brandau was the manager of the store and business. He had Wood, Berg, and another under him. The supervising agent for the

State testified that Brandau looked after the company's interests and business. He selected and hired the company's help. If he wanted to discharge a man he could. He had for years been held out in the city directory as manager of the appellant's business, at the store in question. His authority in that business seems to have been plenary. There is no claim that Brandau and Wood were not under pay, and in the employ of the appellant on this day, and the trouble occurred during business hours. These are a part only of the circumstances which, in our opinion, justified the circuit judge in leaving the questions involved to the jury.

The charge contained the following language:

"I charge you that the liability of the master does not reach wrongs caused by the carelessness of servants in work not directed by the master, as the business of a third party, of the servant himself, or of the master, which he did not expressly or impliedly direct the servant to perform.

"I therefore charge you that if you find that at the time of the commission of the alleged assault Brandau and Wood were not engaged upon the business of the Singer Sewing Machine Company, but were engaged in the private enterprise of defendant Brandau, the Singer Sewing Machine Company is not responsible for their acts, and your verdict must be for the defendant Singer Sewing Machine Company. If you find that the acts of Brandau and Wood in committing the alleged assault of which plaintiff complains were not acting within the scope of their employment by the Singer Sewing Machine Company, and that their acts in that connection were not expressly or impliedly authorized by the Singer Sewing Machine Company, then the Singer Sewing Machine Company is not responsible therefor, and your verdict must be for the defendant Singer Sewing Machine Company.

"I charge you that the fact that the plaintiff believed, or was induced to believe by Brandau that she was having a machine from the Singer Sewing Machine Company, is not alone sufficient to make that defendant liable for the assault, unless you find that the Singer Sewing Machine Company actually owned the machine. The defendant Singer Sewing Machine Company is not liable, unless you

find that it actually owned the machine sold by Brandau to plaintiff. * * * There are two methods of proving every proposition that is alleged in a court of justice. One is by direct proof; the other is by circumstantial evidence. By direct proof, where testimony is given, such as was given in this case by Brandau and the other two witnesses—that is direct proof.

"Now, the other proposition sought to be established, that these men were engaged on the business of the Singer Sewing Machine Company, and were acting within the scope of their employment, is sought to be established by circumstantial evidence. Now if you find that all those circumstances, taken together, in your judgment, in some degree, outweigh the testimony that is opposed to it, and that it establishes the fact sought to be proven by the plaintiff by a fair preponderance of evidence, then you are entitled to act upon the circumstances, notwithstanding an absolute denial."

We are of opinion that the case and the charge fall within the doctrine of the case of *Canton* v. *Grinnell*, 138 Mich. 590 (101 N. W. 811). The jury had the right to consider the reasonableness of the testimony. They are not bound to believe a witness whose testimony is inconsistent with the circumstances, although there is no other testimony bearing on the same question. If there is anything tending to create distrust in the truthfulness of a witness, the question must be left to the jury. *Underhill* v. *Railway Co.*, 81 Mich. 43 (45 N. W. 508); *Michigan Pipe Co.* v. *Insurance Co.*, 92 Mich. 482, 488 (52 N. W. 1070, 20 L. R. A. 277); *Goppelt* v. *Burgess*, 132 Mich. 28 (92 N. W. 497); *Preuschoff* v. *Brewing Co.*, 132 Mich. 107 (92 N. W. 945); *Abbott* v. *City of Detroit*, 150 Mich. 245 (113 N. W. 1121).

The declarations of an agent, and declarations made in the presence of an agent, at the time of doing an act, within the scope of his authority, and relating to the subject-matter of the act, are evidence, as part of the *res gestæ*. *Benedict* v. *Denton*, Walk. Ch. (Mich.) 336; *Converse* v. *Blumrich*, 14 Mich. 110 (90 Am. Dec. 230); *Butters Salt & Lumber Co.* v. *Vogel*, 135 Mich. 383 (97 N. W. 757).

The case seems to have been properly and carefully submitted to the jury, and a verdict reached which the circuit judge, on a motion for a new trial, refused to disturb. There was sufficient basis for this holding.

The judgment is affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and BLAIR, JJ., concurred.

PEOPLE *v.* LAPHAM.

INTOXICATING LIQUORS—LOCAL OPTION—CRIMINAL LAW.

Procuring intoxicating liquors as agent for the purchaser, who provided the money, in a county which had adopted prohibition, was a violation of law. 2 Comp. Laws, §§ 5412–5435.

Exceptions before judgment from Jackson; Parkinson, J. Submitted June 27, 1910. (Docket No. 146.) Decided July 14, 1910.

Steve Lapham was convicted of violating the local-option law. Affirmed.

E. J. Marrinane, for appellant.

Albert O. Reece, Prosecuting Attorney, and *Frank L. Blackman*, Assistant Prosecuting Attorney, for the people.

MOORE, J. The information in this case charges that respondent "did sell, furnish, and give to one William Davis, a certain quantity of malt, brewed, fermented,

spirituous, and intoxicating liquor, to wit, two pint bottles of whisky," contrary to the provisions of Act No. 207 of the Public Acts of the State of Michigan for the year A. D. 1889 (2 Comp. Laws, §§ 5412–5435), as amended, etc. The respondent was convicted and brings the case here by writ of error.

The testimony of the witnesses for the people tended to show that respondent, together with three or four other people, was in Frey & Bollinger's billiard parlor, in the city of Jackson, on the 19th of December, 1909; that the party consisted of respondent, William Davis, and his two brothers, Charles Davis and Myron Davis, and Edward Hogan; that said William Davis remarked that he wished he had a drink, and that respondent said he would go and get some if he had the price, and William Davis gave him the money and respondent went and got it; that William Davis and Myron Davis each contributed 25 cents, and William Davis gave the 50 cents to respondent, and that respondent left the billiard parlor, was gone 15 or 20 minutes and returned with a pint of whisky; that respondent handed the bottle of whisky to one of the Davis boys—which one of the Davises received the bottle from the respondent, none of the witnesses could remember. The three Davises and respondent drank the whisky; afterwards William Davis, as he testified, gave respondent 25 cents and respondent added 25 cents and went out from the billiard parlor and after awhile returned with another pint bottle of whisky, which was drunk by the Davis boys and respondent. There was no testimony as to how respondent obtained either of said bottles of whisky. William Davis further testified that he did not know whether respondent kept liquor for sale, or went and purchased it, or how he got it. Respondent testified that he did not have any whisky in his possession that day, and denied that he furnished any to William Davis or either of his brothers.

The error claimed is stated in the brief of counsel as follows. We quote:

"Appellant relies upon his first assignment of error, which in part is as follows: The court erred in charging the jury:

"'But if he did not have any (whisky) on hand somewhere secreted, out of which he got and produced it for this particular purpose, using Davis's money, and got it from a third party, still he would be the agent, that is, the means, the active, intentional means, of supplying this liquor to the Davises and the others that used it there, and in that case he should be deemed to be the furnisher of the liquor and furnishing it against the terms of the statute, and therefore guilty. So, in either case, no matter how or where he obtained it, if he did furnish the liquor as charged, and as the people claim, then he should be convicted of this offense.'

"There is no evidence in this case that respondent kept the whisky for sale or that he had it in his possession, or under his control, at any time prior to the time he went out and got it as testified to by the people's witnesses, nor is there any evidence that he was the servant of, or agent for, or in any way connected with, any person who had the liquor in question for sale. He procured it at William Davis's request, using William Davis's money. We contend he was the agent of William Davis. The only point we claim is that the court erred in charging the jury as set forth in our first assignment of error. We submit that it was a question for the jury whether the liquor produced was liquor that respondent had on hand, whether he was acting as agent of the seller, or whether he was acting as the agent of William Davis, and that if he was acting as the agent of William Davis he was not guilty of selling, giving, or furnishing the liquor to him, and it was error for the court to charge that he was."

Counsel cite a number of authorities, but none of them are from this State. We think the charge of the court, in view of the testimony, the offense charged, and the provisions of the statute, is not subject to the criticism made by counsel.

The conviction is affirmed.

OSTRANDER, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

PEOPLE v. SWENSON.

1. INTOXICATING LIQUOR — LICENSE — SOLICITING ORDERS — NONRESIDENT CORPORATIONS.
   It is unlawful to solicit orders for the purchase of intoxicating liquors at wholesale without complying with Act No. 291, Pub. Acts 1909, requiring a bond and license, although the solicitor has no authority to make contracts for his principal and the orders are subject to acceptance by the company which is a nonresident corporation.

2. CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS — INTOXICATING LIQUORS — DISCRIMINATION AGAINST NONRESIDENTS.
   The statute prohibiting such solicitation is not unconstitutional as a discrimination against nonresidents.

Exceptions before judgment from Houghton; Streeter, J. Submitted June 27, 1910. (Docket No. 148.) Decided July 14, 1910.

Theordore Swenson was convicted of violating the liquor law. Affirmed.

Burritt & Burritt and *James T. Drought* (*Lawrence Maxwell* and *Joseph S. Graydon*, of counsel), for appellant.

Franz C. Kuhn, Attorney General, and *William J. McDonald*, Prosecuting Attorney (*Arthur P. Hicks*, of counsel), for the people.

BROOKE, J. Defendant brings this case to this court for review upon exceptions before sentence. He was proceeded against and convicted under Act No. 291 of the Public Acts of 1909, upon the charge that he was engaged in the business of selling and offering for sale, and soliciting orders for the purchase of, distilled, brewed, malt, spirituous, and intoxicating liquors, at wholesale, as agent for a foreign and nonresident corporation which had not

paid to the treasurer of the State a license fee, as required by law. Defendant, as agent for the William Bergenthal Company of Milwaukee, Wis., solicited and obtained two orders for liquor at Houghton, Mich. Defendant had no authority to enter into a contract in Michigan binding upon the company. His principal reserved the right to accept or reject orders received by it at Milwaukee. It accepted the orders in question and shipped the goods by rail to Houghton, at the risk of consignees, who paid the freight. Neither defendant nor his principal had paid any license fee, or procured a license for the sale of liquor at wholesale in Michigan.

Section 1 of the general liquor law (2 Comp. Laws, § 5379), as amended by Act No. 291 of the Public Acts of 1909, provides, in part:

"Any person or persons, partnership or corporation, being nonresidents of the State of Michigan, who shall in this State sell the liquor referred to in this act, at wholesale, by or through agents, salesmen or other persons soliciting or doing business in this State, shall pay the same license fee as is provided in this section for resident person, persons, partnerships and corporations. * * * *It shall not be lawful* for any representative of such nonresident person, persons, partnership or corporation *to solicit or do business in this State* until such bond has been filed and approved and such license fee has been paid."

Section 2 of the act, as amended by Act No. 291 of the Public Acts of 1909, contains this provision:

"Wholesale dealers shall be held and deemed to mean and include all persons who sell or offer for sale such liquors and beverages at wholesale, in original trade packages and in bulk and by measure, not to be drunk on the premises."

Defendant urges two grounds for reversal:

(1) That the law does not make it any offense to solicit orders in this State, where the sale is consummated by delivery to the consignee outside the State; and

(2) That, if the law makes such solicitation an offense,

it creates an unconstitutional discrimination against nonresidents.

We are of opinion that, upon a fair reading of the language of the statute, with the purpose of giving effect to every part thereof if possible, an elementary rule of statutory construction will demonstrate that it was the intention of the legislature to prohibit the solicitation of orders for, as well as the consummated sale of, liquor within the State, without the payment of the license fee provided by the act. The construction contended for by defendant would place nonresident dealers in a better position, with regard to the traffic, than that occupied by citizens or residents of the State. It cannot be supposed that the legislature *intended* such a result. Such a construction would permit foreign dealers to do business at will, in Michigan, thereby depriving the State of its revenues, as well as destroying that proper control of the traffic which results from the imposition of the license.

The questions here involved are exhaustively discussed and determined adversely to the contention of defendant in the case of *Delamater* v. *South Dakota*, 205 U. S. 93 (27 Sup. Ct. 447). This decision is controlling. See, also, *State* v. *Ascher*, 54 Conn. 299 (7 Atl. 822).

The judgment is affirmed.

OSTRANDER, MOORE, MCALVAY, and BLAIR, JJ., concurred.

PEOPLE *v.* DICKERSON.

CRIMINAL LAW — APPEAL AND ERROR — REVIEW BY CERTIFYING RECORD—STATUTES.

Under 3 Comp. Laws, §§ 11966, 11967, the record in a criminal case should be certified to the Supreme Court before judgment, in order to test the validity of a law; after sentence the sole remedy is a writ of error.

Case certified from the recorder's court of Detroit, Connolly, J. Submitted June 27, 1910. (Docket No. 155.) Decided July 14, 1910.

Frank M. Dickerson was convicted of murder in the first degree, and sentenced to imprisonment for life in the State prison at Jackson: On certificate of trial court to determine the constitutionality of Act No. 175, Pub. Acts 1905. Dismissed.

Frederick E. McCain, for defendant.

Edwin Henderson, amicus curiæ.

Ormond F. Hunt, for the people.

BLAIR, J. Defendant was convicted of the crime of murder in the first degree on the 9th day of April, 1910, and on the same day he was granted 30 days' time within which to move for a new trial and settle a bill of exceptions. On the 12th day of April, 1910, defendant was sentenced to State prison at Jackson for the remainder of his life and the proper warrant and commitment papers issued, upon which he was incarcerated in said prison. On the 14th day of April, 1910, a motion for a new trial was made and filed, which motion was argued on April 19th and decision thereon withheld. At the conclusion of the argument defendant's attorney requested the court to

certify so much of the record to the Supreme Court as would test the validity of Act No. 175 of the Public Acts of 1905, in pursuance of the provisions of sections 11966 and 11967, 3 Comp. Laws. In accordance with the request of defendant's attorney, and, as stated in the certificate, in pursuance of the sections referred to, the trial judge has certified to this court a portion of the record, together with a memorandum of certain questions of law, for our opinion.

The sections in question appear in their present form in the Revised Statutes of 1838, pt. 4, tit. 2, chap. 5, §§ 3, 4, and from that time to this, so far as we can ascertain, no question has been certified to this court in pursuance of said section 11966. We are, therefore, unable to obtain any aid from our own decisions in construing these provisions. In Wisconsin, however, a statute substantially the same as ours has been construed by the supreme court to require the report to be certified before judgment, holding that after judgment a writ of error must be resorted to. *State* v. *Sheppard*, 37 Wis. 395.

We regard this decision as a correct interpretation of our statute, and we, therefore, decline to consider the questions reported for our opinion.

OSTRANDER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

MISCOTTEN *v.* HELLENTHAL.

QUIETING TITLE — EQUITY JURISDICTION — ADEQUATE REMEDY AT LAW.

An adequate remedy at law exists barring a bill to quiet title against a defendant who is in possession under a claim of title to real property.

Appeal from Allegan; Padgham, J. Submitted June 29, 1910. (Docket No. 68.) Decided July 14, 1910.

Bill by John Miscotten against Walter Hellenthal and another to quiet title to certain land. From a decree dismissing the bill, complainant appeals. Affirmed.

O. S. Cross and *Perle L. Fouch*, for complainant.

Wilkes & Stone, for defendants.

The bill of complaint in this cause is filed to quiet the title to a strip of ground, 16½ feet wide and 163 feet long. The strip lies between lands concededly owned by the complainant on the south and by defendants on the north. The true line between the holdings of the parties has never been established. If it is located as claimed by complainant, he is the owner of the disputed strip. If as claimed by defendants, they are the owners thereof. Defendants claim, however, that, irrespective of the true location of the line, they are entitled to the possession of the strip by virtue of a written lease thereof, made by complainant's grantor to their grantors in February, 1897, for the term of 25 years. From a decree dismissing the bill of complaint, complainant appeals.

BROOKE, J. (*after stating the facts*). While the bill of complaint in one paragraph avers that complainant is in possession of the disputed strip, other facts are set out

therein which indicate the contrary, and the evidence shows conclusively that defendants and their grantors have held possession of the strip for many years, and are now in possession thereof. The circuit court found that defendants were in possession under the lease, which was declared to be valid, and of which complainant had notice at the time of his purchase. It is unnecessary to determine whether this holding was correct or not. The decree was one simply dismissing the bill, and we think it was warranted upon the conceded facts in the case.

Defendants being in possession of the property in dispute under a claim of title, equity has no jurisdiction; complainant's remedy is by an action at law. *Stockton* v. *Williams*, 1 Doug. (Mich.) 546; *Wykes* v. *Ringleberg*, 49 Mich. 567 (14 N. W. 498); *Kilgannon* v. *Jenkinson*, 51 Mich. 240 (16 N. W. 390); *Bresler* v. *Pitts*, 58 Mich. 347 (25 N. W. 311); *Andries* v. *Railway Co.*, 105 Mich. 557 (63 N. W. 526); *Dolan* v. *Smith*, 147 Mich. 276 (110 N. W. 932); *Simmons* v. *Day*, 151 Mich. 1 (114 N. W. 853); *Warren* v. *Warren*, 151 Mich. 96 (114 N. W. 867); *Nicholls* v. *Lumber Co.*, 157 Mich. 234 (121 N. W. 742).

The cases of *Wilmarth* v. *Woodcock*, 58 Mich. 482 (25 N. W. 475), *Campbell* v. *Kent Circuit Judge*, 111 Mich. 575 (70 N. W. 141), *Rhoades* v. *McNamara*, 135 Mich. 644 (98 N. W. 392), and *Cullen* v. *Ksiaszkiewicz*, 154 Mich. 627 (118 N. W. 496), relied upon by complainant, have been examined. They are clearly distinguishable, and have no application to a situation such as is disclosed by the facts in the case under consideration.

The decree is affirmed, with costs of this court to defendants.

BIRD, C. J., and OSTRANDER, MOORE, and BLAIR, JJ., concurred.

PURCELL *v.* PURCELL.

HUSBAND AND WIFE — CONVEYANCE TO WIFE — ABANDONMENT BY WIFE—RESCISSION—FRAUD.

A conveyance of land made by a husband to his wife without consideration, no fraud being shown, will not be rescinded because the wife subsequently deserted him and refused to return on the ground that he had contracted and communicated to her a venereal disease.

Appeal from Ingham; Wiest, J. Submitted June 30, 1910. (Docket No. 89.) Decided July 14, 1910.

Bill by George E. Purcell against Katherine Purcell to set aside a deed on the ground of fraud. From a decree dismissing the bill, complainant appeals. Affirmed.

S. B. Roe and *J. E. Nichols*, for complainant.

L. B. Gardner, for defendant.

MOORE, J. This is a sworn bill of complaint filed for the purpose of having a deed made by complainant to defendant set aside. From a decree dismissing the bill of complaint the case is brought here by appeal.

The parties were married in January, 1900. The complainant was in possession of 115 acres of land under a land contract. This land was deeded to him in 1901, subject to a mortgage of $2,700, and a claim of $265. After the marriage the parties lived upon this land. Later they lived in Webberville, then in Williamston, where they lived until April, 1906, when they removed to Lansing, where they were living at the time defendant left complainant. While living at Webberville in 1905, complainant for about three weeks was in the insane asylum at Kalamazoo. He was discharged because he was regarded as cured.

The substance of the stating part of the bill of complaint is as follows:

"Your orator further shows unto the court that up to and for some time previous to the middle of March, A. D. 1907, said defendant insisted and prevailed upon your orator to convey by deed the above-described lands to said defendant. That your orator thereupon told said defendant that the lands remaining in his name as they then were would be of as much benefit to her as they would if they were deeded to her in her name, that they were for the benefit of both, and that it would serve no beneficial or substantial purpose to convey from your orator said lands unto said defendant, but notwithstanding your orator's explanation in this regard said defendant still insisted that your orator convey the same by deed unto her, she assigning as a reason for your orator deeding and conveying said lands to her that your orator might again in the near future become mentally unbalanced, and while in that condition he might make some deal or bargain with reference to said lands not in keeping with strict business principles as practiced and performed by so-called business men, and that, if he continued rational, she would in the course of a short time deed and convey the same back to your orator. That she would be more at ease and more satisfied if he would convey said lands to her as aforesaid; finally, for the purpose of gratifying said defendant and putting her mind at ease, your orator did on or about the 12th day of March, A. D. 1907, convey lands by deed unto said defendant and without consideration of any value from said defendant to your orator, your orator thinking when he so deeded to her that he was gratifying said defendant's wishes and that it would make no material or substantial difference to him or to her, as he then expected and well hoped and supposed and assumed that your orator and said defendant were to continue to live together in a pleasant and peaceable manner, as is becoming a husband and wife, and that the benefits and enjoyments derived from said lands were to be shared and enjoyed by and between the parties hereto, and that in the course of a few weeks said defendant would become satisfied of the permanent rationality of your orator and redeed said lands back to your orator.

"Your orator further represents unto the court that immediately after the conveyance by deed of the said lands

by your orator unto said defendant as aforesaid, she, the defendant, represented and pretended that she desired to go to visit her relatives living near the village of Williamston and while there to take some medical treatment of a local physician in the village of Williamston, and that she would return home in the course of a few days thereafter; whereupon said defendant did go to her relatives near the village of Williamston as aforesaid, but has never returned to live with your orator as your orator expected and well hoped she would do. That your orator, after waiting for a period of about nine days from the time she so went away on said visit as aforesaid, went down to where she was staying near the village of Williamston to see what was the cause of her staying away from their home so long without informing your orator, and when he thus went and saw her she then told him for the first time that she was not intending and did not intend to live with him any longer, and that she was not coming back to him nor to his home in the city of Lansing, where they were living at the time she so went away as aforesaid. Your orator then told her that he could not understand why she so refused to live with him and why she would not return with him to his home in the said city of Lansing, whereupon she told your orator that she absolutely refused to live with him longer, and that since she had procured the deed and conveyance of the said lands it suited her far better to leave him and live separate and apart from him. That your orator prevailed upon and used all reasonable persuasion to have said defendant return to his home and live with him as his wife, but that, on the contrary, she absolutely and wilfully refused so to do, and still wilfully refuses to return and live with your orator.

"That at the time said defendant was persuading your orator to deed and convey said lands to her, your orator believed that said defendant was bona fide and in good faith in her representations to your orator, and that her purpose was honest, and that she intended to live with him as his wife, and that she would redeed to your orator the above-mentioned lands as she had promised your orator to do, but, on the contrary thereof, the defendant at the time she so persuaded your orator to convey said lands to her was not in good faith, and her representations to your orator were not bona fide and honest in that regard, and she did not intend to live with your orator as his wife at any time after she was able to procure a deed

and conveyance of said lands, but wantonly and fraudulently did she represent and pretend to your orator that she was apprehensive as to his mental condition, and was wanton and fraudulent in conducting herself in a manner to lead your orator to believe that she intended to live with him, and was wanton and fraudulent in procuring the deed and conveyance of the said lands unto herself, and that when she procured said deed and conveyance unto herself as aforesaid, and during the time that she was persuading your orator to deed the same, she was not intending and did not intend to live with your orator, in the event that she was successful in procuring a deed and conveyance unto herself of the lands as above set forth. That the said lands were all the property that your orator owns, and is the only property that he has on earth."

Defendant answered the bill of complaint. Among other things stated in the answer is the following:

"She denies she insisted or otherwise persuaded said complainant to convey the land to her. That for reasons unknown to this defendant at the time of said conveyance, said complainant was extremely anxious to make a conveyance to this defendant. That she did not become aware of his reasons for making said conveyance until after the deed was actually drawn, executed, and delivered, after which said complainant said he conveyed the land to her for the express purpose of defeating his creditors. And then said: 'Now they can all go to hell,' that he would not pay any of them anything. This defendant alleges the truth to be that said complainant was a poor manager, unthrifty, and a person constantly in debt. That she fears, believes, has good reason to believe, and therefore charges the truth to be, that if he had not conveyed said premises to this defendant he would have had nothing. She denies that she ever promised to reconvey the land to said complainant. She denies that she told said complainant that it made no material or substantial difference to him or to her in the event that he made said conveyance to her. (But she avers that she did not, at the time of said conveyance, know of any reason why it should make any material difference between them.) She admits that shortly after the conveyance of said land to her she told said complainant that 'she desired to go to visit her relatives living near the village of Williamston, and while there to take some medical treatment of a local

physician in the village of Williamston;' that she expected to return to her home shortly after her departure from the said city of Lansing.

"She avers and alleges the truth to be that she was not, at the time she was residing in the city of Lansing, and up to the time that she started to the village of Williamston to consult the local physician there, aware of her true condition. That she learned upon her consulting with her physician at Williamston that she was suffering from a most loathsome venereal disease. That after she learned of her true condition and knowing that she contracted said disease from said complainant, and then knowing that said complainant had a loathsome disease, she then refused and has always steadfastly refused from such time to return to the city of Lansing and live or cohabit with said complainant. She admits that she informed said complainant that she did not intend to live with him any longer. This defendant denies that she refused to tell defendant why she would not live with him longer. She avers the truth to be that she did tell him that she had contracted a venereal disease from him; that because of his diseased condition, and because she had contracted the said disease from him, she would not live with him longer.

"She denies that at the time she received said deed as aforesaid, that she had formed any intention to quit said complainant or not live with him. She denies that she ever told said defendant that because of his mental condition she was afraid that he would be unable to take care of said property, or by reason thereof she wished a conveyance to herself."

The case was put at issue by proper pleadings and was heard in open court. The circuit judge filed a written opinion in which he stated that he could not find that the deed was procured by fraud or undue influence. At the time the deed was made complainant was about 39 years of age, and defendant was 12 years younger. There is no claim that his mind at that time was clouded. There is nothing in the record to show that he did not understand fully the legal effect of executing and delivering the deed. There were three children born to the parties, two of whom died in infancy. The oldest one is now upwards of nine years of age.

We agree with the learned circuit judge that complainant has failed to establish that the deed was procured by either fraud or undue influence. We also think he has failed to show that there was an agreement to reconvey the property to him. We are satisfied that defendant expected to continue to live with complainant when the deed was made, but it is equally clear that she did not know at that time that complainant had a loathsome disease which he communicated to her. We are satisfied, also, that the cause of defendant's going home was because she was ill, and that she first learned from her family physician that she, too, had a loathsome disease, well advanced. She testified this disease was contracted from the complainant, and that it was because of this fact that she refused to return to him. We think she testified to the truth in this regard. Complainant has himself to blame for the failure of defendant to return to him, and to continue in her relationship as his wife.

The trial judge made a proper decree under *Jackson* v. *Cleveland*, 15 Mich. 94 (90 Am. Dec. 266), and *Wipfler* v. *Wipfler*, 153 Mich. 18 (116 N. W. 544, 16 L. R. A. [N. S.] 941). See, also, *Draper* v. *Brown*, 153 Mich., at page 133 (117 N. W. 213).

The decree is affirmed, with costs.

BIRD, C. J., and OSTRANDER, BROOKE, and BLAIR, JJ., concurred.

NELSON *v.* GIBE.

1. VENDOR AND PURCHASER—EQUITY—SPECIFIC PERFORMANCE.
   The vendor in a land contract who has been dispossessed of a portion of the premises described, by adverse occupation of third parties, may not compel the specific performance of the contract and the payment of the entire purchase price, on the theory that a conveyance of the parcel as bounded and determined by such adverse holding and by the acquiescence of the grantor's predecessors in title, should be accepted as a performance of the agreement.
2. SAME — CONTRACT — BREACH — SPECIFIC ENFORCEMENT PRO TANTO.
   The purchaser may, however, elect to accept the premises to which the vendor has title, as a performance *pro tanto* and abate the purchase price in proportion to the deficiency.
3. SAME—FORECLOSURE OF CONTRACT—EQUITABLE RELIEF TO DEFENDANT.
   Under proper pleadings, the purchaser may obtain affirmative relief by virtue of the deficiency, in the form of an accounting for overpayments made, specific enforcement *pro tanto* and an equitable adjustment of the purchase price, whether the suit by the purchaser is to foreclose the land contract or compel its specific performance.

Appeal from Newaygo; Palmer, J. Submitted April 11, 1910. (Docket No. 57.) Decided July 15, 1910.

Bill by Swan Nelson and others against Samuel B. Gibe to foreclose a land contract. Defendants filed an answer in the nature of a cross-bill claiming affirmative relief. From a decree for complainants, defendant appeals. Reversed, and remanded.

George Luton, for complainants.

Albert G. Day, for defendant.

MCALVAY, J. The bill of complaint was filed in this case by complainants against defendant to foreclose a cer-

tain land contract, claiming a balance due and unpaid. The contract in question was entered into between the parties December 3, 1904, wherein complainants, who claimed to own the title in fee of the premises, agreed to sell, and defendant to purchase, "all that certain piece or parcel of land situate and being in the village and county of Newaygo, State of Michigan, and described as lot 14 in block 116 of the village of Newaygo, according to the map or plat on record in the office of the register of deeds of Newaygo county," for the consideration of $500 with interest at 6 per cent.

Payments were to be made at certain times, and all of the purchase price except $100 and interest thereon had been fully paid at the time the suit was instituted. The terms of the agreement are the ones usual in the ordinary short form land contract, and, among other things, complainants covenanted that, upon the fulfillment of its conditions by defendant, by a good and sufficient warranty deed, to convey to him said premises as described. The bill alleges that defendant immediately went into possession of said lot and moved into the house situated thereon, and has since continued in such occupancy. The answer of defendant in the nature of a cross-bill admits the execution of the contract and the payments made, and that complainants claimed at the time to be owners of said lot as described in fee, but denies that they were in possession of the whole of it, or that they ever gave to him, or he ever received from them, such possession; that he never discovered this fact, or that the premises of which he received possession were not the premises described in the contract, until after he had paid $400, principal and interest on the contract, when, in having a survey made, because of a dispute with an adjoining owner relative to the lines of some other lots, it appeared that Mr. Boyd, who owned lot 13 next east of this lot 14, was and had for many years been in possession of the east 23 feet and 2 inches of the same. Defendant notified complainants of this fact January 9, 1909, in

writing, stating that the balance of the purchase price was ready, and that they dispossess Boyd and give him possession. This notice was given before complainants made offer of a deed, and defendant's offer is continued in his answer. He asks for affirmative relief, that complainants be decreed to deed to him all that part of lot 14 of which they have the legal right of possession, and to account to him for over-payment. An answer was filed to the cross-bill and issues were joined. A hearing was had, and a decree granted dismissing the cross-bill and granting complainants relief as prayed. The amount fixed as due to them was $109. In default of payment of this amount lot 14 of block 116 was ordered sold, etc. Defendant on appeal asks for a reversal of this decree.

The record shows without dispute that Mr. Boyd, owner on this block No. 116, next east of lot 14, which is described in the contract, had for more than 20 years occupied 23 feet and 2 inches of said lot according to the recorded plat thereof. It appears that this lot was located in the southwest corner of the block; the plat showing that it was 66 feet fronting on Quarter Line street, and 165 feet deep, with Third street on the west side of it. The accuracy of the survey made by the county surveyor is not disputed. Third street on the plat runs north from Quarter Line street apparently to the river, but the record shows that 132 feet beyond the northwest corner of lot 14 the abrupt bank pitches down to the river 400 feet. Defendant also owns lot 1 of block 116 directly north of lot 14, and fronting 66 feet on Third street which is the only way of ingress or egress to and from lot 1 and the lot next north of it. It appears that at the time the contract between these parties was made there was a fence across Third street, and the land had been at least partly cultivated by complainants' father, who was then owner of lot 14, and but part of this street was used as an alley by the owner of the premises on the west side of it. There was no fence on the west side of lot 14 along Third street. Defendant after he moved in used and cultivated about three rods of

Third street west of lot 14. The barn on this lot was built partly in this street. At the time of making the contract complainants' property, sold as lot 14, according to the recorded plat, apparently extended from the old fence up to which Mr. Boyd occupied, west partly across Third street, and was shown to defendant by one of the complainants, and defendant supposed that this was in fact lot 14, and did not know the difference until the survey was made. The next year after he entered into possession, an ordinance having been passed restraining cattle from running at large, he took down this fence across Third street. These detailed facts are material only as bearing upon the proposition that these premises which defendant viewed and purchased as lot 14 presented the physical appearance of a full-sized lot. The record shows little or no diagreement upon the facts presented.

The first material and undisputed fact is that complainants covenanted to convey to defendant this lot 14, according to the recorded plat thereof, and it also appears undisputed that complainants could not then and could not at the time of their proffer of a warranty deed and demand for the balance claimed due, convey or put defendant in possession of the whole of such lot, for the reason that Boyd, the owner of lot 13 next east, had been for many years in open occupancy of the east $23\frac{1}{6}$ feet of lot 14. As soon as defendant discovered this fact he notified complainants. The record shows that complainants' father knew of this occupancy by Boyd, and recognized the old fence as the line between lots 13 and 14. Defendant contends that complainants are bound by their contract according to its terms; that by reference to the recorded plat it became a part of the contract, and that he is entitled to a conveyance of all the premises contained in the lot purchased according to the plat; that complainants not being in a position to convey to him all of said lot, he is entitled to an accounting, and a repayment of the excess he has overpaid, and a conveyance of such part of said lot as he has actually received from com-

plainants. Complainants contend that defendant is concluded by acquiescence of his grantors for many years, as to the east line, and that by the occupation of the street on the west complainants acquired title to it, and defendant in fact will receive more than 66 feet front on Quarter Line street; that the testimony offered to show where the east line of lot 14, according to the recorded plat, was actually located, was inadmissible, because a court of law and not of equity should determine such question. Defendant is not seeking to disturb any rights acquired by Mr. Boyd by reason of acquiescence by complainants in the line between lots 13 and 14. Admittedly they cannot convey to him title to all of lot 14 according to the recorded plat. He asks that complainants who demand specific performance of this contract on his part, or a forfeiture by foreclosure, shall do that which is equitable.

The question is, Are they entitled to the relief they seek? More than one-third of this lot never belonged to complainants. Whether at the time of entering into the contract complainants believed that they owned it is immaterial. As far as the proposition of law is concerned they might have intended to purchase it, or, if it was incumbered, have expected to remove the incumbrance. They are bound by the terms of their contract. They agreed to sell all of the land described. To grant them the relief asked would operate to allow them to take advantage of their own default. Specific performance of a land contract will not be granted where the vendor is unable to perform, but the purchaser may elect to proceed *pro tanto*, with an abatement in the purchase price for the deficiency. 26 Am. & Eng. Enc. Law (2d Ed.), p. 116; Pomeroy on Contracts (2d Ed.), § 347 *et seq.* It is immaterial what the form of the action may be if the relief sought be identical. This principle is applicable to this case.

Defendant by proper pleadings had asked the court to equitably determine the rights of the parties. He is willing to accept a warranty deed for the portion of the prem-

ises complainants own, but asks that they account to him for overpayment already made. He should have been given the affirmative relief he asked. It is in accord with sound principles of equity, and is supported by reason and authority. The court, having obtained jurisdiction of the subject-matter and the parties, was authorized to finally determine the dispute.

The decree of the circuit court must be reversed, because there is no evidence in the case from which this court can determine the amount which should be deducted from the contract price by reason of complainants' default in title to $23\frac{1}{6}$ feet of this lot, and how much less said premises are worth by reason thereof. The case must be remanded for the purpose of taking testimony upon that question to determine that amount, and also to determine the amount defendant has overpaid, if any, and the interest thereon, and all other interest to which he is entitled, and that thereupon a decree be entered in his favor for a conveyance by warranty deed to him of $42\frac{5}{6}$ feet of said lot, and for a money judgment for the amount to which he is found to be entitled over and above his payments, with interest from August 20, 1909, and that he recover all costs of both courts to be taxed.

OSTRANDER, HOOKER, MOORE, and BROOKE, JJ., concurred.

In re FITZGIBBONS' ESTATE.

MARRIAGE—HUSBAND AND WIFE—COMMON LAW RELATION—REMOVAL OF DISQUALIFICATION OF HUSBAND—GOOD FAITH.

A bigamous marriage, entered into by the wife in good faith and by the husband with knowledge that he had a living wife in another State, becomes valid after the removal of his disqualification by the death of the first wife, and continued cohabitation by the living parties, although the wife never learned of the existence or death of the prior wife and the husband was ignorant of her decease. BROOKE, OSTRANDER, HOOKER, and MCALVAY, JJ., dissenting.

Error to Ionia; Davis, J. Submitted February 17, 1910. (Docket No. 81.) Reargued July 1, 1910. Decided July 14, 1910. Rehearing denied December 8, 1910.

Sarah Jane Fitzgibbons petitioned for her appointment as administratrix of the estate of William Fitzgibbons, deceased, claiming to be his widow, and was appointed by an order of the probate court. Later, William Fitzgibbons, Jr., filed a petition asking for her removal and denying the validity of the marriage. Said later petition was granted, the administratrix was removed and the heirs determined, and she appealed to the circuit court. A judgment sustaining the validity of the marriage is reviewed by William Fitzgibbons, Jr., and other heirs on writ of error. Affirmed by a divided court.

A. A. & H. A. Ellis, for appellants.

R. A. Hawley, for appellee.

BROOKE, J. The writ of error in this case is prosecuted by certain heirs of William Fitzgibbons, deceased, for the purpose of reviewing a judgment of the circuit court, by which it was determined that Sarah Jane Fitzgibbons is

the lawful widow of deceased, and, as such, entitled to participate in his estate.

Certain facts appear in the record, about which there is no dispute. William Fitzgibbons, deceased, was married to Armenia Allen, at New Haven, Oswego county, New York, in the year 1868. After the marriage, he and his wife lived at North Volney, New York, until 1876, during which time, two children, Grace and William, Jr., were born to them. The family then removed to Galt, Canada, where a third child, Ella, was born. When the youngest child, Ella, was about two years old, in 1878, deceased sent his wife, Armenia, and the three children, back to New York State, and himself came to Michigan. From 1878 to June 20, 1881, deceased was in correspondence with his wife, Armenia. In 1880, he had settled in Saranac, Ionia county, this State, and there boarded with a family named Stewart. Deceased shortly began paying court to a daughter, Sarah Jane (appellee), who was then about 19 years of age. On February 14, 1881, he took her to Grand Rapids and there went through a marriage ceremony with her, after which they returned to Saranac and commenced to live together as husband and wife. Their home remained in Saranac during the balance of his life, though he was absent at times on business. Appellee bore to deceased one child, a daughter, Madeline, born February 6, 1891. From 1881 to 1900 deceased had no correspondence with his family in New York, so far as the record discloses. In the latter year, his son, William, went to Saranac and discovered himself to his father. Deceased took his son to his home for dinner and supper and held a long conference with him, in which he told his son that he was in Armenia's power, that he did not want to be punished for bigamy, and that when he, the son, needed help, to let him know. Thereafter, and up to the month of his death (November 13, 1904), he paid various small sums to his son, which were devoted to the care of Armenia, who died September 3, 1903. It is apparent that deceased was not aware of the death of his wife, be-

cause he sent his son $20 but a few days before his own death. During the 23 years appellee and deceased lived in Saranac, they were reputed to be husband and wife; they received and were received socially, moving among the best people of the vicinity. Deceased seems to have acquired the respect and confidence of the community, holding the office of postmaster at Saranac for seven or eight years preceding his death.

Prior to her marriage with deceased, appellee heard that deceased was a married man. Upon inquiry, deceased denied the fact of his prior marriage. Again, in 1891, shortly after the birth of the daughter, appellee was told by Mary Fitzgibbons, a sister-in-law of deceased, of the former marriage, and that there were three children. Appellee then made further inquiry of deceased, whereupon, she testifies, he admitted his former marriage, but claimed to have a divorce. She makes the claim that she implicitly relied upon the statements made to her by deceased, both before the marriage ceremony and later, when she taxed him with his bad faith. She states that in spite of the rumors which reached her ears she went through the entire 23 years of her association with deceased in absolute ignorance of the existence of his wife, and in good faith believing herself to be his lawful wife. She swears that she had no knowledge of the death of Armenia, in 1903, because she never knew of Armenia's existence, and that after Armenia's death no new contract was made between herself and her husband, their relations continuing after that event (of which deceased also was ignorant) in reliance upon the ceremonial marriage, contracted in 1881.

Under the facts above disclosed, the court submitted to the jury the question of whether or not appellee was the legal widow of deceased, making the determination of the jury, upon that point, rest solely upon the good faith of appellee in entering into the contract and in continuing to live with deceased thereunder, up to the time of his death, using the following language:

"It is a question of belief. She must have been informed to that degree the burden is upon her to establish she was acting in good faith after the other side have once established there was a former wife living at the time of the marriage. Then the burden shifts to Jennie and it is incumbent upon her to show by a preponderance of evidence she acted in good faith; that is, she believed William Fitzgibbons was her lawful husband and there was no impediment to the marriage between her and William Fitzgibbons, if she honestly believed that, taking into consideration all that was said and told her in the discussion she had with her husband, if she was convinced from what he said, and other sources, these rumors were false and untrue and she was laboring under the honest belief that she was his lawful wife, that she had the legal right to marry him and he to marry her at the time it was done, she would be considered innocent, and the law would consider her the legal wife and widow of the deceased because of the inference that they had a common-law marriage after the death of the first wife, provided she was innocent all the way along."

The legitimacy of Madeline was made to depend upon the finding of the jury as to her mother's legal status. The jury, apparently with much difficulty, found that appellee was the legal widow of deceased and that Madeline was his legitimate daughter.

Section 8589, 3 Comp. Laws, provides:

"Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of parties capable in law of contracting, is essential."

Section 8616 provides:

"All marriages which are prohibited by law, on account of consanguinity or affinity between the parties, or on account of either of them having a former wife or husband then living, * * * shall, if solemnized within this State, be absolutely void without any decree of divorce or other legal process."

It being conceded upon this record that the marriage between deceased and Armenia Allen, in 1868, was a valid union and that Armenia was alive and undivorced in 1881, when the contract between deceased and appellee was en-

tered into, it is clear that the later marriage was absolutely void, and, during the life of Armenia, afforded no protection to appellee. At no time prior to Armenia's death was deceased legally competent to give his assent to a union with appellee. His relations with appellee during those 22 years were meretricious and known to him to be such, for on June 20, 1881, four months after the ceremony was performed between him and appellee, he wrote his wife, Armenia, acknowledging the receipt of a letter from her, and promising to return to her as soon as possible. On September 3, 1903, Armenia died. Then, for the first time, it became possible for deceased and appellee to intermarry. Did they in fact do so?

It is apparent from the record that during the last year of the life of deceased (following the death of his wife) he treated appellee in all overt respects as a husband should treat his wife. He addressed numerous letters to her as his wife, and subscribed them as her husband, and during that year he lived at their home with her for several months, during which time the relations of husband and wife seem to have been sustained, so far as was apparent to the world. His conduct, however, during this period was not different in any respect from his conduct during the preceding 22 years, when he knew his relations with her were adulterous. Under these circumstances, it is claimed by the appellee, and, in effect, so charged by the court, that, assuming the good faith of the appellee in entering into the void contract and continuing to live under it, a marriage should be presumed as soon as the impediment was removed. These facts and circumstances, if uncontradicted and unexplained, might support the inference that a new and valid contract was entered into upon the death of Armenia, but such inference is impossible, if negatived by positive evidence.

Schouler's Domestic Relations (5th Ed.), § 15, defines marriage as follows:

"To constitute a perfect union, the contracting parties should be two persons of the opposite sexes, without dis-

qualification of blood or condition, both mentally competent and physically fit to discharge the duties of the relation, neither of them being bound by a previous nuptial tie, neither of them withholding a free assent."

And further, at section 26:

"A union once originating between man and woman, purely illicit in its character, and voluntarily so, there must appear some formal and explicit agreement between the parties thereto, or a marriage ceremony, or some open or visible change in their habits and relations, pointing to honest intentions, before their alliance can be regarded as converted into either a formal or an informal marriage. Nor is the issue between informal marriage and illicit intercourse to be concluded by the conduct of the pair towards society. They may, for convenience or decency's sake, hold themselves out to third persons as man and wife, while yet sustaining at law, and intentionally, a purely meretricious relation."

Eversley on Domestic Relations, p. 2, says:

"Marriage is a state or relation depending for its existence upon the fact of parties competent to contract the relation, and their *legally voluntary present* consent to do so."

At page 7, he says further:

"The presumption of marriage, arising from cohabitation and repute, can only be rebutted by clear and satisfactory evidence. * * * But this presumption of law in favor of marriage does not hold good under all circumstances."

In 1 Bishop on Marriage, Divorce & Separation, § 344, it is said:

"Where all the facts are covered by direct proofs, and there is no room to presume others, they will be held to constitute marriage only when they disclose a concurring consent to it, by the two minds at the same instant."

Particular stress is laid by counsel for appellee upon some language contained in the opinion of this court, in the case of *Barker* v. *Valentine*, 125 Mich. 336 (84 N. W. 297, 51 L. R. A. 787, 84 Am. St. Rep. 578), but we

believe that a careful reading of the case will disclose that it is not out of harmony with the earlier decisions of the court. In that case, Valentine had started divorce proceedings against his first wife, Ida, in New York. No divorce was granted. He removed to Michigan and entered into relations with the second woman, Margaret. After four years, he and Margaret, in September, 1889, returned to New York where Ida caused a warrant to be issued against him for nonsupport. Ida died in October, 1889, a fact apparently known to both Valentine and Margaret. They returned to Detroit where he made application in a fraternal order for insurance, describing Margaret as his wife. He introduced her as his wife, lived with her as such, and she was so recognized by his friends and relatives for seven years.

We understand that the court held in this case simply that the evidence disclosed by the record was sufficient to support an inference that the parties had entered into a new contract, after the removal of the impediment. For, in discussing the cases of *Rose* v. *Rose*, 67 Mich. 619 (35 N. W. 802), and *Van Dusan* v. *Van Dusan*, 97 Mich. 70 (56 N. W. 234), the court said:

"There is nothing in either of these cases to indicate that if, after the impediment to a lawful marriage between them had ceased, they had intended to take each other as husband and wife, and had indicated that intention by treating each other in all respects as though they were married, and had introduced each other as husband and wife, and had so held themselves out to the world, and had lived together as husband and wife, the court would not have held that the presumption that the illicit relation, which existed when they commenced to live with each other, continued after the impediment to their marriage ceased, was overcome."

An examination of the authorities cited in this case, both from Michigan and other States, shows that in each case the question as to whether or not a common-law marriage existed was determined upon the evidence.

A careful examination of all the cases in Michigan leads us to the conclusion that a contract of marriage can-

not be presumed when such presumption would do violence to the facts in the case, fully covered by the proofs. *Hutchins* v. *Kimmell*, 31 Mich. 126 (18 Am. Rep. 164); *Peet* v. *Peet*, 52 Mich. 464 (18 N. W. 220); *Rose* v. *Rose*, *supra*; *Williams* v. *Kilburn*, 88 Mich. 279 (50 N. W. 293); *Van Dusan* v. *Van Dusan*, *supra*; *Flanagan* v. *Flanagan*, 116 Mich. 185 (74 N. W. 460); *Lorimer* v. *Lorimer*, 124 Mich. 631 (83 N. W. 609); *Judson* v. *Judson*, 147 Mich. 518 (111 N. W. 78).

The question in the case at bar appears to us to be: Did deceased and appellee, at any time subsequent to the removal of the impediment, presently agree to take each other for husband and wife, and live together in that relation? Clearly they did not. He did not, because he died in the belief that his wife, Armenia, was still alive. Her assent to the new contract, if it could be assumed, and it is negatived by her own testimony, would avail nothing, for both must consent at the same time, else no contract follows. To predicate the legal status of the appellee upon her good faith alone is not only contrary to authority, but would result, possibly, in the absurdity of a man leaving two or more legal widows.

If deceased, in the case at bar, had entered into a contract of marriage with a woman in South Carolina, the State in which he was doing business at the time of his death, that woman, entering into the relation in good faith, would also have become his wife upon the removal of the impediment, and would now also be his legal widow. We are aware that the principle contended for by appellee has received recognition to some extent in some other jurisdictions, notably in a late case in New York (*In re Wells' Estate*, 123 App. Div. 79 (108 N. Y. Supp. 164), 194 N. Y. 548 [87 N. E. 1129]), but we are satisfied that no such doctrine has been or should be incorporated into the law of this State.

The judgment should be reversed.

OSTRANDER, HOOKER, and MCALVAY, JJ., concurred with BROOKE, J.

MOORE, J. I cannot agree with the conclusion reached by Justice BROOKE. The record shows that Mrs. Fitzgibbons entered upon and continued her relations with William Fitzgibbons and bore a child to him in full belief that she was lawfully wedded to him, and without knowledge that there was any legal impediment to their entering into the marriage. The record is equally clear that after the impediment to their marriage was removed Mr. Fitzgibbons held Mrs. Fitzgibbons out to the world as being his wife. After that event he addressed her as his wife in at least 50 letters and signed himself as her husband. Under conditions like these it must be said that the authorities are not agreed. The precise question has not been presented and passed upon by this court. There is an interesting discussion of the issue of marriage or no marriage in the case of *Bechtel* v. *Barton*, 147 Mich. 318 (110 N. W. 935). The nearest case in point to the one before us is *Barker* v. *Valentine*, 125 Mich. 336 (84 N. W. 297, 51 L. R. A. 787, 84 Am. St. Rep. 578), in which language is used in the opinion which the trial judge thought justified him in giving the charge he did. It may be true that the language used in the opinion was not necessary to the disposition of the case, but it was fully justified by the authorities cited on pages 342 and 343 of the opinion.

Is it necessary, in the interest of public policy, that when women enter into the marriage relation and continue it in the full belief that they are lawfully wedded wives, and bear children to their husbands in the full belief that those children have a right to bear his name, and the relation continues after the legal impediment is removed, the woman all the time believing she is a lawful wife, and the man holding her out as such, that she should be characterized as though she was a harlot, and had knowingly entered into meretricious relations? Can it be urged as in furtherance of good morals that children born under such circumstances may be truthfully characterized as

illegitimates? An affirmative answer to these questions shocks one's sense of justice.

This view has been taken by very respectable courts. The case of *In re Wells' Estate*, 123 App. Div. 79 (108 N. Y. 164), is directly in point. In the opinion occurs the following:

"In the case of *Rose* v. *Clark*, 8 Paige (N. Y.), 582, Chancellor Walworth uses this language:

"'After all that had transpired previous to the death of the intestate (in this case Arthur Wells), I think he would have been precluded from denying that she (the appellant) was his wife. * * * And if the evidence was sufficient to raise the presumption of a legal marriage as to him, in his lifetime, it must necessarily be sufficient to entitle her representative to the widow's portion of the estate, under the statute of distributions.'

"It is hardly conceivable that in the case at bar Arthur Wells, if living, would be heard to deny that the appellant was his lawful wife. Expression was given to the same principle in the case of *Townsend* v. *Van Buskirk*, 33 Misc. Rep. 287 (68 N. Y. Supp. 512), in an opinion written by Mr. Justice Maddox. The justice said:

"'There is to my mind a well-defined distinction between illicit relations, forbidden because of an undisclosed disability on the part of one of the parties thereto, and such relations as are mutually meretricious, involving on the part of the woman knowledge that its character is not, and is not intended to be, matrimonial, but of a wanton and lustful nature. * * *

"'There can be no other conclusion, from all the evidence in the case, that she and Townsend desired marriage, that that was their intention, and consequently "their cohabitation, thus matrimonially meant," made "them husband and wife from the moment when the disability" on his part was removed, and it was immaterial whether he knew of that removal, * * * the fact being that it was removed, and their consent to the matrimonial relation may be inferred from their acts and conduct.'

"See, also, *Maynard* v. *Hill*, 125 U. S. 190 (8 Sup. Ct. 723), where marriage is defined to be—

"'Something more than a mere contract, though founded upon the agreement of the parties. When once formed, a relation is created between the parties which they cannot change, and the rights and obligations of which depend, not upon their agreement, but upon the law, statutory or common.'

"In the case of *Eaton* v. *Eaton*, 66 Neb. 676 (92 N. W. 995, 60 L. R. A. 605), the same question was considered, and the court said:

"'Another question to be determined is the legal effect of the cohabitation of the parties after the impediment to their marriage had been removed. In this State the only thing essential to a marriage is the consent of parties capable of contracting. * * * If the parties live together and intend to sustain toward each other the relation of husband and wife, they are, in the absence of any impediment fatal to that relationship, legally married.'

"See, also, *State* v. *Worthingham*, 23 Minn. 528.

"The position taken upon this question by the Illinois courts is illustrated in the cases of *Cartwright* v. *McGown*, 121 Ill. 388 (12 N. E. 737, 2 Am. St. Rep. 105); *Robinson* v. *Ruprecht*, 191 Ill. 424 (61 N. E. 631); *Manning* v. *Spruck*, 199 Ill. 447 (65 N. E. 342). See, also, *Stein* v. *Stein*, 66 Ill. App. 526.

"Many other decisions rendered by the highest courts of other States might be cited to like effect. It seems to me, in view of the decisions and authorities which have been referred to, that the rule ought to be that where one person is free to enter into the matrimonial relation and does so in good faith, but the other party is incapable of entering into such relation because of a former wife or husband living, or other impediment, when such impediment is removed, if the parties continue matrimonial cohabitation, continue to introduce and recognize each other as husband and wife, and are so recognized by their relatives, friends, and by society, it ought to be held that from such moment they are actually husband and wife, and that under such circumstances it is of no importance that a formal agreement to live together as husband and wife was not entered into, or that either did not know that the impediment to such an agreement had been removed, when, in fact, it had been so removed, and both parties were competent to enter into the matrimonial state."

In *Eaton* v. *Eaton*, *supra*, it appeared that the parties were married March 21, 1899; that plaintiff, Harriet M. Eaton, obtained a decree of divorce from Enis Goff in Johnson county, December 2, 1898; that said decree of divorce was obtained without the knowledge of Eli Eaton; that the parties to this suit lived together until November 30, 1899; that the decree of divorce from Enis Goff, the

former husband of plaintiff, was obtained less than six months prior to the marriage of plaintiff and defendant; that such marriage was in violation of law and a nullity; and that defendant had no knowledge of the time when the prior divorce was procured until just prior to the commencement of this action. The marriage between plaintiff and defendant was adjudged to be null and void.

In reversing this decree the court used the following language:

"Another question to be determined is the legal effect of the cohabitation of the parties after the impediment to their marriage had been removed. In this State the only thing essential to a marriage is the consent of parties capable of contracting. *Bailey* v. *State*, 36 Neb. 808 (55 N. W. 241); *Gibson* v. *Gibson*, 24 Neb. 394 (39 N. W. 450). Even a license is not indispensable. *Haggin* v. *Haggin*, 35 Neb. 375 (53 N. W. 209). If the parties live together and intend to sustain toward each other the relation of husband and wife, they are, in the absence of any impediment fatal to that relationship, legally married. The marriage between the plaintiff and defendant was an attempt made in good faith to form a legal union. Both intended to live in wedlock. In the absence of an impediment to the marriage no ceremony would have been required; the mutual consent of the parties would have been sufficient. When the impediment was removed, why may not consent be inferred from continued cohabitation? This exact question arose in the House of Lords in the case of *De Thoren* v. *Attorney General*, reported in L. R. 1 App. Cas. 686, decided in 1876. The question turned upon the legitimacy of certain children born to a man and woman who were married in Scotland, going through a public ceremony in a church, believing the marriage a valid one. The man, however, had been divorced, and the time for appeal from the decree at *nisi prius* had not expired at the time of the public marriage. In that case the contention was that the inference of marriage was rebutted, because the parties had commenced living together in pursuance of an invalid marriage, and that the consent deducible from cohabitation must be referred to the ineffectual ceremony. But it was there decided that—

"'It must be inferred that the matrimonial consent was inter-

changed as soon as the parties were enabled, by the removal of the impediment, to enter into the contract.'

"And further:

"'The ceremony which took place, although invalid, was undoubtedly a consent by the parties to live together as husband and wife. And their subsequent cohabitation was proof of continued consent.'

"In the case cited, Lord Chelmsford said:

"'Taking the facts as they are stated in the case, and applying the law to them, the court of session is of opinion that, assuming the ignorance of the parties of the invalidity of the ceremony of marriage during the whole period of their cohabitation, yet after the removal of the impediment to their marriage and before the birth of their eldest son, they became married persons. I agree entirely with this opinion.'

"In *Rose* v. *Clark*, 8 Paige (N. Y.), 574, Chancellor Walworth says:

"'It appears, however, from decisions in our own courts, as well as in England, that a subsequent marriage may be inferred from acts of recognition, continued matrimonial cohabitation, and general reputation, even where the parties originally came together under a void contract of marriage'

"*Fenton* v. *Reed*, 4 Johns. (N. Y.) 52 (4 Am. Dec. 244); *Blanchard* v. *Lambert*, 43 Iowa, 228 (22 Am. Rep. 245). In the recent case of *University of Michigan* v. *McGuckin*, 62 Neb. 489 (87 N. W. 180, 57 L. R. A. 917), it was held, although the relations of the parties were originally meretricious, that marriage is a social status, the existence of which may be shown by conduct clearly indicating free consent and mutual intention to live in wedlock. Upon the conceded facts in this case, our conclusion is that the parties, by continuing to live together in the matrimonial relation, contracted a valid marriage."

In the case of *Robinson* v. *Ruprecht*, Curtis E. Robinson and Johannah Schoeninger began living together without pretense of marriage. In April, 1873, they went before a justice of the peace, where a marriage ceremony was performed. Previous to this ceremony both parties had been married. The woman supposed her first hus-

band was dead, though he in fact was still living. Mr. Robinson had a prior wife living from whom he had not been divorced, as he well knew. The parties continued to live together as husband and wife until the death of Johannah, which occurred in April, 1891. The undivorced wife of Mr. Robinson died in December, 1875. Gottlieb Schoeninger, husband of said Johannah, died in May, 1890. There is nothing to indicate that knowledge of his death came to either of the parties. In disposing of the case the court used the following language:

"The formal statutory celebration of marriage between said Curtis E., Sr., and said Johannah, indicated that it was their desire their subsequent connection should be considered and understood to be matrimonial. They in good faith, so far as this record discloses, at the time of the marriage, believed that Johannah was a widow and might lawfully marry, but Curtis E., Sr., at least, knew that he then had a living wife and could not lawfully enter into another marriage union. In 1875, about two years after their formal marriage, Mary J., the wife of said Curtis E., Sr., died, and within a few months thereafter said Curtis E., Sr., and Johannah, were advised that said Mary J. was no longer living. They then believed there was no impediment to their legal union as husband and wife. There is no direct proof they subsequently entered into a statutory marriage, but their actions, conduct, their cohabitation and repute, were foreign to and inconsistent with any relation other than that of husband and wife, and there can be no doubt but that after the death of said Mary J. the cohabitation between said Curtis E., Sr., and said Johannah, was matrimonial in the intent and belief of both of them. Their actions, life, and repute from henceforth during the remainder of their lives were those of husband and wife. The impediment to that legal relation was removed May 13, 1890, by the death of said Gottlieb, the husband of said Johannah. There is no proof on the question whether they were or were not advised of his death. They believed that he was dead when the ceremony of marriage was performed in McHenry county, in 1873, and so far as the record discloses were never advised to the contrary. Johannah lived nearly a year after the death of Gottlieb and died April 14, 1891, and said Curtis E., Sr., survived Johannah but

about one year. It was lawful after the death of Gottlieb for them to enter into the marriage relation. They believed their cohabitation was matrimonial, intended it should be so, and the presumption of marriage from cohabitation apparently matrimonial became applicable to their relation as husband and wife in aid of the legitimacy of their children. * * * The acts of each toward the other were those of husband and wife, and to said Martha J., Curtis E., Jr., and Bessie L., their children, who were members of the family, they deported themselves as father and mother. Their whole life was inconsistent with any other relation than that of husband and wife. A few months after the death of said Gottlieb Schoeninger, they, with the appellee children, visited the relatives of the husband in Massachusetts. Curtis E., Sr., introduced Johannah to his kindred as his wife and the appellee children as their children. He manifested parental pride in the children, was anxious the appellee daughters should exhibit their proficiency in music to his kindred, and declared his satisfaction that through appellee Curtis E., Jr., his name would be perpetuated. A family reunion was held at the house of his brother, Nathan S., at which Curtis E., Sr., Johannah, and the appellee children attended as a family. * * * A pew was rented in the South Park Avenue Church, and Curtis E., Sr., and Johannah attended services together there. Deeds were executed conveying to them property as husband and wife, naming them as such, and they uniformly treated and called each other husband and wife. Curtis E., Sr., applied for letters of administration on the estate of Johannah, declaring under oath therein that he was her widower. He received an engrossed copy of resolutions passed by a lodge of which he was a member, extending sympathy and condolence on the death of his wife, and he brought such copy home to the children. He directed her name, as Johannah Robinson, to be engraved upon the plate of her coffin, and an inscription to be engraved on her monument in which she was declared to be his wife, and caused to be published an obituary notice of her death, naming her as 'Johannah, beloved wife of C. E. Robinson.' A common-law marriage was thus established, and such marriages are valid in this State. *Port* v. *Port*, 70 Ill. 484; *Elzas* v. *Elzas*, 171 Ill. 632 (49 N. E. 717)."

What was done in the case just quoted was no more

than was done in the case at bar. Mrs. Fitzgibbons all the time supposed she was the lawful wife of Mr. Fitzgibbons, and he having so represented her to the public and to herself after the legal impediment passed away, it is but scant justice to Mrs. Fitzgibbons and to her child and to the public to hold that she was at the time he died his legal wife.

The judgment should be affirmed.

BIRD, C. J., and BLAIR and STONE, JJ., concurred with MOORE, J.

HAMMOND *v.* MICHIGAN CENTRAL RAILROAD CO.

1. PLEADING—DEMURRER—APPEAL AND ERROR.
   On demurrer to a declaration, the pleading must be considered more critically than if the defendant had gone to trial upon a plea to the merits, and unless on its face the declaration affirmatively shows actual negligence, the demurrer must be sustained.
2. MASTER AND SERVANT—RAILROADS—NEGLIGENCE—OPERATION OF TRAINS.
   It is not negligent for a roadmaster to order an engineer in charge of an engine to move it when another employé, who is working in the way, with his back to the engine, has a free method of escape, if customary warning is given.
3. SAME—RAILROADS—SIGNALS.
   One who gives orders to a railroad engineer is not required to see that the track is clear of all persons, before communicating the order.
4. SAME—WARNING SERVANT.
   Failure of the engineer to use due care in executing orders of his superior, cannot be charged to the latter, unless the customary care would not be commensurate with the danger, and the superior servant knew the circumstances.

Error to Saginaw; Gage, J. Submitted April 20, 1910. (Docket No. 131). Decided July 14, 1910. Rehearing denied December 8, 1910.

Case by Fred Hammond against the Michigan Central Railroad Company for personal injuries. An order sustaining a demurrer is reviewed by plaintiff on writ of error. Affirmed.

De Vere Hall, for appellant.

Watts S. Humphrey (*Humphrey, Grant & Baker*, of counsel), for appellee.

HOOKER, J. The declaration in this cause alleges that plaintiff was a sectionman on the defendant's railroad; that his crew was ordered to the scene of an accident to aid in putting some derailed cars upon the track and restoring the road, which was out of repair by reason of the accident; that said accident called for the presence of certain superior officers of defendant, including its roadmaster, Burns, to assist in restoring the track. Plaintiff's crew ran the hand car to a point a few feet from, and in front of, the engine belonging to the train that was derailed, and, after removing some plank from a flat car attached to the engine, the hand-car crew, at the direction of the plaintiff's section foreman, proceeded to take the hand car from the track, plaintiff being upon the track with his back towards the engine; and while so engaged the roadmaster, without advising or warning plaintiff of his intention or purpose to do so, directed the engineer to move the same toward the plaintiff, whereupon he did so and injured the plaintiff. It further alleged: That it was the duty of defendant and said roadmaster:

(1) Not to have given directions to the engineer to move the engine toward the plaintiff while he was in a place of danger therefrom.

(2) Not to do so without advising or warning the plaintiff of such direction.

(3) Not to have assumed the direction and control of

the movement of said engine without advising and warning plaintiff of such fact.

(4) To have advised and warned plaintiff of his intention to move such engine toward plaintiff before giving such direction.

That defendant was careless, negligent, and wrongful in the discharge of its said several duties in the following particulars:

(1) In that the roadmaster gave such direction while plaintiff was in a place of danger.

(2) In doing so without advising or warning him of such direction.

(3) In assuming the direction and control of the engine without advising and warning plaintiff of his direction.

(4) In failing to advise and warn plaintiff of his intention and purpose to direct the engineer to move the engine toward him before giving such direction.

The defendant demurred on several grounds:

(1) No negligence alleged.

(2) If negligence alleged, it is shown to have been act of fellow-servant of plaintiff.

(3) The action of the roadmaster was not the proximate cause of the injury.

(4) The declaration omits to allege knowledge by roadmaster that plaintiff was in a place of danger.

(5) That the risk of the danger causing the accident was assumed by plaintiff.

(6) That the declaration omits to show that it was any part of his duty or authority to direct the movement of the engine, and therefore defendant is not responsible.

(7) That plaintiff was guilty of contributory negligence.

The demurrer was sustained, and plaintiff has appealed.

This cause being before us on demurrer, the declaration must be considered more critically than if defendant had gone to trial upon a plea to the merits. If it does not, upon its face, affirmatively show actionable negligence by defendant's roadmaster, the demurrer was properly sustained.

The gist of plaintiff's complaint is that the roadmaster

directed the engineer in charge of the engine to move the same when the plaintiff was in a place of danger, *i. e.*, a few feet in front of the engine upon the tracks and with his back toward the engine. Without intimating that circumstances might not be such as to make an order to move an engine negligent, we cannot say that an order to move an engine is negligent on the part of the foreman, when there is nothing to prevent the free and ready escape of the person in front of the engine from the track, and where there is nothing to indicate danger to him more than his presence on the track.

We have held that a foreman has a right to suppose that an engine will not be moved without a warning from the engineer, and when it is, and the person injured from the want of care in managing the engine, or without the usual warnings, if a fellow-servant of the engineer, must recover his damages from him, and cannot recover from the company. The engineer generally acts upon orders; but ordinarily the one giving or delivering the orders is not expected to see that the track is clear of all persons before communicating such orders to the engineer. The latter must use care in complying with his orders, and his failure to do so cannot be charged to the one who gives the orders to move his engine, unless the customary care would not be commensurate to the danger and the circumstances such as to make it the duty of the superior officer to know of the extraordinary danger. The declaration is defective under the decision in the case of *Burrman* v. *Railway*, 143 Mich. 689 (107 N. W. 709).

We held, in *Williams* v. *Raper*, 67 Mich. 427 (34 N. W. 890), that—

"A declaration should set out the facts which constitute his cause of action, logically and in their natural order, showing his right, the injury, and the consequent damage, and, if such pleading does not disclose a cause of action, no evidence can be introduced in support of it."

This declaration does show that the engineer ran his engine against plaintiff, when moving it upon orders re-

ceived from the roadmaster; but there is no allegation of fact indicating that the order was negligent or improper. Not only does the declaration contain no such allegation, but it does not state that the customary signals were omitted by the engineer, which we mention as a significant, though perhaps not a controlling, fact.

The judgment is affirmed.

OSTRANDER, MOORE, and STONE, JJ., concurred.

BLAIR, J. I concur in the result upon the ground that the declaration is defective in not stating that the roadmaster knew, or should have known, of plaintiff's dangerous position.

McCAMMAN *v.* DAVIS.

1. EVIDENCE—EQUITY—HEARING—PARTITION.
   The court must base its decree upon testimony given in open court, not upon knowledge which the judge may have of the situation.

2. SAME—VIEW OF PREMISES.
   Knowledge gained by the court, upon a view of the premises, might with propriety be used to determine which of two methods of sale should be adopted in partition proceedings, where both are supported by proofs; but may not be made the sole basis of a decree.

3. PARTITION—SALE—OFFERING SEPARATE PARCELS.
   While the primary object of the partition sale is to obtain the highest possible sum for distribution, and the court may subdivide a parcel for purposes of the sale, if convinced upon a proper showing that such course would produce a higher bid, an order so providing must be based on proofs.

4. SAME—PARTIES—TAX TITLES.

Former owners of tax titles, whose claims to real property are adverse, are not proper parties to partition proceedings.

5. SAME—EXPENSE OF CLEARING TITLE.

Complainants who procure an abstract of title and who, in good faith, purchase the interest of holders of tax titles against the premises at less expense than would be required by litigation to remove the consequent cloud upon the title, are entitled to be reimbursed from the proceeds of the partition sale.

Appeal from Ingham; Collingwood, J. Submitted June 7, 1910. (Docket No. 6.) Decided July 14, 1910. Rehearing denied December 8, 1910.

Bill by James R. McCamman and another against Charles J. Davis and others for the partition of certain real estate. From a decree ordering the property offered for sale first, in one parcel, afterwards in separate parcels, complainants appeal. Reversed.

Horace S. Maynard, for complainants.

Samuel H. Davis, for defendants.

Complainants are the owners of an undivided five-sixths interest in the N. E. ¼ of section 22, of town 4 north, of range 2 west, excepting therefrom the rights of way across said premises of two railroads. Defendant Charles J. Davis is the owner of the other undivided one-sixth interest in said premises. Complainants filed a bill for partition, setting out that the land lies in the city of Lansing, and that upon the same is located a large bed of gravel, of uncertain area and depth, of great value because of its proximity to said city. They aver that a physical division of the property cannot be made so as to secure to each owner with certainty his fair share, and pray that it may be sold in bulk, and the proceeds divided between the owners, according to their several interests. To this bill defendant Davis filed a plea, setting forth that there were of record two several tax deeds, covering a part or the whole of said description, and that the holders thereof or

their heirs should be made parties defendant. While this plea was pending, complainant purchased said tax titles for the sum of $36.79, and procured an abstract for the use of the court at an expense of $5. The plea was overruled, and defendants given leave to answer.

The answer of defendant Davis admits all the material averments of the bill, including the averment that a physical division of the tract cannot be made with equity, but prays that in making the sale the commissioner may be ordered to sell the premises in three parcels; the west parcel to contain about 50 acres, the center parcel to contain about 80 acres, and the east parcel to contain about 30 acres. The gravel deposit is located on the center parcel. Upon the hearing, both complainants were sworn, and both gave testimony to the effect that the property would, in their opinion, bring a higher price if sold as one parcel than it would if divided into three or more parcels. The defendant Davis offered no testimony. A hearing was had upon the settlement of the decree, at the conclusion of which the court entered a decree for the sale of the premises, paragraph 7 of which is as follows:

"(7) Such sale shall be made at public auction, and the premises shall be offered as follows:

"First. As three parcels described as follows:

"(*a*) All that portion of said premises lying west of the line formed by extending the center line of Lathrop street.

"(*b*) All that portion of said premises lying between the line formed by extending the center line of Shepard street and the line formed by extending the center line of Lathrop street.

"(*c*) All that portion of said premises lying between the line formed by the extension of the center line of Shepard street, and the east line of said premises.

"Second. As one parcel."

Complainants appeal.

BROOKE, J. (*after stating the facts*). It is urged by complainants that the court had no authority, under the proofs in this record, to do anything but decree a sale of

the parcel *en masse*. It is to be noted that the record is barren of testimony to the effect that a sale, as ordered by paragraph 7 of the decree, will or may produce more than a sale of the whole parcel *en bloc;* indeed, the only testimony in the case is that given by the complainants, who swear that, in their opinion, the property will bring a higher figure, if offered as one parcel. If the contention of defendant Davis, that the property will sell better in three parcels than in one, is well founded, it certainly should have been easy for him to have produced evidence to that effect for the guidance of the court. This he did not do. He even refrained from going upon the stand himself, and placing his opinion upon record, as to the best method of sale. It may be that he relied upon the knowledge of the court as to the situation. It is elementary that the court must base its decree upon testimony given in open court. Knowledge gained by a view of the premises might, with propriety, be used to determine which of two methods of sale should be adopted, where both are supported by proofs; but such knowledge cannot *alone* be made the basis of a decree. The primary object in a partition sale is, of course, to obtain the highest possible sum for distribution, and there is no doubt of the authority of the court to subdivide a single parcel for the purposes of such sale, if convinced *upon a proper showing* that such course would produce a higher figure than a sale in a single parcel; but, as we have pointed out, no such showing was made, and there was therefore no basis for the decree entered.

Should complainants have been reimbursed, from the proceeds of the sale, the expense incurred in buying in the tax titles and procuring an abstract? It is clear that the former owners of the tax titles, their claims to title being adverse, were not proper parties defendant in this proceeding. *Summers* v. *Bromley*, 28 Mich. 125; *Wilkinson* v. *Green*, 34 Mich. 221; *Bell* v. *Pate*, 47 Mich. 468 (11 N. W. 275); *Hayward* v. *Kinney*, 84 Mich. 591 (48 N. W. 170). Defendant Davis, at the time he filed his

plea, evidently considered these outstanding titles such a cloud upon the title held by himself and complainants as to warrant their removal. To have filed a bill for this purpose, even supposing the absolute invalidity of the claims, would probably have involved the expenditure of a larger sum than was paid by complainants in purchasing the titles. Complainants apparently acted in good faith and for the purpose of clearing the title, in order that prospective bidders at the sale might not be deterred from offering the full value of the property. In an equitable proceeding, in the absence of any indication of bad faith, we can see no reason for denying complainants reimbursement for this item as well as for the abstract. Both were made for the benefit of the estate, and both were, in our opinion, necessary to insure a sale at the best price obtainable.

A decree will be entered providing for the sale of the premises in a single parcel, and providing, further, for the payment, from the fund, of the sums expended by complainants, above referred to. In other respects, the decree is affirmed, with costs to appellants.

BIRD, C. J., and McALVAY, BLAIR, and STONE, JJ., concurred.

PEARLL *v.* PEARLL ADVERTISING CO.

PEARLL *v.* PEARLL.

1. HUSBAND AND WIFE—EARNINGS OF WIFE—PROPERTY RIGHTS. Upon allegations of a bill of complaint that defendant corporation was formed by complainant and his wife and sons, to carry on a business which the husband claimed to have built up, and that he consented to the creation of the company

upon the promise that he should have 100 shares of the stock, and that no stock has been issued to him, no relief can be granted, where the proofs fail to support the charge, under a theory not contemplated by the bill, that the parties are living together and the husband is entitled to control or share in the community property.

2. SAME—EMANCIPATION OF WIFE.

A wife, compelled by circumstances to assume control of her husband's business, which she conducts for twenty-five years with the aid of her sons, dealing with her husband as with a stranger, and recognized by him as entitled to earn and disburse funds independently, will not be required to turn over the business to him, and to desist from interfering with it.

3. SAME—WIFE'S SEPARATE ESTATE — VOLUNTARY CONVEYANCE—CONSIDERATION.

Evidence that complainant deeded to his wife land incumbered by a mortgage for its full value, without consideration, that she controlled it for 21 years as the owner, improved it, paid taxes and remortgaged it to rebuild, without complainant making any claim of ownership, does not warrant a decree vesting an interest in the husband.

Appeal from Bay; Collins, J. Submitted June 17, 1910. (Docket Nos. 75, 76.) Decided July 14, 1910.

Bill by Anton W. Pearll against the Pearll Advertising Company and others to have complainant declared to be a stockholder, and by the same complainant against Severyna Pearll for the cancellation of a deed. From a decree dismissing the bills, complainant appeals. Affirmed.

James Van Kleeck (*George P. Cobb*, of counsel), for complainant.

L. G. Beckwith, for defendants.

OSTRANDER, J. These causes were heard together and are presented in this court upon a single record. In the first, in which the Pearll Advertising Company is a party defendant, complainant claims to be entitled to, and asks to be declared to be the owner of, one-fifth of the capi-

tal stock of the said advertising company; that the association be required to meet and elect a board of directors who are stockholders in the association; and that the association be enjoined from doing any other or further business as a corporation until a board of directors is elected who are stockholders and authorized as such to act as directors. It is charged in the bill of complaint that about four years before it was filed the complainant started the business of bill posting and outdoor advertising, which was carried on under the name of the "Bay City Bill Posting Company;" that he invested in the business a large sum of money and labor, to wit, $2,000 and upwards; that after the business was started, complainant, Severyna Pearll, and their two sons, Julian and Thadius, worked together in the business and shared the fruits and profits in common until about August 1, 1906, when the said Severyna took complete control of the business and excluded complainant from participating therein except as a common laborer performing manual labor for the said company; that she took possession of the books of account and refused to let complainant see or inspect them or have anything to do with the business except to labor; that after repeated and earnest efforts to adjust matters in relation to said business, and on or about January 28, 1907, he filed his bill of complaint, praying, among other things, that he be relieved touching the matters of the business of said company, and especially that the said Severyna be ordered and directed to deliver to him the books of account and be restrained by injunction from interfering with complainant's business affairs; that afterwards an amicable agreement was made, by the terms of which complainant was to discontinue his suit, a stock company or corporation was to be organized with $5,000 of capital stock, divided into 500 shares, and all the property of the bill-posting company should be put into the corporation and constitute the capital stock, and complainant should have 100 shares of the stock, the rest being divided between Severyna, Julian, Thadius, and

one David L. Galbraith, who was a son-in-law of the parties; that in February, 1907, articles of association were made and filed and recorded pursuant to law, the name of the corporation being "Pearll Advertising Company:" that Severyna Pearll subscribed for 430 shares of stock, Julian for 20, and Thadius for 50; that complainant was told that he was a stockholder to the extent of 100 shares and believed it; that a meeting was held at which a board of directors was elected, including complainant and said Galbraith, and the said directors elected complainant president and Galbraith treasurer; that after the organization of this company the business was carried on in the same manner as it was before, but, when he discovered that he was not a stockholder and had no interest in the corporation and applied for 100 shares of the stock, he was informed that he was not a stockholder and had no interest in the corporation.

The bill was verified and was answered by the defendants other than the Pearll Advertising Company, denying especially that complainant ever started the business of bill posting or invested in the business a large sum of money. On the contrary, the defendants say that complainant has never been engaged or interested in the business except at different times in the capacity of a hired employé. Most of the material allegations of the bill are denied, and it is alleged that after executing the articles of association, and before any transfer of the business aforesaid to said corporation, the stockholders by proper action terminated the corporation and dissolved it. Mere convenience is said to have induced the formation of a corporation, which, however, did no business as such and issued no stock.

In the other suit the bill sets out: That previous to April 16, 1885, complainant was the owner of two certain lots. That on that day, in order to provide for each other in case of death, complainant and his wife, the defendant, made and executed and delivered deeds of the said lots; complainant deeding the land to his wife, and the wife at

the same time deeding it to complainant. These deeds were made and delivered on the advice of counsel for the purpose of creating a joint tenancy in complainant and his wife. That the said Severyna fraudulently obtained possession of the deeds and destroyed the deed which she had executed to complainant, but recorded the deed executed by complainant to her. That the premises were were worth $2,000 and upwards. The rental value was $600 a year. Severyna has collected and kept the rent and threatens to continue to do so. He also avers in this bill that he went into the business of bill posting, and invested in it about $2,000, and that his wife, Severyna, after all of the family had worked together in said business, took the business into her own hands, so that complainant has no knowledge of how the business is conducted. The relief prayed for is that the deed made by complainant to Severyna be canceled; that she may be directed to make a conveyance of said land to complainant, or that they may be declared to be joint tenants of said property; that Severyna be ordered and directed to deliver up the books of account relating to the bill-posting business; and that she be restrained by injunction from interfering with complainant's business affairs, excepting the bill-posting business. She answered the bill denying the material allegations thereof. In each of these causes the court below dismissed the bill, and the complainant has appealed from both decrees.

I have read the record, and find that, so far as the cause first above stated is concerned, complainant has failed to prove any material allegation of the bill excepting only the merely formal allegations. The parties still are living together, and it is the contention of complainant that the case, upon the facts, requires the application of the doctrine that the husband is head of the family and entitled to control, or at least to share in, the community property. It is said, too, that the earnings of the wife, she having worked and earned money for some 25 years, sometimes as much as $900 a year, belong to the husband, in the absence of agreement or understanding, and that

she could not acquire any exclusive interest in the property in which this money has been invested.

The answer to these contentions is: *First*, that the bill is filed upon no such theory; and, *second*, that it appears that circumstances, in this instance, forced the wife to become the executive and working head of the family, and the complainant has for years recognized her right to earn and disburse money, doing business with her himself as he would with a stranger. She has sought to acquire for the sons a business in which they can earn their living, and has exercised good judgment in seeing to it that her husband did not much interfere in the management thereof.

With regard to the other cause, I find that the complainant was the owner of the property described in the bill of complaint, and that he executed a deed thereof to his wife as is alleged, and that she paid no consideration for the transfer, although it seems to be claimed by counsel for defendants that she paid him $200 for the deed. The property was worth about $3,000 and was mortgaged for $3,000. From 1885, when the deed was made, to 1907, when complainant filed his first bill of complaint, the wife appears to have paid the taxes, insurance, repairs, and interest, collected the most of the rents, borrowed money on her own account to repair and rebuild the property after it had been burned, remortgaged the place for $1,200 to procure money to buy the bill-posting business, again remortgaged it to pay for the cost of rebuilding upon the property without any interference from the complainant or any claim upon his part that he had any interest in the property. The allegation that a deed of the property was executed by defendant to complainant is not proved.

These two causes must be disposed of here as they were disposed of in the court below, and both decrees are affirmed, with costs to appellees.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

WRIGHT v. WRIGHT.

DIVORCE—ALIMONY—SEPARATION AGREEMENT—TERMINATION.

An agreement between husband and wife for a separation, with a settlement of property matters, is abrogated by their resumption of marital relations, second separation and second resumption thereof, and the contract is no bar to alimony in a suit by the wife for divorce.

Appeal from Wayne; Donovan, J. Submitted June 17, 1910. (Docket No. 86.) Decided July 14, 1910. Rehearing denied December 8, 1910.

Bill by Elizabeth E. Wright against George Wright for a divorce. From a decree for complainant, defendant appeals as to the award of alimony. Affirmed.

Merriam, Yerkes, Simons & Ladd, for complainant.

John E. Maloney (*Frank W. Atkinson*, of counsel), for defendant.

OSTRANDER, J. The parties were married in 1880 and lived together until December, 1897, when they mutually agreed to separate and live apart from each other. They executed an instrument which recites the agreement, and makes provision for the wife in consideration that she release her husband from the duty to support her, and bars her homestead and dower rights in certain real estate which is described therein. The instrument is witnessed and duly acknowledged. Later, we assume in October in the year 1907, complainant filed her bill against defendant for a divorce, and for alimony, setting up that after the separation in 1897 their marital relations were resumed at different times, the last time, in the summer of 1907, and charging defendant with repeated acts of extreme cruelty. She asked for permanent alimony. There was

an answer and replication, a hearing in open court, and a decree finding the charges of extreme cruelty sustained. The marriage was dissolved, and permanent alimony was awarded. Defendant, appealing, does not ask to have the decree dissolving the marriage reversed, but only that the provision made for the wife at the time of their separation in 1897 be held to be a fair division of the property, and, as it was executed, a bar to the allowance of alimony. It is also claimed that the amount awarded as alimony is, in any event, excessive. It is unnecessary to set out the testimony. We find, as did the court below, that the parties after their first separation resumed marital relations, ended them, and again resumed and ended such relations, upon the promises of defendant, each time broken, to desist from conduct not only reprehensible but criminal. The agreement to separate was therefore abrogated (*Knapp* v. *Knapp*, 95 Mich. 474 [55 N. W. 353]), and the conduct of the parties, in other respects, indicates that they regarded it as abrogated. Indeed, it is urged that defendant later on made other considerable provision for complainant. Complainant's right to permanent alimony was not barred, and we are not satisfied that the court made an unfair division of the property.

The decree is affirmed.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

PETOSKEY & BAY SHORE GAS CO. *v.* CITY OF PETOSKEY.

TAXATION—BOARD OF REVIEW—INCREASE OF VALUATION.

Of its own motion and without a showing of cause or notice to the taxpayer, the city board of equalization created by 1 Comp. Laws, §§ 3322, 3323, may increase the valuation of any property assessed in its jurisdiction.

Error to Emmet; Shepherd, J. Submitted June 22, 1910. (Docket No. 128.) Decided July 14, 1910. Rehearing denied December 8, 1910.

Assumpsit by the Petoskey & Bay Shore Gas Company against the city of Petoskey for taxes paid under protest. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Henry T. Heald, for appellant.

B. H. Halstead, for appellee.

STONE, J. The plaintiff is a corporation organized and existing under the laws of Michigan, owning and operating a gas plant in the city of Petoskey. The defendant is a municipal corporation organized under the laws of this State for the incorporation of cities of the fourth class.

This action was brought to recover for certain taxes paid under protest. The declaration consists of a special count in assumpsit, and the common counts. At the trial and after an opening statement made by plaintiff's attorney, and as soon as the first witness for the plaintiff was sworn, the defendant's counsel objected to the introduction of any evidence under the special count for the following reasons:

First. The protest set forth, which is the foundation of the claim of the plaintiff, does not show an illegal assessment.

Second. At the time this action was commenced the council of the city of Petoskey had neither rejected the claim of the plaintiff, nor had it had a reasonable opportunity to investigate and pass upon it.

In his opening statement to the jury counsel for plaintiff said:

"As you probably know, the city of Petoskey operates under what is known as the law governing cities of the fourth class. The taxes are assessed by the city assessor; they are returned by the city assessor to the board of review and equalization, on the third Monday in May, which, in 1909, was the 17th of May. The city assessor in 1909 assessed the personal property of the gas company at the sum of $27,000. This assessment was returned to the board of review and equalization at that sum. On the day when the board of review and equalization was to hold its first meeting, Mr. Wells, who is the manager of the gas company, came here to the city hall to discover what the assessment against the property of the company was. I think he came here a few minutes before the board of review and equalization were actually in session; but he did see the city assessor, and either the city assessor told him, or else he saw on the books, that the assessment against the personal property was placed at $27,000. That was the same amount at which it had been assessed the year previous, and the company found no complaint with that assessment. Prior to this time, of course, the board of review had published its notice of meeting in the paper, as required by law. Being satisfied with the assessment at that sum, he did not think it necessary to appear before the board of review further, and did not appear before the board of review. The board of review continued its sessions from the 17th day of May to the 24th day of May. On the 22d day of May, which was Saturday, the board, on motion of one of its members, raised the assessment of the company from $27,000 to $42,000—a raise of $15,000. Neither Mr. Wells, nor any other person for the company, was given any notice that this raise was contemplated by the board; and so far as we know, there were no investigations made as to the value of the personal property. The company had no knowledge whatsoever that this raise had been made, and supposed that the assessment still remained at the sum of $27,000 until on or about the 6th of December, 1909, when

Mr. Wells went to the city treasurer's office to ascertain the amount of taxes that the company would be called upon to pay this year, and there, for the first time, learned that the assessment had been raised to the sum of $42,000. Of course it was too late to consider the question with the board of review at that time, so the company, on January 6, 1910, within the time limited, paid these taxes on its personal property, under protest."

During the discussion of the matter, the attorney for the plaintiff further stated:

"I understand that he (Mr. Wells) came up the first day they were to be in session, and was informed that the assessor was upstairs, and he came up and found the assessor, but the board of review had not been called."

The court sustained the objections of the defendant, and directed a verdict and judgment for defendant. The ruling was excepted to by plaintiff, and the questions are properly raised by assignments of error.

It is the contention of the defendant that the law, applicable in this case, permits the raising of an assessment by the board of review, without other than the published notice, and that the assessment here was legal. We shall first consider this question, for if it shall turn out that the tax was legally assessed, the plaintiff has no standing in court, and the conclusion reached by the circuit judge was correct. Sections 3322 and 3323, 1 Comp. Laws, are controlling here. We quote section 3322 in full, viz.:

"The supervisors of the several wards, the mayor, and the city attorney, shall constitute a board of equalization and review of the general assessment rolls of the several wards of said city, a majority of whom shall constitute a quorum for the transaction of business, but a less number may adjourn from day to day. They shall have power, and it shall be their duty, to examine said assessment rolls, and they shall have authority to, and shall, correct any errors or deficiencies found therein, either as to the names, valuations or descriptions; and of their own motion or on cause shown, may reduce or increase the valuation of any property found on said rolls, and to add thereto any taxable property in said city that may have

been omitted, and to value the same; and to strike from said rolls any property wrongfully thereon, and generally to perfect said rolls in any respect by said board deemed necessary and proper, for which services such members of said board shall receive two dollars per day while actually employed. If on such examination they shall deem the valuation of the several wards to be relatively unequal, they shall equalize the same by adding to or deducting from the total valuation of the taxable property in any ward such an amount as, in their judgment, will produce relatively an equal and uniform valuation of the real estate in the city; and the amount added to or deducted from the total valuation in any such ward shall be so stated in the certificate attached to the assessment roll of such ward; and all taxes for State, county, school, general city, and sewer purposes shall be apportioned according to said equalization, in the manner hereinbefore provided, and said equalization shall not be changed with regard to the relative valuation of the several wards of said city, and the board of supervisors of the county in which said city is located shall equalize such city as a unit the same as a township is equalized, and any amount added to or deducted from the total valuation of such city as a unit, shall be apportioned by the clerk of the board of supervisors among the several wards according to the equalized valuation of the real property in each ward as fixed by the city board of review."

The next section provides that the board shall meet on the third Monday in May after notice of the meeting by the city clerk; at which time and place the several supervisors shall submit to said board their respective general assessment rolls. It provides for the organization of the board and that they shall continue in session at least four days successively, and as much longer as may be necessary to complete the review, and that any person or persons desiring to do so, may examine his, her or their assessment on said rolls, and may show cause, if any exists, why the valuation thereof should be changed, and that the said board shall decide the same and their decision shall be final. They may examine on oath any person touching the matter of his or her assessment, and keep a record of their proceedings, and all changes made in the

rolls. The amount added to or deducted from the total valuation in each ward shall be entered upon such record, which record shall be deposited with the city clerk, who shall be clerk of the board. Said board shall have the same powers, and perform the same duties in all respects, as boards of review of townships, in reviewing and correcting assessments made by the supervisors of townships, *except* as in the act otherwise provided. It is worthy of note, that unlike boards of review in townships, this board holds but one session or meeting, to wit, the one commencing on the third Monday of May.

We think that there can be no doubt of the power of this board to raise valuations of property, of their own motion. They have—

"Authority to, and shall, correct any errors or deficiencies found therein, either as to names, *valuations*, or descriptions; *and of their own motion*, or on cause shown, may reduce or increase the valuation of any property found on said rolls, and to add thereto any taxable property in said city that may have been omitted, and to value the same."

This statute makes no provision for any notice other than the general notice which the statute gives, and that given by the clerk generally.

In 1 Cooley on Taxation (3d Ed.), at pages 778 and 779, that author says:

"Sometimes the board has not jurisdiction to change the valuation except upon complaint or application; but frequently the board has power to make alterations of its own motion."

These are clearly proper matters for statutory regulation. The eminent author last quoted says, at page 782:

"Where a statutory board of review holds stated meetings, with power to increase assessments, everybody is notified of the fact, and is warned to attend if he deems it important; and it is often held that under such circumstances special notice of the raising of a particular assessment, or of the adding of omitted property, need not be given."

The author cites cases in United States Supreme Court, in Arkansas, California, Illinois, Indiana, Missouri, New York, Oregon, Tennessee, and Michigan.

In *Detroit Citizens' St. Ry. Co.* v. *Common Council of Detroit*, 125 Mich. 673 (85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589), it was decided that the common council, sitting as a board of review, was not required to notify appellant to attend when it was considering appeals from the board of assessors, and that, if appellant desired to be heard it should have been present and requested it.

In *Township of Caledonia* v. *Rose*, 94 Mich. 216 (53 N. W. 927), it was held that a taxpayer who fails to appear at the time and place provided for the board's sessions is estopped from attacking the assessment.

It was said in *Hinds* v. *Township of Belvidere*, 107 Mich. 664 (65 N. W. 544), that a taxpayer must be presumed to know the powers and duties of the board of review, and the time fixed by statute for its meeting, and that he cannot excuse his failure to appear before that body by showing that he was out of the State at the time.

In *Michigan Savings Bank* v. *City of Detroit*, 107 Mich. 246 (65 N. W. 101), it was held that boards of review are the proper tribunals for the correction of unjust assessments, and that parties will not be heard in the courts, until they have exhausted their remedy before these tribunals. See, also, *First Nat. Bank of St. Joseph* v. *Township of St. Joseph*, 46 Mich. 526 (9 N. W. 838); *Williams* v. *City of Saginaw*, 51 Mich. 120 (16 N. W. 260); *Comstock* v. *City of Grand Rapids*, 54 Mich. 641 (20 N. W. 623); *Peninsula Iron & Lumber Co.* v. *Township of Crystal Falls*, 60 Mich. 510 (27 N. W. 666); *Detroit River Sav. Bank* v. *City of Detroit*, 114 Mich. 81 (72 N. W. 14); *Traverse Beach Ass'n* v. *Township of Elmwood*, 142 Mich. 78 (105 N. W. 30), 142 Mich. 297 (105 N. W. 768). Many more cases might be cited to the same effect.

The plaintiff relies upon the case of *Avery* v. *City of East Saginaw*, 44 Mich. 587 (7 N. W. 177). That case

involved a tax levy under the charter of that city. We have taken some pains to find and examine the charter provisions under which that proceeding was had. Act No. 246 (Laws 1859, tit. 5, §§ 5, 6) is as follows:

"The supervisors of said city shall complete their assessment of all taxable property in said city within such time as is or may be prescribed for the supervisors or assessors of townships by the general law of this State, and upon the completion thereof shall file a notice thereof with the city clerk, who shall report the same to the council at their next meeting.

"SEC. 6. The supervisors, comptroller, treasurer, and city attorney shall constitute a board of review, four of whom shall constitute a quorum. They shall have power and it shall be their duty to examine said assessment and correct any errors found therein, and on *cause shown* to reduce, equalize, or increase the valuation of any property found on said roll, and to add thereto any taxable property in said city that may have been omitted, and to value the same. They shall meet at such time and place as shall be appointed by the common council, of which time and place notice shall be given by said council at least two weeks prior to the time of meeting, by publishing a notice thereof in some newspaper published in said city, and also by posting the same in three public places in each ward of said city, and shall continue in session at least three days successively, and as much longer as may be necessary, at least six hours in each day during said three days; and any person desiring so to do may examine his or her assessment on said roll, *and may show cause*, if any, why the valuation thereof should be changed, and the said board shall decide upon the same, and their decision shall be final; and the said board shall keep a record of their proceedings and all changes made by them in said roll, and their record shall be deposited with the city clerk."

The general tax law referred to by Justice CAMPBELL in the *Avery Case*, being section 986 of the Compiled Laws of 1871, made the supervisor the reviewing officer, and provided that:

"On the request of any person, his agent or attorney, considering himself aggrieved, on *sufficient cause* being

shown, to the satisfaction of the supervisor, he shall alter the assessment as to the valuation thereof and he shall also, upon sufficient cause being shown by any credible person on behalf of any other person whose property is assessed, alter the assessment in such manner as shall to him appear just and equal; and to this end he may in either case examine, on oath, the person making the application, or any other person present, touching the matter, which oath the supervisor is hereby authorized to administer."

As said by Justice CAMPBELL on page 589:

"The powers of the city board of review are broader in some respects than those of the township assessing officer, because they can enlarge the assessment in some cases. But there is nothing in the charter indicating an intention of allowing this to be done with any less care or responsibility than that required of the original town assessors. The board is to value the property it deals with 'as provided in the general tax law of the State.' The general tax laws do not allow any change of valuation except on a proper examination, and they allow no valuation to stand, until there has been an opportunity of investigating it on the part of the property owner. The assessment must in the language of the law be 'complained of,' which signifies at least some distinct reason to be so suggested that it may be examined into in some responsible way."

The difference between the provisions of the statute in that case, when compared with the charter provisions we are dealing with, is very striking. In the *Avery Case* neither the charter nor the general statute gave the power to change an assessment except on *cause shown*. Neither officers nor board could increase an assessment upon their own motion or initiative, as is the case here. They had not the almost plenary power to deal with the assessment possessed by the board in the case we are considering. The time of the meeting of the board even was not fixed by the statute, as is here the case. We must agree with counsel for the defendant that the *Avery Case* arose under statutes so different from those now in question, that it can in no sense be said to be controlling. In fact we

think that the case is readily distinguished. The dissenting opinion of Justice MARSTON in that case would probably have been the majority opinion, had the statutes then under consideration been as we find them in this case.

Counsel for plaintiff cites the following cases: *Griswold* v. *School District*, 24 Mich. 262; *Woodman* v. *Auditor General*, 52 Mich. 28 (17 N. W. 227); *Phillips* v. *Township of New Buffalo*, 64 Mich. 684 (31 N. W. 581); *Monroe Water Co.* v. *Township of Frenchtown*, 98 Mich. 431 (57 N. W. 268); *Common Council of Three Rivers* v. *Smith*, 99 Mich. 507 (58 N. W. 481); *Auditor General* v. *Sessions*, 100 Mich. 343 (58 N. W. 1014); *Auditor General* v. *Sparrow*, 116 Mich. 574 (74 N. W. 881).

In *Griswold* v. *School District* the charter of Bay City was under consideration, and it was held that the power conferred upon the board of review could only be exercised on the application of a party concerned, and when upon such application they have acted, and reduced a valuation, they could not change it without notice. There was no power in the board under that charter to change a valuation of their own motion, and certainly when they had once acted upon the party's application they could not alter the determination without notice. In *Phillips* v. *Township of New Buffalo*, the doctrine of the last-cited case was applied, when the board had acted on application. We do not think that the case of *Monroe Water Co.* v. *Township of Frenchtown* applies here. The plaintiff knew that there was a personal tax assessment in the case at bar. In *Common Council of Three Rivers* v. *Smith* it was held that the right to a hearing was one that the taxpayer could not be deprived of. There the entire assessment of personal property was first entered on the last day of the meeting. Until that time there was no assessment; and it was held that there was no waiver, and the action was without authority under the charter. In the other two cases cited, it may be said to be assumed without question that assessments may be

raised by boards of review under the general tax law, or under a charter giving that right without notice, at a proper time, but it cannot be done after the time limited. In the *Sparrow Case*, where the general tax law applied, it was held that sweeping changes could not be made at the *last* meeting, on the board's own motion, and the statute is cited. In the *Sessions Case* that right was only given during the first five days, by charter, and increase made after the five days was held void, as it clearly should have been.

We are of opinion that none of the cases cited can be held to support the contention of plaintiff, that the assessment here made and tax here levied were illegal. The charter in question provides for but one session, or meeting, unlike the general tax law. The plaintiff did not appear before the board. That body, of its own motion, had the authority to increase this assessment, and the plaintiff should be held to be estopped to complain of the action taken. Having reached the conclusion that, upon this record, the tax levy appears to have been legal, it is unnecessary to consider the other questions.

The circuit judge reached a correct conclusion, and the judgment below will be affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, and BLAIR, JJ., concurred.

STOEPEL v. SATTERTHWAITE.

1. TRUSTS—WILLS—PARTICULARITY.
   A legacy of $2,000 in stock to a physician, for the purpose of carrying on the work of relieving suffering through a sanitarium conducted by him, is void for uncertainty of its beneficiaries.

2. SAME—STATUTES—WILLS—ESTATES OF DECEDENTS.
   Since a will speaks from the death of the testatrix, it is not affected by a statute which took effect after her decease. (Act No. 122, Pub. Acts 1907.)

Appeal from Lenawee; O'Mealey, J. Submitted April 14, 1910. (Docket No. 40.) Decided September 27, 1910.

Bill by Anna R. Stoepel and Mary S. Wilson against J. Newton Satterthwaite, executor of the last will and testament of Mary E. Sutton, deceased, and William H. Jones for a construction of said will. From a decree for defendants, complainants appeal. Reversed, and decree entered for complainants.

William J. Ingersoll, for complainants.

Garland Gillespie and *Bird & Sampson*, for defendants.

MOORE, J. This is a suit to obtain a judicial construction of a provision in the last will of Mary E. Sutton, deceased. The testatrix drew the will herself. Her husband was dead. Her daughters were both married and had good homes. Mrs. Sutton had some ailment and was in the habit of going to Dr. Jones' Sanitarium at Adrian for treatment. After her death, which occurred December 30, 1906, her will was admitted to probate. The complainants, her daughters, filed this bill. Clause 6 of the will is as follows:

"Having been at the Sanitarium many times and knowing personally the amount of charity work done in connection with his business, and feeling the importance of this work, I hereby give and bequeath to William H. Jones the sum of two thousand dollars ($2,000) or four shares of Calumet & Hecla copper stock, to be used as he sees best for carrying on the work of relieving suffering."

The court below considered the bequest as an absolute gift to Dr. Jones, and held that the testatrix did not intend to create a trust fund of the said bequest. In his opinion occurs the following:

"It was conceded on the argument by counsel for the defendant Jones that if the language in said paragraph can be interpreted and construed as creating a trust that it is void, and cannot be sustained, for the reason that the beneficiaries of the bequest are too indefinite and uncertain, being practically afflicted and suffering humanity. * * *

"I think Mrs. Sutton had a kindly heart, easily moved and affected by human suffering, particularly the afflictions of the poor and indigent, and that she, when at the sanitarium, had noted the amount of charity extended there to the needy, and, being pleased with and feeling very friendly towards Dr. Jones by reason thereof, gave him absolutely $2,000 or four shares of Calumet & Hecla copper stock to encourage the continuance of the work then being done by him in behalf of and for the relief of the needy and afflicted poor.

"It would be clear as to the character of the legacy if the words of gift stood alone. They would constitute an absolute gift of the legacy to Dr. Jones, and the language which precedes them was, I think, intended by the testatrix to state, express, and declare her reason, motive, and purpose in making an absolute gift of the legacy to Dr. Jones, and the language which follows them I do not think can be construed as cutting down or affecting the absolute character of the gift which she had previously made to him. They are expressions of faith and confidence on her part that the good work in which she found the doctor engaged would be carried on by him in the future as she had observed it in the past, and she doubtless expected that he would use the money she was giving him in relieving suffering, but there is nothing in the

clause which can be construed as indicating an intention on the part of the testatrix to make it obligatory on him to do so, and therefore the features of a precatory trust are wanting."

There is not very much conflict as to the law in this State, though counsel have cited many authorities. The decisions made in this State which bear upon the questions involved are *Hopkins* v. *Crossley*, 132 Mich. 612 (96 N. W. 499); *Trustees of Hillsdale College* v. *Wood*, 145 Mich. 257 (108 N. W. 675); *Abrey* v. *Duffield*, 149 Mich. 248 (112 N. W. 936); and *McPherson* v. *Byrne*, 155 Mich. 338 (118 N. W. 985), and the cases cited in the opinions filed in those cases.

The important question is What is the meaning of the language used by Mrs. Sutton? Was she interested in Dr. Jones as an individual, or was it the charitable work he was doing which she thought was important? Was the money to be used by him for his own personal use, or was it to be used to carry on the charitable work of relieving suffering humanity? To ask these questions is to answer them. It is clear the gift could be used only for the purpose of relieving suffering, if the will of the testator was to be given effect. For this reason, the gift must fail under the authorities cited. It is said the gift may be saved by reason of Act No. 122 of the Public Acts of 1907. It is not necessary to construe the provisions of that act, for the reason that it did not go into effect until nine months after the death of Mrs. Sutton, and the will must speak from her death.

The decree of the court below is reversed, with costs, and one may be entered here in accordance with this opinion.

OSTRANDER, HOOKER, MCALVAY, and BROOKE, JJ., concurred.

PEOPLE *v.* DETROIT UNITED RAILWAY.

1. STREET RAILWAYS—FRANCHISE—EXTENSION—MUNICIPAL CORPORATIONS.

   In a prosecution for violation of a municipal ordinance requiring the sale of 8 street railway tickets for 25 cents for transportation anywhere in the city, and giving the railway company a right to extend its tracks to the easterly limits of the city, a purchase of the rights of a street railway outside the city which subsequently changed its boundaries so as to include the purchased line, is properly treated as an extension of the railway system. 2 Comp. Laws, § 6448.

2. SAME—FRANCHISE—WORDS AND PHRASES—STATUTES.

   There are two methods of extending street railways within the meaning of 2 Comp. Laws, § 6448; by construction and by purchase.

3. SAME—FRANCHISE—INTERPRETATION—CONTRACTS.

   A franchise requiring the sale of tickets at a certain rate, to be good within the city, contemplates the growth and extension of the city, and provides for single fares within the city limits as they may from time to time be fixed, so as to include any street railway subsequently purchased and thereafter included in the city by a change of boundaries.

ON REHEARING.

1. SAME—MUNICIPAL CORPORATIONS—OPERATION OF ORDINANCES.

   A municipal ordinance, regulation, or contract, designed for a city at large, operates throughout its boundaries as enlarged or extended from time to time.

2. SAME — FRANCHISE — CONSTRUCTION — CONSTITUTIONAL LAW — VESTED RIGHTS.

   Franchises being strictly construed as against the grantee, no vested rights claimed under the franchise of that portion of railway which respondent purchased are injured.

Certiorari to the recorder's court of Detroit; Phelan, J. Submitted February 7, 1910. (Docket Nos. 110 and 111.) Decided April 1, 1910. Rehearing granted May 7, 1910. Reargued July 1, 1910. Former opinion affirmed September 28, 1910.

The Detroit United Railway was convicted of violating a city ordinance, and sentenced to pay a fine of $100. Affirmed.

John J. Speed and *Charles D. Joslyn* (*William L. Carpenter* and *John C. Donnelly*, of counsel), for appellant.

Bernard F. Weadock (*P. J. M. Hally*, of counsel), for the people.

MONTGOMERY, C. J. The Detroit City Railway Company obtained a franchise from the city of Detroit in 1862. At that time the city limits were located at Mt. Elliott avenue. In 1885, by amendment of the charter, the city limits were extended to Baldwin avenue. In 1889 an ordinance was passed by the council and accepted by the Detroit City Railway Company, providing for the sale of workingmen's tickets, so called, 8 for 25 cents during certain hours of the day, good over any of its lines in said city for a single fare. This ordinance also gave the right to the company to extend its double track on Jefferson avenue to the easterly limits of the city of Detroit. The Detroit City Railway Company continued to operate the line until 1890. Its rights and franchises were subsequently assigned to the defendant. A later ordinance imposes the duty of keeping these workingmen's tickets on sale by conductors. The defendant subsequently purchased a street railway located wholly without the city limits, and maintained under authority of a franchise from the township of Grosse Pointe and the village of Fairview.

In 1907 the city limits of Detroit were extended to include a large portion of this territory. These two cases were brought to enforce penalties in the one case for refusing to accept a ticket good in the city of Detroit for passage over this last-named territory, and the other to recover a penalty for failure to keep tickets entitling a passenger to ride over this territory from any point in the

city on sale. The question in each case is therefore whether the requirements of the ordinance of 1889, that passengers should be conveyed to any point in the city limits binds the defendant, as assignee of the Detroit City Railway Company, to transport passengers to the easterly limits of Jefferson avenue as extended, notwithstanding that the defendant company is the assignee of the franchise granted by Grosse Pointe township and approved by the village of Fairview.

It is the contention of the city that, when the provision was made in the ordinance for transporting passengers anywhere within the city limits, it means the city limits as they may from time to time be fixed. On the other hand, the defendant contends that the defendant occupies the position of an assignee of the Grosse Pointe Railway Company, and that it is not, as to the railway in the late village of Fairview, an assignee of the Detroit City Railway Company. There are two methods of extending street railways. One is by construction, and the other may be by purchase under section 6448, 2 Comp. Laws. The purchased railway becomes as much a part of the system as does the railroad as constructed. So we think it after all gets back to the question of whether the real intent of this ordinance was to provide for single fares within the city limits as such limits should from time to time be fixed.

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. The case of *Township of West Bloomfield* v. *Railway*, 146 Mich. 198 (109 N. W. 258, 117 Am. St. Rep. 628), involved a question not entirely dissimilar. In that case the company had contracted that the fare from any point in said township to the city of Detroit and

vice versa should not exceed the rate then charged by the company from Pontiac and Detroit and *vice versa*. The company while in competition with another line maintained a fare of 25 cents. It subsequently purchased the competing line, and over the line passing through West Bloomfield increased the fare from Pontiac to Detroit to 35 cents. It was held that the language of the provision that the rate of fare from any point in the township to Detroit should at no time exceed the rate then charged from Pontiac to Detroit and *vice versa* referred to the company mentioned in the franchise, and it included any line which that company or its assignee might at any time build or purchase.

A case almost on all fours with the case at bar is that of *Indiana R. Co.* v. *Hoffman*, 161 Ind. 593 (69 N. E. 399). Its reasoning is convincing, and we think the case should be followed. The case presented does not involve in this view an interference with any vested right of the company as assignee of the Fairview Railway, but resolves itself simply into a question of the construction of the ordinance, and 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.

The convictions are affirmed.

MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

ON REHEARING.

STONE, J. A rehearing having been granted in these cases, they have been reargued and reconsidered. The sole question here involved, as we view it, is the construction to be placed upon an ordinance granted the Detroit City Railway in 1889. Subdivision D of section 3 of such ordinance reads as follows:

"Such arrangements shall be made by said company that within two months after this ordinance shall have been accepted by said company it shall carry such passen-

gers as shall have taken passage on the cars between the hours of five-thirty o'clock and seven o'clock in the morning, and between the hours of five-fifteen o'clock and six-fifteen o'clock in the afternoon, over any of its lines in said city for a single fare, to be paid for by a ticket sold at the rate of eight tickets for twenty-five cents, for one continuous trip, with all the rights of transfer and through carriage provided for in paragraphs 'A,' 'B' and 'C' of this section."

The ordinance was duly accepted. It is conceded that the Detroit United Railway has become the successor and assignee of the Detroit City Railway Company by purchase. This being so, we think it accepted the benefits of the franchise granted, as well as assumed the obligations imposed upon it.

Does the ordinance relative to workingmen's tickets have application to that territory now a part of the city, but without its confines at the time the ordinance was granted? A further investigation of the questions involved satisfies us of the correctness of the reasoning and conclusion of Chief Justice MONTGOMERY who wrote the former opinion in these cases (*ante*, 416), to which opinion reference is here made. He cited and followed the case of *Indiana R. Co.* v. *Hoffman*, 161 Ind. 593 (69 N. E. 399), decided by the supreme court of Indiana. That case is well reasoned, and is supported by the authorities therein cited, and we think it should be followed in these cases. It may be asserted as a general proposition, applicable here, that a municipal law or ordinance designed for a city at large operates throughout its actual boundaries, whatever they are, and is not affected by the fact that these are enlarged from time to time. The following authorities support the proposition that a municipal ordinance, regulation, or contract designed for a city at large operates throughout its boundaries whatever their change: McQuillin on Municipal Ordinances, § 218; 1 Dillon on Municipal Corporations (4th Ed.), § 185, citing *St. Louis Gaslight Co.* v. *City of St. Louis*, 46 Mo. 121; *Town of Toledo* v. *Edens*, 59 Iowa, 352 (13 N. W. 313).

In *St. Louis Gaslight Co.* v. *City of St. Louis*, above cited, which involved the amount due the company for gas furnished the city in its enlarged boundaries, the court said:

"The additional orders for lamps were all to be within the city, and the city is a unit, though with changing boundaries. There might be a question as to the extension of the exclusive rights of the plaintiff, for grants of monopolies are to be strictly construed; but there is no doubt that a city ordinance, or a city contract, designed for the city at large, operates throughout its boundaries whatever their change."

In *Town of Toledo* v. *Edens*, it is said:

"If an ordinance be enacted and afterward the city limits be extended by adding thereto adjacent territory, no one would contend that a new ordinance must be passed in order to be operative in the newly acquired territory."

It is true that that case involved a police regulation, but the authorities cited seem to make no distinction between such a regulation and an ordinance or contract relating to traffic regulation.

We agree with Chief Justice MONTGOMERY that the cases presented do not involve an interference with any vested right of the company as assignee of the Fairview Railway, but resolves itself into a question of the construction of the ordinance. The rule that the terms of the franchise must be construed strictly against the respondent, as held in *Township of West Bloomfield* v. *Railway*, 146 Mich. 198 (109 N. W. 258, 117 Am. St. Rep. 628), is applicable here.

We see no reason to recede from the former ruling in these cases, and the convictions are affirmed.

BIRD, C. J., and OSTRANDER, HOOKER, MOORE, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

ELY *v.* OAKLAND CIRCUIT JUDGE.

1. INSURANCE — MUTUAL COMPANIES — STATUTES — AUTHORITY TO ISSUE POLICIES—FIRE INSURANCE.

   A mutual fire insurance company organized under chapter 195, 2 Comp. Laws, whose charter contemplates the issuance of policies, not mutual, for a cash premium, has no power to issue such policies, which are expressly prohibited by statute. 2 Comp. Laws, § 7256.

2. SAME—ASSESSMENTS—INSOLVENCY—RECEIVERS.

   Policies of such mutual insurance company in the standard form, containing an additional clause declaring the policy subject to the statutory assessment liability, although the policy provides for a fixed premium, are subject to assessment as mutual policies, although those issued without the additional clause are void.

3. SAME—MARSHALING ASSETS — INSOLVENCY OF FIRE INSURANCE COMPANIES.

   The assessment made by the receiver after insolvency should be determined in amount by including, as a liability to be met, unearned premiums of all outstanding cash premium policies and all valid loss claims.

4. SAME—VOID POLICIES—REMEDIES — ILLEGALITY OF CONTRACTS —FARM POLICIES—FIRE INSURANCE.

   Policies of insurance on farm property issued *ultra vires* in violation of statute are illegal and void, and the holders are equitably entitled to a return of the unearned premiums paid.

5. SAME—SET-OFF AND RECOUPMENT—ASSESSMENT OF MUTUAL POLICY HOLDERS—DEFENSES.

   Unearned premiums on cash premium policies subject to assessment may be set off by the holders against *pro rata* assessments by the receiver of the insurer.

6. SAME—RECEIVERS—ASSESSMENTS.

   An assessment to pay liabilities of an insolvent mutual fire insurance company in a receiver's charge, should be based on the number and classes of policies, the amount of unearned premiums due on them, the amount required to pay losses under valid insurance, and the costs and expenses of administration.

7. SAME—COSTS—RECEIVERS.

The costs of an application of a receiver to the court for instruction may be paid out of the assets of the insolvent.

Mandamus by Francis G. Ely, receiver of the Citizens' Mutual Fire Insurance Co., of Holly, Michigan, to compel George W. Smith, circuit judge of Oakland county, to enter an order for an assessment upon the members of said company for the payment of losses and expenses. Submitted February 8, 1910. (Calendar No. 23,658.) Writ granted March 19, 1910. Rehearing granted May 25, 1910. Resubmitted on briefs July 1, 1910. Former opinion modified September 28, 1910.

Kleber P. Rockwell and *Henry M. Zimmermann*, for relator.

Harry E. Hooker, *J. Arthur Tillson*, and *Frank L. Covert*, for respondent.

Franz C. Kuhn, Attorney General (*Arthur P. Hicks*, of counsel), *amicus curiæ*.

STONE, J. The petition for mandamus against the circuit judge in this case is made by Francis G. Ely, receiver, and represents:

(1) That he was appointed receiver of the Citizens' Mutual Fire Insurance Company of Holly, Mich., by the circuit court of Oakland county on December 28, 1908, and gave the required bond.

(2) That said company is a corporation organized under Act No. 82 of the Laws of 1873, as amended in 1895 (2 Comp. Laws, chap. 195). That said company, availing itself of the provisions of said amendment, amended its charter January 8, 1896, and that said company has been engaged in the business of insuring property against loss by fire since its incorporation in April, 1874.

(3) That said company did a general fire insurance business in the State of Michigan, having at risk at the date of suspension insurance amounting to $5,064,139, with approximately 6,000 policy holders, scattered throughout the State of Michigan.

(4) That three forms of policies were written by said company; the usual mutual policy providing for assessments, and written on application made to the company, in writing by the insured. The second class of policies known as "cash premium policies," were written for one, two, and three years, for which in every instance a cash premium was paid in advance; the premium charged varying according to the character of the property insured. The policies of this class were labeled "Michigan standard form," and were in fact Michigan standard form, except that at the bottom of the policy was printed a clause in the following language, which is worded differently from the language in the ordinary Michigan standard form policy:

> "This policy is subject to the conditions of the charter of this company, and of the act under which the company is organized, as to liability of members to assessment for losses incurred."

The third class of policies were also cash premium policies, written for one, two, and three years, for which in every instance a cash premium was paid in advance; which were in language and form exactly like those in the second class above described, except the assessment clause above quoted was wholly omitted from the policy.

(5) That said company is a mutual company entirely, and carried no reserve fund to meet extraordinary losses or liabilities.

(6) That during the month of October, 1908, serious fires occurred in the northeastern part of the State of Michigan, burning whole areas of territory, and some towns entirely.

(7) That claims for losses amounting to $19,589.90, or thereabouts, are outstanding and unpaid against said company.

(8) That of said claims outstanding and unpaid against said company for fire losses, $12,071.13 are due on farm risks, which it appears by the terms of the statute, under which said company was doing business, were prohibited, and which the said company, in consequence, had no legal right to take.

(9) That claims for unearned premiums amounting to $20,000, or thereabouts, largely on policies terminated on the appointment of receiver, have been filed for allowance.

(10) That there were no funds available with which to meet the outstanding and unpaid obligations of said com-

pany, on account of said fire losses, unearned premiums claimed, if the latter could be legally allowed, or to meet the usual necessary expense incident to the receivership and winding up of said corporation, and neither will there be unless an assessment on the members and persons insured in said company can be made to meet the same.

(11) That soon after the appointment of the receiver, as aforesaid, he petitioned the said circuit court for instructions, as to whether an assessment could lawfully be made against all of the policy holders irrespective of the particular form of the policy held in said company, and as to the amount of the proposed assessment, the manner of levying the same, whether upon both the cash premium and mutual holders alike, or otherwise, and for such further instruction, direction, and authority as the court might deem necessary and proper to grant.

(12) That petitioner, at the time of filing his said petition, also filed another petition praying for the instruction of said court whether, as receiver, he should allow unearned premiums in offset to the assessment by him proposed to be made on the members and persons insured in said company; that the court determine whether the members and persons insured in said company were entitled to unearned premiums on the cancellation of their policies, either before or after said appointment of receiver, and, if to be allowed in either or both cases, how, and in what manner the same ought to be paid; what proceedings, if any, said receiver should take with reference to the premiums due on policies returned as "refused," "canceled," etc., after his said appointment; also praying for such further instruction, direction, and authority in the premises as to said court might seem proper.

(13) That orders were made by said court on the filing of said petitions, requiring notices to be given to all members and persons insured, fixing a time within which objections might be filed by persons interested therein, and a time for hearing said objections.

(14) That proof of service of notice in accordance with said orders was made and filed by petitioner; numerous objections to said proposed assessment were filed by members, and persons insured in said company; certain of the cash premium policy holders objecting to an assessment, yet claiming unearned premiums.

(15) Testimony was taken and hearing had on said objections, in said court, disclosing the character and num-

ber of the policies issued, the losses suffered, and the necessity for the appointment of a receiver for said company, a transcript of which, with the findings of the court, are attached to said petition.

(16) That, after said hearing, a further petition was filed in said circuit court by certain mutual policy holders, praying for a further disclosure on the part of said receiver, as to the nature and character of the property insured by said company, on which losses occurred, and on account of which said receiver desired to levy an assessment. Hearing on said petition was also had, which disclosed that losses aggregating the sum stated in the eighth paragraph were on farm risks; objection being made to any assessment to cover those losses for the reasons above stated.

(17) That on June 26, 1909, orders were made by said circuit court as follows:

(*a*) The prayer of the first petition was denied, and the receiver was instructed to make no assessment for any purpose whatsoever; said order being made in anticipation of these proceedings to obtain a ruling of this court as to the status of the policy holders in each class, as to the question of membership in said company.

(*b*) That no assessment for return premiums be made. That the members and persons insured are not entitled thereto in the opinion of said circuit court.

(*c*) That no assessment be made to pay losses on risks on farm property, declaring said risks void.

Said receiver prays for mandamus directing said circuit court to order:

(1) An assessment on all members and persons insured in said company, excepting those only who held, or now hold, policies on farm property, to pay losses and expenses.

(2) That the order of the circuit court, holding that no assessment for return premiums be made, be affirmed.

(3) That the order of said circuit court holding that policies issued on farm property are void, and that no assessment for the payment of losses on such risks be made, be affirmed.

(4) And for such further relief by mandamus as justice may require.

The answer of the respondent, the circuit judge, shows that the facts stated in said petition are true.

Section 17 of the act under which said company was organized provides for the appointment of a receiver, and it is made his duty to ascertain the amount due from said company on property insured, and to at once proceed to assess upon all of the members and persons insured in such company such sums of money as will in the aggregate be sufficient to pay all the losses and liabilities of said company, together with the services and expenses of such receiver, according and in proportion to the amount of their insurance or interest in such company.

The charter of the company clearly contemplates the issuing of cash premium policies. It provides that no risk, except dwelling house risks, shall be written on the straight mutual plan; that all cash premium business shall be written at the full tariff rate, as adopted by the State board of underwriters; the percentage of the tariff rate the company shall be netted, etc.; that the company may take cash premiums, or notes from the assured, which shall also be the basis for future assessments; that premium notes shall not be transferable, and shall not exceed five times the cash premium paid in one year; that once in each year the directors shall, if deemed necessary, make an assessment on all policies insured in the company, to raise money to liquidate the losses and incidental expenses of the company; that each member insured on the assessment plan shall be notified of any assessment made against his policy, etc.

This clearly implies that there may be members who are not insured on the assessment plan. We think there is both by the statute and the charter of the company a recognition of the intention and right of the company to insure on the cash premium plan. The doctrine of *ultra vires* cannot be applied to contracts not prohibited, either expressly or by necessary implication in the statute. *Day* v. *Buggy Co.*, 57 Mich. 147 (23 N. W. 628, 58 Am. Rep. 352); *Carson City Sav. Bank* v. *Elevator Co.*, 90 Mich. 550 (51 N. W. 641, 30 Am. St. Rep. 454); *Dewey* v. *Railway Co.*, 91 Mich. 351 (51 N. W. 1063); *Coit* v.

City of Grand Rapids, 115 Mich. 493 (73 N. W. 811); *Rehberg* v. *Surety Co.*, 131 Mich. 135 (91 N. W. 132); *Spier* v. *City of Kalamazoo*, 138 Mich. 653 (101 N. W. 846); *Peterson* v. *City of Ionia*, 152 Mich. 678 (116 N. W. 562).

So while the cash premium policy plan is not expressly authorized by the statute, it is not prohibited, and this fact, coupled with the fact that it is authorized by the charter and by-laws of the company, makes it a valid and binding obligation upon the company. This brings us to an important question in the case: Is the cash premium policy subject to assessment?

It is urged that this question is answered in the negative, and the question foreclosed, by the decision of this court in *Osius* v. *O'Dwyer*, 127 Mich. 244 (86 N. W. 831). That was a case where the receiver of a mutual fire insurance company sued a policy holder for an assessment. It was objected that defendants never became members of the company, and that objection was sustained. We have examined with care the record in that case. The company was organized under the same statute as was this company. The charter differed in many essential respects from the charter of this company. The contract or policy in that company differed from the cash premium policy containing the assessment liability clause, issued by this company, in the following particulars: It appears clearly that the policy in this case was issued by a mutual company (a point upon which we do not lay much stress). The policy referred to issued by this company contained the following clause, the substance of which did not appear in the policy in that case, viz.:

"*This policy* is subject to the conditions of the charter of this company, and of the act under which the company is organized *as to liability of members to assessments for losses incurred.*"

The following clause contained in the policy in the *Osius Case*, viz.:

"If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, * * * such regulations shall apply to and form a part of this policy, as the same may be written or printed upon, attached, or appended hereto"

—is no longer a necessary clause in a policy issued by a mutual company.

The standard form policy act in force when the *Osius Case* was decided was declared unconstitutional in *King* v. *Insurance Co.*, 140 Mich. 258 (103 N. W. 616), and mutual fire insurance companies organized under the act of 1873 (Act No. 82, Laws 1873), as amended, are now expressly relieved from having attached to policies the charter and by-laws. See Act No. 277, Pub. Acts 1905, § 5. So we think that nothing can be claimed for that part of the decision in the *Osius Case*.

We are not disposed to extend the doctrine of the case of *Osius* v. *O'Dwyer* beyond its language, and, had the policy in that case contained the assessment liability clause found in the class of policies issued by this company, which we are now considering, we do not think that this court would have held that the assured was not a member of the company, in that case. We conclude that persons who accepted the cash premium policies containing the clause above named should be held to have become members of the company, and subject to assessment by the receiver to cover all losses and expenses. The Wisconsin supreme court held cash premium policies issued under a statute somewhat similar to ours liable to assessment. *Rundle* v. *Kennan*, 79 Wis. 492 (48 N. W. 516). The statute in that case authorized an assessment on all "the property insured," while the Michigan statute authorizes the receiver to assess all "members and persons insured." We do not, however, in view of *Osius* v. *O'Dwyer*, *supra*, feel authorized to hold that the cash premium policies issued by this company which did not contain the assessment liability clause are liable to assessment, or constituted the policy holders members of the company. We

think that there is a clear distinction between these policies, and that such distinction should be recognized.

The next important question to be answered is: Should the assessment cover unearned premiums due the holders of the cash premium policies? That there is such a liability is clear from the language of the policies. They provide as follows:

"This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy, or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain *only* the *pro rata* premium."

We think that common honesty would dictate that, in case of insolvency, the unearned premiums paid on the stock policies are a part of the "liabilities" of the company. The contract creates the liability. They are just claims against the company. *Fayette Mutual Fire Ins. Co.* v. *Fuller*, 8 Allen (Mass.), 27; *Clark* v. *Insurance Co.*, 130 Ind. 332 (30 N. E. 212); *Warner* v. *Delbridge & Cameron Co.*, 110 Mich. 590 (68 N. W. 283, 34 L. R. A. 701, 64 Am. St. Rep. 367).

Unlike the case of *Detroit Manufacturers' Mut. Fire Ins. Co.* v. *Merrill*, 101 Mich. 393 (59 N. W. 661), there was here a contract to pay unearned premiums on all cash premium policies. The logical view is that the company has received under the contract more money than it has earned, and justice requires it, in a case like this, to make a refund. Nor can such a holding be deemed unjust. In the light of this record, the mutual members had knowledge and notice of the issuing of cash premium policies. The reports of the company showed the amount received from cash premiums, and the amounts received from assessments annually. And the same may be said of the cash premium policy holders.

The last matter to be considered is the one relating to farm policies. Section 7285, 2 Comp. Laws, expressly prohibits the insurance of farm property by such companies. It may be said, therefore, that the farm policies were issued and accepted in violation of the statute. They were void for illegality, and the issuing of them was *ultra vires*. The holders of these policies should be left where they are found, and they are not entitled to the return of unearned premiums. 25 Cyc. p. 759; *Smith* v. *Barstow*, 2 Doug. (Mich.) 155; *Bagg* v. *Jerome*, 7 Mich. 145; *Niagara Falls Brewing Co.* v. *Wall*, 98 Mich. 158 (57 N. W. 99).

From the foregoing considerations, we reach the following conclusions:

(1) The said company was authorized to write and issue cash premium stock plan policies, and the holders of such said policies as contain the assessment liability clause must be considered members of the company, with all the rights and subject to all the liabilities of membership, and are liable to assessment.

(2) The holders of such cash premium stock plan polices as did not contain the assessment liability clause will not be considered members of said company, and are not liable to assessment.

(3) That the holders of both classes of the cash premium stock plan policies are entitled to unearned premiums, in accordance with the terms of the policies.

(4) That an assessment upon the mutual policy holders, and also upon the cash premium stock plan policy holders, which contain the assessment liability clause, be made, not only to pay valid loss claims, but also to pay unearned premiums on cash premium stock plan policies of both classes, and also all necessary expenses.

(5) That farm risk policies being in violation of the statute are void and *ultra vires*, and the holders thereof are not entitled to unearned premiums, nor to any relief.

It logically follows that such of the cash premium stock plan policy holders as are liable to assessment should be allowed to offset the unearned premium. The unearned premium due policy holders by reason of the appointment of the receiver should be prorated.

It will be the duty of the receiver to ascertain and re-

port to the circuit court the number of each class, of cash premium stock plan policies, and the amount of unearned premiums due thereon, as well as the amount required to pay losses upon the basis of this opinion, together with the cost of services, and the expenses of the receiver. Whereupon an assessment shall be ordered by said court upon the basis of this opinion.

The order of the circuit court relating to policies issued on farm property is affirmed. The costs of this proceeding will be borne by the fund of the said company, to be provided for in the assessment.

The writ will issue accordingly.

MONTGOMERY, C. J., and MCALVAY, BROOKE, and BLAIR, JJ., concurred.

ON REHEARING.

STONE, J. This cause has been before the full bench upon a rehearing granted on motion of the Lansing Insurance Agency *et al.* and by consent of the petitioner. Although the application for a rehearing is based upon the one question whether cash premium policies are assessable, yet the briefs of the several parties in interest, as well as that of the attorney general as *amicus curiæ*, have gone into nearly all of the questions considered by us in the original opinion. For a statement of the contents of the record, and the facts of the case, we refer to the original opinion (*ante*, 422), which we do not deem it necessary to enlarge or change, except as hereinafter set forth.

Upon the first hearing of the case, our attention was not called to section 7256, 2 Comp. Laws, which reads as follows:

"It shall not be lawful for any company organized upon the mutual plan to do business, or take risks upon the stock plan, neither for a company organized as a stock company to do business upon the plan of a mutual insurance company."

A careful examination of our statutes satisfies us that the section above quoted has not been repealed or modified,

except as it may be said to be affected by Act No. 197, Pub. Acts 1909, with the provisions of which last act it is not claimed that the Citizens' Mutual Fire Insurance Company of Holly has ever complied. For the purposes of this case, therefore, we must consider said section 7256, 2 Comp. Laws, as still in force. There can, we think, be no question that the company with which we are here dealing was organized upon the mutual plan under the provisions of Act No. 82, Laws 1873, being chapter 195, 2 Comp. Laws, and that the provisions of section 7256, 2 Comp. Laws, apply here. We are frank to say that, had we known of the existence of this statute, we should have held, as we now hold, that such of the cash premium stock plan policies as did not contain the assessment liability clause were void, as we held the farm policies to be, because issued contrary to the express provisions of the statute. An examination of the record and briefs in the case of *Osius* v. *O'Dwyer*, 127 Mich. 244 (86 N. W. 831), shows that section 7256, 2 Comp. Laws, was not referred to, nor considered by the court. It was not necessary to a disposition of that case to pass upon the validity of the policy. The case simply decides that the policy there considered was an ordinary contract of insurance, and did not make the defendants members of the company, and liable for assessment. That this was true cannot be questioned.

We are now satisfied that such of the cash premium stock plan policies as did not contain the assessment liability clause, and all of the farm risk policies, are in the same class and should be treated as void, because issued in violation of the statute. This brings us to the question whether the holders of these policies are entitled to a return of the unearned premiums. In our former opinion we held that the holders of the farm risk policies were not entitled to a return of unearned premiums in any case. A further investigation of the question satisfies us that this conclusion was not equitable or just under the circumstances. While the contracts are void and cannot be en-

forced, it does not follow that the holder of the cash premium stock plan policy of any class should not be entitled to a return of the consideration paid. If an insurance company issues today to A. a void policy, and receives the premium, both parties acting in good faith (as all the parties here seem to have acted), and tomorrow it is discovered that the policy is void, it would seem to be just and equitable that A. should be entitled to receive back the premium paid. If the risk did not attach, and in consequence the risk was never actually carried by the insurer, there has been a failure of consideration, and the insured is entitled to a return of his consideration paid, namely, the premium, as money had and received to his use. 19 Cyc. p. 609; *Waller* v. *Assurance Co.*, 64 Iowa, 101 (19 N. W. 865), and the many cases there cited; 2 May on Insurance (4th Ed.), § 567, and cases cited. While no recovery can be had upon the contract, because *ultra vires* and void under the statute forbidding it, and such contract cannot be made binding by estoppel even, yet applying the equitable rule which this court has applied to Sunday contracts, and void contracts of that nature, the parties should be placed as near as may be *in statu quo*. *Tucker* v. *Mowrey*, 12 Mich. 378; *Winfield* v. *Dodge*, 45 Mich. 355 (7 N. W. 906, 40 Am. Rep. 476); *Brazee* v. *Bryant*, 50 Mich. 136 (15 N. W. 49). This is a proceeding in equity, and certainly the rules which should apply in the equitable action of assumpsit for money had and received should apply here. The opinion of this court in the recent case of *Hoyt* v. *Paw Paw Grape Juice Co.*, 158 Mich. 619 (123 N. W. 529), is very pertinent, and is, we think, controlling of this question. A distinction should be made between contracts merely *ultra vires* and void and those which are illegal or immoral, such as wager policies and similar contracts where the parties are *in pari delicto*. 15 Am. & Eng. Enc. Law (2d Ed.), p. 932; 19 Cyc. p. 759; *Walhier* v. *Weber*, 142 Mich. 322 (105 N. W. 772.

It may be said that, to be logical, we should hold that

these policy holders are entitled to recover the *entire* premium paid, and not merely the unearned portion thereof. But we think that when we consider that this is an equitable rule to be applied in an equitable proceeding, where the holders of policies have only asked for the return of unearned premiums, and where the reports of the company have shown the manner in which the business was done from time to time, and the contracts were entered into in good faith and were treated as binding upon all parties, until the failure of the company, it would not be just or equitable to the members who must pay the assessment to require of them more than the unearned portion of the premiums. We are content with, and adhere to, the conclusion in our former opinion wherein we held that the holders of such cash premium stock plan policies as contain the assessment liability clause must be considered members of the company, with all the rights and subject to all the liabilities of membership, and are liable to assessment. Their contracts were legal and binding, and it follows that they are entitled to unearned premiums under the terms of their contract. As we held before, we now repeat:

"There was here a contract to pay unearned premiums. * * * The logical view is that the company has received under the contract more money than it has earned, and justice requires it, in a case like this, to make a refund."

We think that a distinction should be made between this class and the members who hold mutual policies, and who paid assessments from time to time, as the obligations of the company required them to be made.

We conclude therefore:

(1) That the holders of the mutual or assessment plan policies and the holders of such of the cash premium stock plan policies as contain the assessment liability clause are members of the said company, and are liable to assessment.

(2) That the holders of such cash premium stock plan

policies as did not contain the assessment liability clause, and the holders of the farm risk policies, will not be considered members of said company, and are not liable to assessment, and their policies are void.

(3) That the holders of both classes of the cash premium stock plan policies and the holders of such of the farm risk policies as were issued on the stock plan are entitled to unearned premiums, the same to be prorated.

(4) That an assessment upon the mutual policy holders, including the cash premium stock plan policy holders which contain the assessment liability clause, be made by the receiver, not only to pay valid loss claims, but also to pay unearned premiums on cash premium stock plan policies of all classes, including cash premium stock plan farm risk policies, and also all necessary expenses and costs. The cash premium stock plan policy holders, here held to be liable to assessment, should be allowed to offset the unearned premiums. It will be the duty of the receiver to ascertain and report to the circuit court in chancery the number of each class of cash premium stock plan policies, and the amount of unearned premiums due thereon, as well as the amount required to pay valid losses, upon the basis of this opinion, together with the costs for services, and the expenses of the receiver. Whereupon an assessment shall be ordered by said court upon the basis of this opinion. The order of the circuit court relating to policies issued on farm property is so modified as to entitle the holders of cash premium stock plan policies in that class, if any, to unearned premiums.

The costs of this proceeding will be borne by the fund of the said company to be provided for in the assessment.

BIRD, C. J., and OSTRANDER, MOORE, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

PEOPLE, *for use of* BUHL SONS CO., *v.* FINN.

1. MUNICIPAL CORPORATIONS — PUBLIC BUILDINGS AND IMPROVEMENTS—STATUTORY BOND.

   Under an agreement with the principal contractor to furnish hardware trimmings in accordance with plans and specifications of the original contract to construct a municipal fire station, a firm which furnished the hardware were not materialmen but subcontractors, from whom a notice to the contractor and the board of fire commissioners was required as a condition precedent to an action on the statutory bond under Act No. 187, Pub. Acts 1905. *Avery* v. *Board of Sup'rs of Ionia Co.*, 71 Mich. 538 (39 N. W. 742).

2. SAME—CONSTRUCTION BOND—STATUTES.

   In an action based on the statute, and tried on the theory that a statutory bond had been given, the plaintiffs were not entitled to recover on the theory that the bond had not been filed in accordance with the statute, and that they were thereby excused from complying with the law.

Error to Wayne; Donovan, J. Submitted October 14, 1909. (Docket No. 11.) Reargued January 10, 1910. Decided September 27, 1910.

Assumpsit by the people of the State of Michigan, for the use and benefit of Buhl Sons' Company, against John Finn, principal, and John M. Spaulding and Michael Finn, sureties, on a statutory bond. A judgment for plaintiff on a verdict directed by the court is reviewed by defendants on writ of error. Reversed, and judgment entered for defendants.

Frank C. Cook, for appellants.

Frederic T. Harward and *Jefferson G. Thurber*, for appellee.

MCALVAY, J. Defendant John Finn was a building contractor, who on August 16, 1906, entered into a con-

tract with the fire commission of the city of Detroit to build engine house No. 29, according to plans and specifications furnished by Donaldson & Meier, architects, and to their satisfaction, for the sum of $19,970.85. The other defendants were sureties upon a bond given by Finn as provided by Act No. 187, Pub. Acts of 1905, entitled:

"An act to insure the payment of subcontractors and wages earned and materials used in constructing, repairing or ornamenting public buildings and public works."

George Moynes was a subcontractor under Finn, under written contract, according to plans and specifications, to furnish the carpentry work, the builders' hardware, and to line some bins and stalls in this engine house. Buhl Sons Company contracted with Moynes by letter to furnish the hardware trimmings as per plans and specifications for $154.50, and did furnish the hardware trimmings accordingly. Pudrith & Candler examined the plans and specifications to ascertain what would be required of them in lining the stalls and feed bins, and then agreed with Moynes to do this work according to plans and specifications, and did so do it, for $147. Afterwards Moynes became bankrupt and did not complete his contract. Finn, the principal contractor, completed it at a cost of $456 more than the contract price with Moynes. Finn made his last payment to Moynes May 10, 1907. The bond sued upon was not given until August 23, 1907, after the contract was completed and Finn had received his final estimate from the architects, and presented it to the commission for his final payment. The secretary informed him that on account of these two claims the commission would not pay him until the statutory bond was furnished. Claimants did not give the notice in writing to the fire commission or to the contractor, required by section 2 of Act No. 187, Pub. Acts 1905. Contractor Finn first received knowledge of these claims from claimants' attorney on or about July 1, 1907. The trial resulted in a judg-

ment for the full amount claimed upon a verdict directed by the court. Defendants assign error upon the refusal to direct a verdict in their behalf as requested, and upon refusal to give certain requests.

The question in the case is whether plaintiff and his assignors were subcontractors or materialmen. The suit was upon the bond required by Act No. 187, Pub. Acts 1905, and the court, without in terms holding plaintiff and his assignors to be subcontractors, in effect so held, in determining that all the requirements of the statute as to notices had been complied with by plaintiff. If these parties were subcontractors, the court was in error. The notices required by this statute in case of subcontractors admittedly were not given, either to the fire commission or the principal contractor.

Plaintiff argues: *First*, that it was a materialman; and, *second*, that if the court should hold that it was a subcontractor, in view of the fact that no bond had been filed by defendants, the notices which were given were sufficient.

This last contention is not tenable under the declaration, which is upon this statute. Defendants pleaded the general issue, and the case was tried by both sides upon the theory that a statutory bond had been given.

In the case of *Avery* v. *Board of Sup'rs of Ionia Co.*, 71 Mich. 538 (39 N. W. 742), the principal question was whether plaintiff was a subcontractor or a materialman. At that time and at the time the cases which followed that decision arose, the statute did not insure the payment of subcontractors. The act under which the case at bar was brought extends its protection to subcontractors, as well as materialmen. In the *Avery Case, supra*, it was held that "one who takes under the original contract, and is to perform in accordance with the original contract," is a subcontractor. Approved and affirmed in *People, for use of Winkle Terra-Cotta Co.*, v. *Cotteral*, 119 Mich. 27 (77 N. W. 312). Later, in *People, for use of Davis*, v. *Campfield*, 150 Mich., at page 677 (114 N. W. 659)

the same question was before the court. Mr. Justice CARPENTER, speaking for the court, quotes the definition of a subcontractor from the *Avery Case*, and says:

"Under this definition, which we think correct, we determine whether a person furnishing material is a subcontractor * * * by this test, viz.: Has he agreed that the original contract shall be the standard by which the performance of his contract shall be judged? If he has, he is a subcontractor. * * * If he has not made that agreement, he is an ordinary materialman. * * * Under this definition, and according to this test, a manufacturer who agrees to furnish doors and sashes for a building in accordance with the terms of the original contract is a subcontractor, while if he merely agrees to furnish them in accordance with certain measurements, he is a materialman."

The same rule was announced by this court in *People, for use of Reynolds*, v. *Banhagel*, 151 Mich., at page 46 *et seq.* (114 N. W. 669).

Plaintiff's proposition in writing to Moynes was:

"As per request we are pleased to quote you on Yale and Towne hardware trimmings for engine house No. 29 as per plans and specifications, at $150.50."

Plaintiff's assignors of part of its claim "went all over the plans and specifications prepared by Donaldson & Meier for this job," and from them ascertained what work would be required, and agreed to do the work according to such plans and specifications. These plans and specifications were a part of the original contract, which required the contractor to furnish material and articles in conformity therewith, under the direction and to the satisfaction of the architects. The case at bar must be controlled by the cases above cited. Both plaintiff and its assignors were subcontractors. They are classified as such by the contracts entered into by them. They insist that these articles were the ordinary trade goods upon their shelves and in stock, and were furnished as such. They might have done this; but it is not that which was done. These materials, articles, etc., they assumed to

furnish in accordance with the terms of the original contract, making that "the standard by which the performance of their contracts shall be judged."

This case is distinguishable from the case of *People, for use of Kuenzel*, v. *Construction Co.*, 159 Mich. 133 (123 N. W. 801), heard at the term of court when this case was first argued. In that case there was no proposition to manufacture certain concrete blocks according to plans and specifications. Plaintiffs made no agreement with reference to the original contract. They agreed at 22 cents apiece to furnish such number of blocks as should be required to be used in the construction of the sewer. The molds for the blocks were furnished by the construction company. The opinion states:

"* * * It is clear that plaintiffs were concerned only to manufacture blocks of proper material in the forms or molds which were furnished, to allow them to properly harden, and to deliver them on the line of the sewer. * * * We think that it is made clear in this case that plaintiffs never undertook to perform any part of the original contract with the city, however complete their knowledge of its requirements may have been."

The court distinguishes the case from the cases of *Avery* v. *Board of Sup'rs of Ionia Co.*, *People, for use of Winkle Terra-Cotta Co.*, v. *Cotteral*, and *People, for use of Reynolds*, v. *Banhagal, supra.*

In the instant case plaintiffs and their assignors, by specific agreements, each for a lump sum, did undertake to perform, and did perform, certain parts of the original contract according to plans and specifications. In *People* v. *Campfield, supra*, the class of cases one of which actually arose in the *Kuenzel Case, supra*, was discussed and distinguished. The rule laid down is a reasonable one, and the only one which this court has been able to formulate applicable to all cases.

It follows that plaintiff cannot recover in this action. The requirements of the statute, relative to notices which subcontractors must give, were not followed. The judg-

ment is reversed, and, as there is no dispute as to the absence of these notices, no new trial is ordered.

A judgment for defendants will be entered in this court.

OSTRANDER, HOOKER, MOORE, BROOKE, BLAIR, and STONE, JJ., concurred.

FELDMAN *v.* DETROIT UNITED RAILWAY.

1. NEGLIGENCE — INFANT — IMPUTED NEGLIGENCE — PARENT AND CHILD.

   In actions brought by an infant in its own right the negligence of the parent is not imputable to the child; in actions brought by the parent for loss of services, the want of care of the plaintiff will bar recovery; in actions brought under the "death act" (3 Comp. Laws, § 10427), if the parent is the real beneficiary, his contributory negligence will be imputed to the infant.

2. SAME—STREETS—INFANT.

   In an action by a parent as administrator, for the wrongful death of his infant son of the age of four years, who was killed by a street car, the fact that the child was unattended on the street at the time of the accident established *prima facie* the negligence of his parents, and whether their conduct should be excused or justified by the alleged circumstances was a question of fact for the jury.

3. EVIDENCE—DAMAGES—OPINION.

   A witness who possessed no knowledge on which to base his conclusion, was not qualified to express an opinion that an infant's services would be worth to his father from $4,000 to $5,000 or more.

4. SAME — RES GESTÆ — ADMISSIONS — PRINCIPAL AND AGENT — DURESS.

   Testimony that after the car struck the infant, and a crowd

had gathered about the conductor and motorman and had assaulted both and were threatening further violence, the motorman stated that it was his fault, is not admissible, since the statement was not voluntary or spontaneous.

Error to Wayne; Rohnert, J. Submitted April 9, 1909. (Docket No. 22.) Reargued January 10, 1910. Decided September 27, 1910.

Case by Max J. Feldman, administrator of the estate of Marvin Feldman, deceased, against the Detroit United Railway for the negligent killing of plaintiff's intestate. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed.

Corliss, Leete & Joslyn, for appellant.

George B. Greening and *Friedman & Smilansky*, for appellee.

MCALVAY, J. Plaintiff, as administrator of the estate of his son, Marvin Feldman, a child of the age of four years, brought suit against defendant for damages occasioned by the death of this child, claimed to have been caused by the negligence of the servants and agents of defendant. Plaintiff and his family lived on Winder street, in the city of Detroit, between Hastings and Rivard streets, at about the middle of the block. On Sunday afternoon, May 21, 1905, he, with his wife, were at home as he testified, "enjoying a Sunday afternoon rest." Some one of his relatives had given the boy some money. He went out of the house with his sister, who was seven years old. Plaintiff did not know where he was going. He was next seen on Hastings street going north on the east side of the street with a little girl. There is some doubt whether this girl was the sister. One witness testifies that it was his daughter, of the age of six years. When the boy had gone a short distance north on Hastings street, upon which there is a street car line of defendant company, he turned out into the street alone,

running across it, supposedly towards some candy shops located almost opposite. He was struck by an approaching car, and killed. It is admitted that this car had stopped at Napoleon street, next south of Winder street. There is a dispute as to whether it stopped at Winder street, and there is also a dispute as to whether the car was running fast or slow at the time of the accident. The record shows that the boy was 20 feet or more north of the corner of Winder street when he started to run across the track. The distance from this corner north to the alley is 97 feet. The outside length of the car is 35 feet. It was stopped about 2 feet south of the south line of the alley. It moved about 40 feet after striking the child.

No question is raised as to the competency of the motorman, nor as to his acts in stopping the car. There is a dispute as to whether the gong was sounded by him. When the accident occurred, the conductor was in the car, taking fares. He saw nothing of the accident. When he came out of the car, a crowd had gathered and set upon him, and assaulted him violently. The case was submitted to the jury and a verdict returned in favor of plaintiff, upon which judgment was entered.

Defendant brings the case here for review upon a writ of error. Errors are assigned upon the charge of the court, and the refusal to charge as requested relative to the contributory negligence of plaintiff, and also upon certain rulings upon evidence. The most important question in the case is whether, under the facts presented, the court was in error in charging the jury that—

"There is no testimony tending to show any contributory negligence on the part of the father, so that the question of whether or not there is a liability depends simply and solely upon the question whether or not the motorman was negligent."

The first question to be considered is whether, if plaintiff was guilty of contributory negligence, such negligence may be imputed to his infant child in this case. Upon the reargument of the case counsel for plaintiff gave

large attention to the question, and cited numerous authorities which he claimed supported his contention that such contributory negligence could not be imputed to the child in cases like this. This action was brought under sections 10427, 10428, 3 Comp. Laws, known as "Lord Campbell's Act," and commonly called the "Death Act." The profession is familiar with its terms. In all such cases the action must be brought in the name of the personal representative of the deceased,—

"And the amount recovered in every such action shall be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate," and "the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered."

In the instant case under this statute the suit is brought by the father, as administrator of the personal estate of his minor child who died intestate, alleging that as such he is entitled to what he would have earned had he not been killed by the negligence of defendant, and by such death plaintiff was damaged in that he lost the value of the services of his intestate. There is want of harmony in the authorities upon the question of the negligence of a parent being imputed to the child of tender years in actions for personal injuries to the child. We find from an examination of the authorities that the question has been considered by the courts in three classes of cases:

(1) In actions brought by the child in its own right. (2) In actions brought by the parent for loss of services. (3) In actions brought under Lord Campbell's act by the personal representative of the child to recover for loss of services to the parent.

In the first class of cases, by the great weight of authority, it is held that the negligence of the parent cannot be imputed to the child. In the second class the negligence of the parent will bar the action. In the third class, where, although the action is brought by the personal

representative for the benefit of the child, if the parent is the real beneficiary, his contributory negligence will be imputed to the child. The most recent discussion upon this question, where cases are cited and digested, and reference is made to all the leading authorities, will be found in the first two of the following cases: *Davis* v. *Railroad Co.*, 136 N. C. 115 (48 S. E. 591, 1 Am. & Eng. Ann. Cas. 214, and notes); *Atchison, etc., R. Co.* v. *Calhoun*, 18 Okl. 75 (89 Pac. 207, 11 Am. & Eng. Ann. Cas. 681, and notes); also *Ploof* v. *Traction Co.*, 70 Vt. 509 (41 Atl. 1017, 43 L. R. A. 108, 13 Am. & Eng. R. R. Cas. [N. S] 702); Tiffany, Death by Wrongful Act, §§ 68–72.

In this case the fact that this child was unattended upon the street at the time he was killed by the car established *prima facie* the negligence of his parents. Whether their conduct should be excused or justified by circumstances was a question of fact for the jury, and the court should have so instructed. *Grant* v. *City of Fitchburg*, 160 Mass. 16 (35 N. E. 84, 39 Am. St. Rep. 449). See, also, *Lindsay* v. *Railroad Co.*, 68 Vt. 556, at page 567 (35 Atl. 513); *Davis* v. *Railroad Co.*, *supra; Green* v. *Railway Co.*, 110 Mich. 648 (68 N. W. 988). The court was in error in charging the jury upon the question of contributory negligence as above quoted. As a new trial will be ordered, other questions must necessarily be passed upon for the benefit of the trial judge.

A witness named Jacobs was produced by plaintiff, and testified relative to the value of the services of plaintiff's intestate, to recover the loss of which this action was instituted. His examination shows that he had no knowledge upon which to base his opinion. He testified, over objection and exception:

"It looks like that, if the boy turned out anything like a success, he could get $4,000 or $5,000 or more."

This was his answer to a question as to what would be

the earnings of this child over and above its costs and expenses up to the age of 21 years. Witness had already said he could tell what his experience had been, but could not tell for others. It was the random, loose statement of a garrulous witness, and should have been stricken out as defendant requested.

A witness, over an objection, was permitted to testify that the motorman 15 or 20 minutes after the car struck the child, but before the body had been removed from under it, made the statement, "Gentlemen, it is my fault." A motion to strike it out was denied. It is urged that this was a voluntary and spontaneous statement, made by the motorman while in the discharge of his duty, and so near the time of the accident as to be part of the *res gestæ*. The witness states that a great crowd of a thousand people had gathered about the car; that they became noisy; that they were talking with the motorman when he made this statement. The record also shows that this crowd was violent; that the conductor as soon as the accident occurred ran to assist in getting the child out from under the car, but was prevented and not permitted to do so by this crowd, and was set upon by them and seriously assaulted and injured; that they also assaulted the motorman, and that the conductor ran to a telephone for police protection. This witness says that the motorman stood on the platform of the car with tears in his eyes. All of the authorities in discussing the admissibility of declarations of this character hold that such statements must be voluntary and spontaneous. Under the circumstances of this case, this statement claimed to have been heard by this witness cannot be held by this court to have been either voluntary or spontaneous. It is not necessary to know what the questionings of this angry and excited crowd were. They had already assaulted him and severely injured the conductor. The overwhelming inference from these facts is that whatever he said was under duress and in dread of personal violence. To extend the mantle of *res gestæ* to include statements so made would be repre-

hensible. For the reasons given, the testimony should have been stricken out. No opinion is expressed as to whether under other circumstances the motorman's statement would have been admissible. It was error under these circumstances to admit it.

Other assignments of error are discussed, but an examination discloses that they are of minor importance, and, in view of a new trial, and the probability that they will not arise again, we do not think they require attention.

The judgment, for the errors pointed out, is reversed, and a new trial ordered.

OSTRANDER, HOOKER, MOORE, BROOKE, BLAIR, and STONE, JJ., concurred.

HOULIHAN *v.* FOGARTY.

1. EXECUTORS AND ADMINISTRATORS—SALES—LICENSE.
   Without a lawful license, no valid sale of real estate can be made by executor, administrator, or guardian.

2. SAME—GUARDIAN AND WARD—EVIDENCE OF SALE.
   The sale of real estate by an administrator who also controlled the same property as a guardian of a part of the interested owners, is shown to be a sale in his capacity of guardian by evidence that as such guardian he published a notice, acknowledged the deed and filed an account of the sale.

3. GUARDIAN AND WARD.
   No valid sale of real estate is executed where the guardian having control of the property obtains no license, in advance of the sale, although he procures the subsequent execution of a license dated back to a proper time, where he gave no bond upon the sale, took no oath in writing, published an incorrect and incomplete notice of sale, accepted a bid not made

at the place of sale or in the county in which the land was situated, and failed to execute a deed in accordance with the alleged authority. 3 Comp. Laws, §§ 9094, 9129.

4. SAME—CONFIRMATION OF SALE—VALIDITY.
A confirmation of guardian's sale of realty made 30 days after the sale and 15 days after the execution of a deed transferring the property, but dated two days later than the date of sale at the request of the guardian, is not a valid confirmation.

5. SAME—PURCHASE BY GUARDIAN—GOOD FAITH.
A purchase at public sale, by a guardian, of property held by him in trust for others, is void, where the title has not passed to a bona fide purchaser without notice. 3 Comp. Laws, § 9095.

6. SAME—PURCHASER IN GOOD FAITH.
Where purchasers have notice by a reference in the guardian's deed that license to sell was granted on the day of sale, and where fatal defects in the proceedings appear, no title is conveyed.

7. ESTOPPEL—CONVEYANCES.
An estoppel to question the validity of a guardian's sale does not arise in favor of parties who know the actual facts, are not induced to act to their prejudice or to lose rights by the acts of the owners.

8. SAME.
The lessor is estopped as against his lessee from asserting ownership of a smaller interest, but not from asserting title to a larger interest than the instrument expresses.

9. SAME—DEEDS—LEASE.
In an action not founded on a lease recitals contained in it do not operate by way of estoppel, as to a party with whom no covenants are made.

10. EQUITY—LACHES.
Evidence *held* not to show laches of the complainants in a suit to set aside a guardian's sale and conveyance.

Appeal from Iron; Stone, J. Submitted February 18, 1910. (Docket No. 56.) Decided September 27, 1910.

Bill by Theresa Houlihan and others against Patrick Fogarty and others to set aside a deed. From a decree

dismissing the bill, complainants appeal. Reversed, and decree entered for complainants.

Fred H. Abbott (*M. J. Sherwood*, of counsel), for complainants.

Cummiskey & Spencer and *A. F. Dixon* (*John Power*, of counsel), for defendants.

MCALVAY, J. Complainants on January 23, 1907, filed their bill of complaint against defendants for the purpose of having a certain deed set aside and declared null and void as a cloud upon their title to certain lands located in Iron county. On July 10, 1887, Michael Houlihan, the father of the complainants, died intestate, at his home in Wisconsin, seised in fee simple of 160 acres of wild timber land described as the southeast quarter of section 36 in township 43 north, range 35 west, in Iron county. The complainants are his only heirs at law. Ellen Houlihan, his widow, is their mother. These nine children were all minors at the time of the death of their father, of ages between 18 and 3 years, and all but two of them have always been nonresidents of this State. In December, 1887, the probate court of Iron county appointed defendant Patrick Fogarty guardian of the nine minor children. He afterwards, on January 3, 1888, petitioned to be appointed administrator of the estate of Michael Houlihan, deceased. He qualified in both capacities. His bond as guardian, and also his bond as administrator, were signed by defendants John Dinneen and Edward Donovan (deceased) as sureties. The estate of Michael Houlihan consisted only of the 160 acres of land above described. He was indebted at the time of his death to the amount of $400 or $500. The widow and the children had no means of support. The estate of the minor children consisted only of their several interests in this land inherited from their father. It is claimed that as administrator Patrick Fogarty petitioned the probate court for license to sell this land for the purpose of paying

debts, interest, and charges, as appears from what purports to be an order of sale of the premises for the purposes mentioned, subject to dower and homestead rights of the widow, made on hearing a petition granted to him as administrator. The date upon which this license to sell was made is in dispute. In the first paragraph it appears that the date had been changed. A pen had been drawn through the date September 8, 1888, and July 25th substituted. It reads as follows:

"STATE OF MICHIGAN, } ss.
"County of Iron. }

"At a session of the probate court for said county held at the probate office in the township of Crystal Falls on Saturday the ~~eighth~~ 25 day of ~~September~~ July, in the year of our Lord one thousand eight hundred and eighty-eight.

"Present, Charles Gallagher, Judge of Probate."

Fogarty as guardian of the minor heirs of Michael Houlihan, commencing June 9, 1888, published a notice for thirteen successive weeks, as follows:

"FOR SALE: As guardian of the heirs of M. Houlihan, deceased, I am authorized, by the probate court of Iron county, to dispose of the following described property for the benefit of the heirs, to wit: The S. E. ¼ of section 36, township 43, range 35 west. Will sell with right to reserve one-fourth interest in minerals. Price paid to be cash. Good clear title will be given. For information write to me at Stambaugh, Michigan, or apply at my homestead in Stambaugh township. Bids to be in by September 8, 1888.

"PAT FOGARTY, Guardian."

In the description given in the above notice it was printed township "42." An erasure has been made with a pen, and it is changed in ink to read "43" which is the correct description. Fogarty admits that he made this change. There is not of record in the probate court any order of hearing the petition for license to sell this land by Fogarty either as guardian or as administrator, nor any proof of publication, or other service of such order, nor any order granting any license to sell any of this land for

any purpose by him in any capacity. The order above referred to as purporting to be a license of sale granted to him as the administrator of the estate of Michael Houlihan, deceased, was found in the files in probate court. It will be more particularly described later in this opinion. On September 8, 1888, Fogarty reported that he had sold as "guardian of the heirs of M. Houlihan" the following described lands to the following named persons:

"The N. W. ¼ of the S. E. ¼ of sec. 36, 43–35 to William Young at $8 per acre, equals $320.00. The N. E. ¼ of the S. E. ¼ of sec. 36, 43–35 to John Swanson at $10.25 per acre equals $410.00. The S. ½ of the S. E. ¼ of sec. 36, 43–35 to John Dinneen at $8 per acre equals $640.00."

On September 14, 1888, Fogarty, as guardian, executed deeds of the lands above described to the parties above named. The deed executed to defendant John Dinneen purporting to convey the S. ½ of the S. E. ¼ of section 36, excepting an undivided one-quarter interest in all minerals, is the deed which complainants by this suit ask the court to set aside. The other deeds are not involved. The bid of Dinneen was made to Fogarty at Escanaba, Delta county, before the sale, and was accepted by Fogarty at Escanaba. Dinneen was not present at the sale in Iron county. At this time the relations between Fogarty, the guardian, and defendants Dinneen, Maloney, and Donovan, now deceased, but who is represented by an administrator, were that Dinneen and Donovan were sureties upon his bond as administrator, and also upon his guardian's bond, and Maloney was a surety upon what is claimed to be his administrator's sale bond. The four defendants, Fogarty, Dinneen, Donovan, and Maloney, resided at Escanaba, and were old friends. Within six months after Fogarty as guardian made the deed to Dinneen and while he was yet administrator of the estate of M. Houlihan and guardian of these minors, Dinneen divided the interest he claimed in the premises equally with Fogarty, Donovan, and Maloney, by deeding to

each one-fourth thereof, making each the apparent owner of three-sixteenths, and each paid Dinneen exactly one-fourth of $640, the purchase price paid by him. At the time of instituting this suit, the apparent fee-simple title to the mineral conveyed to Dinneen remains exactly the same as when deeded by Dinneen to Fogarty, Maloney, and Donovan. They received from the Kinneys who purchased the surface land $800 in 1901.

In the year 1903 William J. Tully obtained an option for a mining lease on these premises from the parties claiming to be the owners, including these complainants, and afterwards a mining lease was prepared by Fogarty; but this lease was in some way lost. This option and lease are not in the record. They were procured by Mr. Tully for the purpose of prospecting for iron ore. While he was attempting a sale of his option, the question of the state of title was raised for the first time, and eminent counsel was employed to investigate the title and to procure options for a mining lease. He acted for defendant Tully Mining Company, to which Tully has assigned his rights, and for other clients. Counsel says in his testimony:

"There were grave doubts in my mind at that time as to whether that sale was valid, and as to whether or not the Houlihans were not entitled to the entire property."

He succeeded in obtaining another option from complainants to Mr. Tully dated November 2, 1903. The first option to Tully was dated January 10, 1903. A few days before November 2, 1903, Mr. Tully's counsel met Mrs. Ellen Houlihan, the widow, at her daughter's house in Oconto in October before the 28th. He says:

"I endeavored to make her understand as well as I could just what the situation was, and also that the title of Dinneen, and those claiming under him, was seriously open to question. I advised her to present the matter to her lawyers. The daughter who was sick was present, and the old lady's mind was very much troubled, and I got over the matter as soon as I could. The daughter was

lying there, and I could see her through the door. The old lady seemed to be very nervous and troubled."

He also talked with a son-in-law of Mrs. Houlihan when he was securing his wife's signature to an option. The son-in-law testifies that he told some of the Houlihans. This is the first notice any of the complainants had that the validity or regularity of the sale made by Fogarty was questioned. Several of the complainants did not learn of it until late in 1905. Mrs. Houlihan's interest in these premises, as widow of Michael Houlihan, is not in dispute or questioned by any of the defendants. She is not a party to this suit. The defendants Fogarty, Dinneen, Maloney, and Donovan (by representatives) are the fee claimants, and the real defendants in the case. Defendants Kinney are interested only in the surface land. The defendant mining companies by stipulation with complainants will be unaffected whatever the result of this suit. The foregoing statement of the situation in this case if not sufficiently complete will be made so as necessity arises. In their answer to the bill of complaint, the principal defendants rely for their source of title upon the conveyance from Fogarty, claiming to act as guardian, and that he as such guardian conveyed to Dinneen, in fee simple, the land in question, and allege the regularity of such sale. Upon the hearing had in the court below a decree was entered dismissing the bill of complaint without costs.

It is insisted by the principal defendants that the proceedings relied upon by them, which were taken by Fogarty to sell the land in question, were valid proceedings and according to law; that, at most, the imperfections in those proceedings pointed out by complainants were mere irregularities which will not make void the sale. They contend that under a valid license to sell as administrator Fogarty followed substantially the essential requirements of the statute in every step taken by him, and in all that he did he acted as administrator. The contention of complainants is that, acting as guardian, Fogarty undertook to make a

sale of this real estate, and as such guardian attempted to convey the same to defendant Dinneen; that he did so without authority by license as required by statute; and that he failed in practically all essential particulars to conform with the law. The learned circuit judge took the view, and adopted the theory, of the principal defendants.

Section 9129, 3 Comp. Laws, to which both parties appeal as containing the requirements necessary to the validity of a sale of real estate by executors, administrators, or guardians, provides:

"In case of an action relating to any estate sold by an executor, administrator or guardian in which an heir or other persons claiming under the deceased or in which the ward, or any person claiming under him shall contest the validity of the sale it shall not be avoided on account of any irregularity in the proceedings, provided it shall appear:

"*First.* That the executor, administrator or guardian was licensed to make the sale by the probate court having jurisdiction;

"*Second.* That he gave a bond which was approved by the judge of probate in case a bond was required upon granting a license;

"*Third.* That he took the oath prescribed in this chapter;

"*Fourth.* That he gave notice of the time and place of sale as in this chapter prescribed; and

"*Fifth.* That the premises were sold accordingly and the sale confirmed by the court, and that they are held by one who purchased them in good faith."

It must first be determined from this record in what capacity Fogarty acted in making this sale. If, as is contended by defendants, and determined by the court, he was acting as administrator of the estate of Michael Houlihan, deceased, we must consider the authority under which it is claimed he acted. It is urged that the probate court of Iron county granted him a license to sell as administrator. This claimed license was found in the files of court. No indorsement of filing is written upon

it. It was never recorded in the records of the probate court, as provided by law. It is a blank form filled in, purporting to be a license granted to Fogarty as administrator to sell this real estate. It is not signed in the place provided in the blank. The only signature of the probate judge is to the following form of a certificate which is written upon it:

"STATE OF MICHIGAN, } ss.:
"County of Iron. }

"I hereby certify that the foregoing is a true copy of the order and of the whole thereof heretofore entered in the above matter authorizing a sale by the said administrator of the above described real estate.

"Dated Sept. 8, 1888.

"CHARLES GALLAGHER,
"Judge of Probate of said County."

This date is quite significant. If the first paragraph of this instrument given above is examined, it will show that it is the same date which was first written and afterwards erased, and for which July 25th was substituted. September 8th is the date Fogarty claims the sale was made to Dinneen. The learned circuit judge inclined to the belief that this was the original order, that the probate judge in his carelessness or ignorance signed it as it appears, and that the presumption was that the erasure was made before its execution—citing *Munroe* v. *Eastman*, 31 Mich. 285, and quoting,

"*Where nothing suspicious appears on the face of the deed beyond the fact that an erasure is manifest.*"

If it is accepted as the original, its date is fixed upon its face as September 8, 1888, when it was signed, from which it must be inferred that the correct date was first written in this license when it was made out, and was afterwards changed. An examination of a calendar for the year 1888 shows that September 8th occurred on Saturday and July 25th on Wednesday. The license as mutilated reads, "On Saturday the ~~eighth~~ 25 day of ~~September~~ July," which is additional proof that the license was not issued

before Saturday, September the 8th. Fogarty gave notice of the sale of this land, which will be considered later. This notice and its date of publication is, however, of present importance, as bearing upon the question of the genuineness and validity of the claimed license to the administrator. It will be remembered that it is claimed that this license was granted July 25, 1888. The files of the newspaper in which this notice was published, introduced in evidence, show that the first publication was June 9, 1888, and the last was September 1, 1888. By the notice he claimed to be authorized by the probate court of Iron county to sell this real estate 47 days before July 25, 1888.

From the foregoing facts, taken from this record, it would appear that the instant case is readily distinguishable from the case relied upon. Can it be said that nothing suspicious appears on the face of the instrument beyond the fact that an erasure is manifest? Not only is the face of this instrument clouded with suspicions, but the evidence furnished by Fogarty impeaches its authenticity and forces the conclusion that it was made on the date first written. After a careful consideration of the facts, it is impossible to seriously consider this license as genuine. The only reasonable theory which will account for this instrument is that on the day of the sale it was discovered that no license had ever been granted. Such a paper was necessary to show a license authorizing a sale of this real estate, and this paper was manufactured. We have in this record in the handwriting of Fogarty evidence requesting a similar act by this judge of probate which will be considered later. We find that, in fact, no license was issued as provided by law to Fogarty as administrator authorizing him to make this sale. If the contention that Fogarty acted as administrator in his proceedings to make this sale is admitted, our finding that no license was ever granted to him as administrator for that purpose disposes of it. Without lawful license, no valid sale of real estate can be made by executor, administrator, or guardian.

On the other hand, if Fogarty, as complainants contend, proceeded to make this sale as guardian of these minors, we must determine whether that contention is true, and if found true, whether his proceedings were taken according to the requirements of the statute and the sale consequently valid. The deed by which title, if any, passed to these defendants being their source of title, would naturally be the first item of evidence to challenge attention. In this Fogarty describes himself as "guardian of the heirs of Michael Houlihan," and he acknowledged the deed as such guardian. Next, the notice given by Fogarty in pursuance of which the sale was made also describes him as guardian of the heirs of M. Houlihan, and signed by him as such guardian. The record shows what purports to be a report of the sale, also signed by him as "Guardian of the heirs of M. Houlihan." He also as guardian filed an account of proceeds realized from such sale. All of these solemn instruments made and signed by him in the performance of his official acts, not contradicted by any testimony in the record, established beyond question that the grantor of these defendants intended to, and did, make this sale to these defendants as such guardian, and not otherwise. No claim is made in this record, or can be made, that he acted under a mistake. The allegation in their answer, "These defendants further severally answering admit that the defendant Patrick Fogarty claiming to act *as guardian of the complainants* made, executed and delivered unto John Dinneen a certain deed bearing date the 14th day of September, 1888, * * * whereby for the consideration of $640.00 the said Patrick Fogarty *as such guardian* conveyed to said John Dinneen in fee simple," etc., and the further statement in said answer denying the allegation in the bill that Fogarty was not authorized to make such deed as guardian, and the absence of claim or intimation in the answer that he was acting in any other capacity, are overwhelming evidence of the understanding of these parties, who were grantees in that deed, both at the time

it was executed in 1888, and in 1907, when its validity was challenged.

We find no evidence in the record to show that Fogarty acted or intended to act in any other capacity than as guardian in making this sale. Under the statute above quoted, the first essential requirement to make a valid sale of real estate by this guardian was "a license to make the sale by the probate court having jurisdiction." It is not claimed that the record shows that any license to make this sale was ever granted to the guardian. As already shown, the case was decided upon another theory. The two theories cannot be reconciled. Fogarty at the time was holding two distinct fiduciary offices. He was administrator of the estate of M. Houlihan, deceased. He was also "In the matter of the estate of Katie Houlihan and others, minors," appointed guardian of these minors. These were separate estates. His duties as administrator and guardian were distinct and separate. He never petitioned the probate court for a license to sell real estate, "In the matter of the estate of Katie Houlihan and others, minors," of which he was guardian. This is practically admitted upon this record. If the paper purporting to be a license to sell real estate could be accepted for what is claimed for it, it appears upon its face that as administrator "In the matter of the estate of Michael Houlihan, deceased," he was licensed to sell all real estate whereof decedent died seised, to pay debts, claims, interest, and charges, "subject to the right of dower and the homestead rights of the widow." It is not claimed by defendants that this was a license to Fogarty as guardian, but it is admitted and was determined to be a proceeding by the administrator, "In the matter of the estate of Michael Houlihan, deceased." The contention of these defendants indicates that the fact that two separate estates were being administered has been disregarded, not because the record of that fact is in any manner disputed, but because of the fact that in no other way is it possible to give this sale a semblance of validity under the statute.

Our determination that no license to sell was ever granted to Fogarty has eliminated all confusion of the two estates, and the separate offices he held. We find from the great weight of the evidence that Fogarty, as guardian of these minors, was never licensed to make the sale of this real estate by the judge of probate.

We think it proper to consider other alleged fatal defects in these proceedings because of the insistence of counsel for defendants that they were mere irregularities, and for the reason that, if the conclusion as to the irregularities of the claimed administrator's license is questioned, other defects appear to show the invalidity of this sale. It is undisputed that Fogarty as guardian never gave a sale bond as required by the statute. It follows that no bond was approved. As to the required oath, it appears from the testimony of Fogarty that he was at Crystal Falls on September 8, 1888, and took an oath before the sale was made. There is no evidence to show that this oath was in writing. No oath was filed as required, and no official record or evidence shows that the required oath was taken. The notice of this sale is already given. It in no essential particular conforms with the requirements of law. The undisputed evidence shows that this notice as published described land in another township. When Fogarty attached a copy of this notice to the claimed administrator's license, he changed the number of the township to make a correct description. This notice contains neither time or place of the sale, nor that the land would be sold at public vendue to the highest bidder. It was of no legal effect whatever as notice of a guardian's or administrator's sale of real estate. It follows that the sale was made without notice previously given as required by law. It appears as an undisputed fact from the testimony of Dinneen and Fogarty that the bid of Dinneen was given to and accepted by him at Escanaba, Delta county, not at Crystal Falls, the county seat of Iron county, in which the land was located, nor at Stambaugh. It also appears

that Dinneen was not present in Iron county on the date of the sale. Fogarty testifies:

"I made the sale the 8th of September, 1888. When I made the sale, I was either at Stambaugh or Escanaba. It may be possible that I made the sale to Dinneen at Escanaba. Dinneen never went over to Iron River. His bid was at Escanaba, and it was accepted there."

The sale therefore was not made according to notice or the provisions of section 9094, 3 Comp. Laws, which requires "such sale to be in the county where the lands are situated, at public vendue," but was made to Dinneen, in Escanaba, Delta county, where his bid was received and accepted. It was not made in accordance with the claimed authority, which reserved the widow's dower and homestead interest, nor was the whole of it sold as reported to the court, but with a reservation of one-quarter of the mineral. The record shows conclusively that no valid sale was made. The report of the sale was inclosed in a letter from Fogarty to the judge of probate, dated October 9, 1888, which, among other things, contained the following:

"Inclosed please find my report of sale, and I wish you would send me a confirmation or copy of confirmation of the sale and *date it back to about September 10, 1888*, and if necessary to put my report into blank form, you do so and it will be all right."

This is the instance referred to where Fogarty requested the judge of probate to falsify his record. It is evident that at the time this letter was written the sale had not been confirmed by the court, and this is the only evidence in the case relative to confirmation, except a recital in the deed to Dinneen. This was 30 days after the sale and 15 days after the deed was executed and delivered. A slip of paper found in the files apparently torn from a sheet of legal cap bears upon it the following writing:

"1. Wednesday, July 25. 2. July 25. Sold September 8. Confirmation given Sept. 10."

It was considered by the court below as evidence of confirmation of this sale. It is certainly evidence that, if there was a confirmation, it was falsely and fraudulently made and dated back, according to Fogarty's request, from which it may be conclusively inferred that the other dates now very familiar to the court on this slip of paper were likewise fixed to serve the exigencies which confronted the guardian. A confirmation brought about in this manner cannot be held by this court to be a bona fide valid confirmation contemplated by the statute.

Much stress has been laid upon the *bona fides* of the fee claimant defendants Fogarty, Dinneen, Donovan, and Maloney. From foregoing intimations in this opinion it is evident that the good faith of Mr. Fogarty is at least questioned, and the fact that within six months after the sale he became a one-fourth owner of the property sold in consideration of $160 while he was yet administrator and guardian, thereby by indirection becoming a purchaser at his own sale, as a matter of law dissipates his defense of a good faith purchaser. The law prohibits such a transaction, and declares it void. Section 9095, 3 Comp. Laws. This court in construing this statute has held that such a purchase is void, where the title has not passed to a bona fide purchaser without notice, before the sale is impeached. *Otis* v. *Kennedy*, 107 Mich. 312 (65 N. W. 219), and cases cited. See, also, *Litchfield* v. *Tunnicliff*, 118 Mich. 383 (76 N. W. 760). The explanation of Fogarty and Dinneen as to how Dinneen became a purchaser "just to help out his neighbors the Houlihans," and how the three others each took an interest from Dinneen "just to help him out," because he was short of money, does not carry conviction of its truth. It has been explained that three of these men were bondsmen for Fogarty in these estates. It appears from the testimony of Fogarty that quantities of equally good land in that locality were for sale at $1.25 per acre, and yet the above is the only explanation either of them makes why eight dollars an acre were paid by them, or why there

was any reservation of minerals. It is apparent that it was expected by these men that minerals underlay this land, otherwise mention of minerals in the deeds and a division of interest in the minerals among them would be foolishness. Whether or not they were in a conspiracy to get this land is not material. None of them can be held to be a bona fide purchaser. All had knowledge of the record of the title deed upon which Dinneen relied. On its face this deed showed that no valid license to sell had ever been granted to Fogarty. The deed was executed and delivered September 14, 1888, and among its recitals stated that the sale was made pursuant to a license granted September 8, 1888, which is the date of the sale, as stated in the deed. Furthermore, the defense of good faith under section 9129, *supra*, is not available to a purchaser except when all the essential requirements of the statute have been complied with. The defects in the proceedings in this case to sell these premises were not mere irregularities but were fatal and rendered the sale absolutely void. It follows that title never passed from complainants, and they are entitled to the relief asked, unless by their acts or failure to act since knowledge came to them of their rights in the premises. It is admitted by these fee claimant defendants that they cannot establish title by estoppel *in pais* because of the statute of frauds. It is also admitted that an estoppel will not arise in favor of defendants claiming title.

They urge, however, that an estoppel has arisen in favor of the defendant mining company. This last-named defendant has not answered the bill of complaint. Whether the bill has been taken as confessed against it does not appear. The amended record shows that, by stipulation, whoever succeeds in this suit the interests or rights of that company will in no manner be affected. The record shows that the solicitors for all these parties at the close of the proofs in a colloquy with the court stated that the royalty under the mining lease would follow the decree of the court on the fee, that no estoppel was claimed

against complainants by reason of this lease, and the attention of this court has been specifically called to this stipulation, which it is understood will be provided for in the decree if necessary. The joining by complainants in the options and leases did not operate as an estoppel, legal or equitable. The lessees were not induced to enter into these agreements by reason thereof. They were fully informed of all the facts as to the title. They did not do or omit to do anything to their prejudice in consequence or on the faith of such acts of complainants. Authorities need not be cited to show that estoppel will not be created by such acts. The options and leases were not made by complainants with the fee claimants, but are agreements separate and distinct made with the lessees. The first option and lease were given by complainants before any knowledge of an invalid sale. Do these options and leases create estoppel by deed? The lessor is estopped as against the lessee from asserting ownership of a smaller interest, but not from asserting title to a larger interest than is expressed. There is no covenant whatever with the co-lessor. The action in this case is not founded upon the mining option and lease but is collateral to it, and facts recited or admitted in such instrument do not operate by way of estoppel in this action. 16 Cyc. p. 721, and notes; 11 Am. & Eng. Enc. Law (2d Ed.), p. 401, and notes. The mining lease printed in a supplemental record is too long to be printed in this opinion. The recitals above referred to are simply statements that complainants are collectively owners of an undivided one-fourth of the premises.

There is no question of adverse possession in this case, nor is the statute of limitations invoked. Nor can complainants be charged with laches. After all were fully and completely informed of their rights, reasonable diligence was had in bringing this suit. The relative positions of the parties are not altered to the prejudice of these defendants by any delay of complainants. The deed made to Dinneen is a cloud upon the title of complainants to these premises by reason of the illegality of the sale.

The decree of the circuit court is reversed and a decree will be entered in this court in their favor, declaring the sale of said land by Fogarty null and void, and vacating and setting aside the deed given to Dinneen, as a cloud upon the title of complainants, and that they be decreed to be the owners in fee to all of said premises, subject to the right of dower or other right of Ellen Houlihan, widow, and subject to the rights of defendant Tully Mining Company under the stipulation between the parties, the essential terms thereof to be recited in such decree, and that complainants do recover against said defendants Fogarty, Dinneen, Maloney, and the representatives of Donovan, their costs of both courts to be taxed.

HOOKER, MOORE, BROOKE, and BLAIR, JJ., concurred.

BARNES *v.* SPENCER & BARNES CO.

1. CORPORATIONS—DIVIDENDS—FORMALITY OF DETERMINATION TO DISTRIBUTE PROFITS.
   Stockholders of a corporation may informally agree to distribute a certain sum as dividends without going through the form of corporate action, or without action of the board of directors.

2. SAME—PROFITS—DIVIDENDS.
   A division of profits is a dividend, even though not called or considered such by directors or stockholders.

3. SAME—BILLS AND NOTES—DENIAL OF EXECUTION.
   Failing to deny the execution of a corporate note, made by the president of the association without express authority, permits the introduction of the note in evidence; whereupon it makes a *prima facie* case.

4. SAME—NEGOTIABLE INSTRUMENTS—AUTHORITY OF CORPORATE OFFICER—RATIFICATION.

A promissory note executed in the corporate name by its president, to himself, for the price of timber sold by him to the corporation, is valid in the absence of evidence that the price was unfair, and especially upon proof that the directors knew of the transaction, never repudiated the note, and the corporation credited the amount of the purchase price on its books, in his name.

5. SAME — DEALING BETWEEN OFFICERS AND CORPORATION — FIDUCIARY RELATION.

A corporate officer may deal with the corporation if his acts are open and fair and known to the directors and stockholders.

6. EQUITY—SET-OFF—ACCOUNTING.

Under a plea of the general issue and notice that the defendant purposes to file a bill for an accounting of plaintiff's acts as corporate president, asking that the amount, when so determined, may be set off against any amount due upon notes involved in the action at law, the defendant's remedy is in equity.

Error to Berrien; Coolidge, J. Submitted April 6, 1910. (Docket No. 10.) Decided September 27, 1910.

Assumpsit by John E. Barnes against the Spencer & Barnes Company for money had and received. A judgment for plaintiff on a verdict directed by the court is reviewed by defendant on writ of error. Affirmed.

Gore & Harvey, for appellant.

M. L. Howell and *Humphrey S. Gray*, for appellee.

MOORE, J. The plaintiff sued defendant in an action of trespass on the case upon promises, and gave notice that upon the trial under the money counts he would give in evidence certain notes. One of them was for $1,000, payable to Mrs. J. E. Barnes, guardian, etc., and was dated July 1, 1903. It had on the back of it the indorsement:

"Pay to the order of J. E. Barnes, Mrs. J. E. Barnes, guardian."

It also had 11 indorsements showing the interest had been paid up to July 1, 1908, and 9 indorsements showing payments upon the principal. One of the notes was for $5,000, dated January 1, 1904, payable to the order of J. E. Barnes, and had many indorsements showing upwards of $1,200 paid upon the principal, and many indorsements showing payment of interest up to July 1, 1908. There was another note for $3,000 and two notes for $2,000 each. All of these notes were signed: "The Spencer & Barnes Company, by J. E. Barnes, President." Each note had many indorsements showing payments upon the principal, and many indorsements showing payments of the interest up to July 1, 1908.

The defendant did not deny under oath the execution of any of these notes. It pleaded the general issue, and gave notice of several defenses, one of which was to the effect that when the notes were given the payee was president of the company, under a large salary, and owed all his services to the company; that he engaged in outside business under the firm name of Barnes & Robinson, which firm dealt with defendant company. We quote from the plea and notice:

"That by virtue of such sales the said John E. Barnes realized large profits which said Barnes then and there converted to his own use, and which said sums of money the defendant avers lawfully and of right belonged to the defendant, and which said amounts the plaintiff has refused to pay over and account for to the defendant, though the same have often been demanded of plaintiff.

"The defendant avers that by virtue of such manipulation and by reason of plaintiff's interest in said contracts with the Spencer & Barnes Company, that the said plaintiff, John E. Barnes, has realized large profits on said contracts, amounting to the sum of $10,000, and said profits lawfully and of right belong to said defendant. That no part thereof has been paid by plaintiff to the defendant, though often requested so to do, and thereby the plaintiff became and is indebted to the defendant in the sum of $10,000.

"That said John E. Barnes, in violation of his contract

obligations to the defendant, as aforesaid, whose president and financial manager he was, made several purchases of timber and timbered lands for his own account and not for the account of the Spencer & Barnes Company, as he was under contract and legally bound to do. That said plaintiff, John E. Barnes, scheming and designing to deprive the defendant of its just share of the profits in said purchases of timber and timber lands, entered into a copartnership with one John Robinson under the firm name and style of 'Barnes & Robinson,' and also under the name of the 'Weesaw Lumber Company, John E. Barnes, Manager,' for the purpose of purchasing large tracts of timbered lands located in the county of Berrien, and for the cutting of the timber thereon and the sale thereof upon the market. * * * Said John E. Barnes realized large profits therefrom, the exact amount whereof is unknown to defendant, but defendant avers that from such sales the plaintiff reaped large profits, to wit, the sum of $10,000. That said profits justly and legally belonged, and do now belong, to the defendant, and, although often requested, the plaintiff has refused and neglected, and still refuses and neglects, to pay the same, or any part thereof, to the defendant."

Notice was given of the following:

"That said defendant will insist that said notes and each thereof are null and void.

"That defendant will insist that said notes, and each thereof, are void because each of said notes was made, executed, and delivered by said plaintiff to himself or to others for his benefit, while president of the Spencer & Barnes Company, defendant, without authority so to do.

"Defendant will show in evidence that there has been no ratification by the stockholders of the making, execution, and delivery of said notes by the plaintiff, as president of the Spencer & Barnes Company, to himself."

The plea ended with the following statement:

"You will further take notice that, pursuant to Circuit Court Rule 24c, the defendant hereby waives the benefit of the general issue, and admits the facts alleged in the plaintiff's declaration (that is to say, defendant admits that, except for the facts set forth in this notice, the plaintiff would be entitled to recover upon the promissory notes set forth in the declaration herein, and waives the neces-

sity of the introduction of said notes in evidence for the purpose of proving the signatures thereon and the delivery thereof, and waives the necessity of the computation of the amount due thereon), and, hereby relying on the defense herein set forth, this defendant claims the benefit of said Rule 24 in respect to the opening and closing in the taking of testimony and in the argument on the trial of said cause."

Upon the trial the notes were introduced in evidence, and many witnesses were sworn on the part of the defendant. At the close of the testimony, after hearing arguments of counsel, the circuit judge expressed himself as of the opinion that the defense of invalidity of the notes and of offset could not be urged in an action at law. He said:

"In this suit, gentlemen, Mr. Barnes is a party on one side and the corporation on the other, and the stockholders are not made parties. I hold equal justice could not be done unless all the stockholders are brought in, and I also hold that so far as offsets are claimed in this case they are matters for a court of chancery for similar reasons, and therefore the plaintiff as far as this action is concerned is entitled to judgment upon the notes.

"A court of chancery may hereafter determine as to what offsets will be allowed to the corporation, and perhaps determine what remedies may exist between the various stockholders of this company. Therefore, as a matter of law, I have come to the conclusion that the plaintiff is entitled to a judgment upon those notes, and that there is no legal defense whatever to the notes. The amount of those notes has been computed and amounts to $20,841.83."

He directed a verdict for the above amount. The case is brought here by writ of error.

The important alleged errors relied upon are stated by counsel as follows:

"(1) The court erred in sustaining the validity of all the notes sued on (except the note, dated July 1, 1903, for $1,000), because each thereof was given without consideration, without authority of the directors, and because the

plaintiff as president of the corporation, without specific authority so to do, made the notes to himself as payee.

"(2) The validity of the notes dated January 1, 1904, for $5,000 each, are assailed as invalid because each thereof is without consideration and each thereof purports to be a contract between the plaintiff as president of the defendant corporation and himself as payee; and because there is no authority in the charter, by-laws, or elsewhere for making said notes and no attempted ratification thereof by the directors or stockholders.

"(3) The court erred in permitting a recovery upon the two notes for $2,000 each, dated July 1, 1905, wherein Z. Dotte Waite, guardian, etc., and Z. Dotte Waite, the plaintiff's daughter, is payee, because it conclusively appears there was no consideration for such notes; that said notes were wholly unauthorized and *ultra vires*.

"(4) The note for $2,000 dated July 22, 1905, is void because it is shown by undisputed proof to have been given by the plaintiff to himself on account of the sale of certain logs belonging to plaintiff at Union Pier, Mich., and sold by plaintiff to himself as president of the defendant company. No other officer or person was a party either to the contract of sale or the promissory note in question.

"(5) The note for $3,000 dated December 1, 1903, wherein plaintiff is both payee and maker, is void. It is wholly unauthorized and without consideration. The only action taken by the directors during the year 1903, referring to dividends, was that all small stockholders be paid the amount of dividends due, 20.2 per cent.

"(6) The fiduciary relation of the plaintiff to the defendant is involved. He was its president and was paid by it for his time and services, and it was his duty to purchase timber, logs, lumber, and timbered lands for and on account of the defendant, and his embarking, against the protest of the other officers, in such enterprises for his individual profit at the expense of the company whose president he was, and in violation of his trust relation and contract of employment, renders the profits so earned and held by him as money had and received for the defendant's benefit. The court erred in ruling that said moneys could not be recovered by the defendant in this suit."

Counsel are agreed upon the following:

"Upon the organization of this company there was

issued 2,000 shares of preferred stock to B. H. Spencer and 2,000 shares of preferred stock to John E. Barnes; and 1,340 shares of common stock issued to John E. Barnes, and 50 shares of common stock issued to Z. Dotte Ortland, daughter of John E. Barnes. There was issued to B. H. Spencer 1,370 shares of common stock and to his daughter, Mary L. Spencer, 20 shares of common stock, making a total stock issue at par of $67,800. It is thus seen that the stock in this company was owned by these two families, B. H. Spencer and John E. Barnes. Later stock was transferred by B. H. Spencer to other members of his family. In 1899 Frank T. Plimpton became a stockholder in the company, and he has continued as such ever since.

"From the organization of the company in 1896 until 1903 the amount of the stock owned by B. H. Spencer and the members of his family was exactly equal to the amount of stock owned by John E. Barnes and the members of his family. During all this time John E. Barnes was president of the company and as such exercised the powers and performed the duties laid down in the by-laws, and B. H. Spencer was vice president and superintendent and as such exercised the powers and performed the duties provided in the by-laws except as hereinbefore stated. The same board of directors served the company from its organization in 1896 to 1907. These directors were John E. Barnes, B. H. Spencer, and Mary L. Spencer. The latter was secretary and treasurer of the company. She was also head bookkeeper of the company. The business was apparently conducted with little regard for the by-laws."

The purpose of the corporation is stated in its articles to be "the manufacture of various kinds of furniture from wood, iron, or brass, as the demands may require." The preferred stock drew a fixed dividend of 6 per cent. The by-laws provided that the president should have full charge of all the offices and business and should sign all drafts, notes, checks, and contracts and all papers pertaining to the business of the company wherein there was a money consideration making the company liable. They also contained the following provisions:

"The dividends shall be declared on the first day of

March after the annual inventory. All profits shall be divided with the preferred stockholders up to six per cent., and the remainder with the preferred and common stockholders share and share alike and shall be paid within sixty days thereafter."

An annual meeting was held each year. A yearly inventory was taken, and a statement made showing resources and liabilities, and also showing whether the business had been profitable or unprofitable. The action was sometimes somewhat informal as to the declaration of dividends, but there were some entries made upon the books in relation thereto. At the annual stockholders' meeting February 2, 1899, the following action was taken:

"It was moved and carried that small stockholders be paid the 5.8 per cent. which is the per cent. of gain after preferred stockholders' 6 per cent. is deducted from whole gain."

At the stockholders' meeting of January 23, 1900, the following appears upon the minutes, to wit:

"Moved that all stockholders except B. H. Spencer and J. E. Barnes be paid in full 25.35 per cent. which is per cent. after 6 per cent. on preferred stock has been deducted and as all stockholders except B. H. Spencer and J. E. Barnes have always been paid in full the balance is to be divided equally between them, and to be drawn out as business will allow. Motion was carried."

At the annual meeting of directors for 1901 the following appears:

"It was moved that surplus on account of B. H. Spencer and J. E. Barnes be taken up by notes with interest at 4 per cent. per annum from January 1st, 1901, interest payable quarterly. Motion carried. It was then moved that $4,000 of undivided profits be set aside for building account and balance, $3,064.24, be paid in dividends as provided by by-laws. Motion was carried."

At the annual meeting of the stockholders February 3, 1902, the following appears:

"Moved by J. E. Barnes and supported by B. H. Spen-

cer that the notes held by B. H. Spencer and J. E. Barnes bearing 4 per cent. be taken up and new notes be given drawing 6 per cent. interest per annum, payable quarterly. Motion carried. It was then moved that small stockholders be paid 14.11 per cent. dividends in full and large stockholders be given notes, bearing 6 per cent. interest per annum, interest payable quarterly. Motion was carried."

At the annual meeting of the directors January 20, 1903, the following appears:

"It was moved by J. E. Barnes that all small stockholders be paid the amount of dividends due, 20.2 per cent. Motion carried."

At the annual meeting of the directors January 30, 1904, the following appears:

"Moved by J. E. Barnes and supported by B. H. Spencer that small stockholders, Irven Spencer and W. S. Waite, be paid as soon as convenient and that notes be made for J. E. Barnes and B. H. Spencer as in previous years. Motion carried."

At the annual meeting of the directors January 16, 1905, the following appears:

"Moved by M. L. Spencer that stockholders be paid dividends due and that Irven Spencer and W. S. Waite be paid five (5) per cent. of the net profits of 1904 as per agreement as soon as convenient. Supported by B. H. Spencer and carried."

At the annual meeting of the directors January 24, 1907, the following appears:

"It was then moved that stockholders be paid their share of profits on or before March 1, 1907. Motion carried."

The record is clear that the stockholders and directors were fully advised as to what was done. From time to time the small stockholders were paid dividends in cash. The profits were often shown to be in the form of accounts, notes, and merchandise. Mr. B. H. Spencer and the plaintiff owned the great bulk of the stock, and, instead

of being paid cash, as were the smaller stockholders, they were credited the amount of the dividends due them upon the books of the company, or notes were given to them for these amounts.

The record indicates pretty clearly that no one thought that there was anything irregular about the method of making dividends or of paying them. Miss Spencer, who was secretary and treasurer of the company and the daughter of B. H. Spencer, vice president and superintendent of the company, and the two constituting a majority of the directors, testified that not until August, 1907, did she have any knowledge—

"As to what legal authority the president of a manufacturing corporation like Mr. Barnes had in the manner and matter of drawing promissory notes. I was not informed in regard to the limitations upon that power until after this suit was commenced. I did not have knowledge until after this suit was commenced as to the power or authority of an officer of the company to execute and deliver so-called dividend notes."

On the cross-examination she testified:

"The books of the Spencer & Barnes Company show that interest was paid on these notes. It is regularly entered upon the books. The interest indorsed upon these notes was entered upon the books of the company. Witness wrote some of the notes and made indorsement for interest on some."

Witness' attention was called to $5,000 note, January 1, 1904, and she testifies that was given for a dividend.

"*Q.* Did you and all the other stockholders of the company receive the same percentage of dividend that those notes were on the stock held by Barnes; that is, were the dividends equal in per cent. of the stock—I mean all the common stock?

"*A.* Yes, sir; the common stock all got the same dividend, and the preferred stock all got the same dividend. At the time Mr. Barnes got those two $5,000 notes, my father got two $5,000 notes. They did not hold the same amount of stock at this time, Mr. Spencer had some more. It might have been 60 shares more; it might not have

been that much. He had a majority of the stock at that time. He got the same percentage on the stock that Barnes did. His notes were canceled and stock issued to him for them. I would not be positive these were the notes for which stock was issued. His notes were all taken up in this manner by the company, except one note of $1,200. He has received all but $1,200 of the dividends. The other stockholders have all been paid except Mr. Barnes."

The indorsements on the $5,000 note were identified by witness as all in her handwriting, with the exception of one made by the assistant bookkeeper, Mrs. Clark. Exhibit 3, indorsements made of interest by Mrs. Clark, Mr. Belding, a clerk in the office, and some by the witness. Exhibit 3 was a dividend note. It is dated December 1, 1903.

"*Q.* That was given for a dividend declared about that time?

"*A.* No, sir.

"*Q.* For what was it given?

"*A.* Part of a dividend note of, I think, $7,000, and $4,000 was paid. $3,000 was the renewal of the note.

"*Q.* The other stockholders got the same per cent. of dividends that went into this note; that is, the common stockholders got the same per cent. with each other and the preferred stockholders got the same per cent. with each other?

"*A.* Yes, sir; that is, the common stockholders shared with the preferred stockholders after the 6 per cent.

"*Q.* As far as you were concerned, those dividends were voted in good faith, all of them, were they not?

"*Mr. Gore:* That is assuming that they were voted. One of our claims is that they were not voted, and the record don't show the authority for it. (Objection overruled. To which ruling of the court the defendant by its counsel duly excepted.)

"*The Court:* To the witness: Did you understand the question?

"*A.* Yes, sir; he asked about voting on the question. I do not think the records of the meeting would say that we did vote on the question.

"*Q.* The dividends you say that were declared and the notes that were issued, was that done in good faith?

"*Mr. Gore:* That assumes what the witness has not said. She has not said dividends were declared.

(Last question read.)

"*The Witness:* There is no record of the dividends being declared; but, as far as my action is concerned in writing out the notes, it was in good faith. The records that I kept of the minutes showing the earnings of the company, its assets and liabilities, are correctly shown, and correctly show the profits that appeared by the books to have been made.

"*Q.* So that when they did show that the profit, or so much remained, that was believed to be so in every case, was it not?

"*A.* Yes, sir. At the time this $3,000 note dated December 1, 1903, was given, my father had a majority of the stock; I can't tell how much either one of them had. The books show that. Notes were issued to my father and to Mr. Barnes at the same time; whenever one got a note the other got one. This was always so, and each for the proportion of the dividend due him according to the computation."

Though the record does not show that as formal action was taken as would be shown by the records of a carefully conducted corporation, we think it cannot be said that dividends were not authorized and declared. It must be remembered that no question of the right of creditors is involved. See 2 Cook on Corporations (6th Ed.), § 534; *Hartley* v. *Pioneer Iron Works*, 181 N. Y. 73 (73 N. E. 576); *Rorke* v. *Thomas*, 56 N. Y. 559; *Reading Trust Co.* v. *Reading Iron Works*, 137 Pa. 282 (21 Atl. 169, 170); *McKusick* v. *Seymour, Sabin & Co.*, 48 Minn. 172 (50 N. W. 1116); *Pennsylvania Iron Works Co.* v. *Mackenzie*, 190 Mass. 61 (76 N. E. 228).

A resolution will be construed as equivalent to a declaration of a dividend where any other construction would amount to an illegal preference among the stockholders. *Redhead* v. *Iowa Nat. Bank*, 127 Iowa, 572 (103 N. W 796).

A dividend may be legal even though not formally declared, it being paid by common consent, and hence cannot be recovered back on that ground after being actually

paid. *Berryman* v. *Insurance Co.*, 117 App. Div. 730, 102 N. Y. Supp. 695.

The stockholders may agree among themselves informally to distribute a certain sum as dividends without going through the form of corporate action. No formal declaration is necessary, either by the stockholders or board of directors, and a distribution of profits by a unanimous consent without corporate action is legal. *M. Groh's Sons* v. *Groh*, 80 App. Div. (N. Y.) 85 (80 N. Y. Supp. 438).

A division of profits is a dividend, even though not called such and not considered such by the directors or stockholders. 2 Cook on Corporations (6th Ed.), § 534, p. 1445, and cases cited. A scrip dividend is resorted to where company has profits not in cash. *Id.* § 535.

It is impossible to read this record without reaching the conclusion that in what was done about the dividends everybody acted in good faith, believing they had been earned. All of the stockholders have been paid upon the same ratio in proportion to the stock carried by them, except this plaintiff. It is also clear that all the stockholders and directors knew the course of procedure and approved of it. The other two directors knew of the giving of these notes, for what they were given, and the treasurer from time to time made payments thereon, and made indorsements thereon. The authorities cited by counsel fail to show that notes made under the circumstances disclosed by this record were void.

As to the $2,000 note given in payment for certain logs sold by plaintiff to defendant, there is nothing in the record to indicate that they were not sold for a fair price. The other directors knew all about the transaction. By failing to deny the execution of this note under oath, it was competent to introduce it in evidence, and when offered in evidence it *prima facie* made a case, which case has not been overcome by the defense interposed. A time came when Mr. Spencer and his family got a controlling share of the stock. They had control when the logs were bought for which this note was given. Mr. Barnes was

credited on the books for the amount of these logs before the note was given.

There came a time when there was a discussion between the plaintiff and the other stockholders about his engaging in outside operations. The record would indicate that the discussion resulted in an understanding with reference to what should be done, and Mr. Barnes wrote the following letter:

"BENTON HARBOR, MICH., 1/14/1905.

"I, J. E. Barnes, agree that I will close up my land, log and wood matters as fast as I can without loss, and from this date will not buy any of the above except for the firm of Spencer & Barnes Company while I am an officer of said company.

[Signed] "J. E. BARNES."

The Spencers then had a majority of the stock, but Mr. Barnes was continued as a director and the president. The record does not disclose any departure from this agreement.

It is not the law that an officer of a corporation cannot deal with the corporation if his acts are open and fair and known to the directors and stockholders. See 10 Cyc. p. 794; *Ft. Payne Rolling Mill* v. *Hill*, 174 Mass. 224 (54 N. E. 532); *Africa* v. *Duluth News-Tribune Co.*, 82 Minn. 283 (84 N. W. 1019, 83 Am. St. Rep. 424); 2 Cook on Corporations (6th Ed.), § 652; *U. S. Steel Corp.* v. *Hodge*, 64 N. J. Eq. 807 (54 Atl. 1); *Ten Eyck* v. *Railroad Co.*, 74 Mich. 226 (41 N. W. 905, 3 L. R. A. 378, 16 Am. St. Rep. 633); *Henry* v. *Benevolent Ass'n*, 147 Mich. 142 (110 N. W. 523).

At the annual meeting held in January, 1907, a full settlement, except the notes, was had with Mr. Barnes. In the statement of the affairs of the corporation appeared the notes held by Mr. Barnes and Mr. B. H. Spencer as bills payable, and, as already appears, Mr. Spencer was afterwards paid nearly all his notes. B. H. Spencer, M. L. Spencer, and Irven Spencer were elected as directors. The records of the meeting show the following:

"That the stockholders of the Spencer & Barnes Company extend their thanks to John E. Barnes, the retiring president, for the services rendered by him during the past ten years. That this resolution be spread upon the minutes of the company and a copy of the same be presented to Mr. Barnes. Carried unanimously."

These notes had been included after they were made in every annual report made to the stockholders. January 26, 1907, the following resolution was adopted:

"It was moved that whereas it was shown by the books of the company that there is an outstanding indebtedness exceeding $50,000, and whereas in view of recent changes in the management and policy of the company a larger amount of capital is necessary to properly and successfully carry on the business of this company: Now therefore be it resolved, that the president and secretary of this company be and the president and secretary hereby are authorized to sell all the unissued stock in the treasury of this company, to wit, 1,980 shares at not less than $10 per share (par value)."

Miss Spencer, the secretary, testified:

"That indebtedness referred to in the minutes of 1907, of over $50,000, included all notes in this suit on February 5, 1907."

Mr. Barnes was not a director at this time. If this record does not show knowledge and ratification of the acts of the plaintiff, it is difficult to see how a record could show them.

In relation to the matter of the set-off, in addition to what we have already said about what is contained in the notice attached to the plea, is the following:

"Defendant gives notice of its intention to file a bill of complaint in equity for the purpose of obtaining a full and complete accounting from the plaintiff of the profits made and received by him out of sales to this defendant and to other persons, firms, and corporations, during the time the said plaintiff was president of the defendant corporation and owed to it his time, services, and business ability. That this action should abate until such account-

ing between the parties is had. Wherefore, the defendant demands that the amounts due it from the plaintiff, when ascertained, be set off against the demands of the plaintiff sued upon in this action."

No such accounting had been made when the case was tried. In 10 Cyc. p. 794, in discussing the matter of profits received by an officer of a corporation, it is said the rule applies to secret and not to open profits, and as to them—

"Such contracts will be scrutinized in equity and will be set aside if not made in the utmost fairness and good faith. * * * The rule is especially applicable where, although the director received a profit out of the transaction, the contract was made in good faith, was not improvident, had been performed, and the corporation had received the benefit of its performance, under which circumstances it has been held that it could not be undone by a receiver subsequently appointed for the corporation."

It is said, at page 795:

"Rule subject to maxim that he who seeks equity must do equity. The rule under consideration does not extend so far as to work entire confiscation of the property of the unfaithful director, which he may have attempted to sell to his corporation at an advance over its cost to him, so as to derive a secret profit therefrom; but in the accounting which takes place under the principle, the director will be compelled to yield to the corporation the secret profit, but will be allowed a credit for the property sold to the corporation at its real value."

The stockholders of this corporation are practically the same as they were during all the time the plaintiff was president. All of them except the plaintiff have received and retained dividends. As has already appeared, they knew of the contracts before mentioned; they had and used the material furnished. The proof as to profits consisted largely of so-called admissions which were more in the nature of an expression of hope or expectation before the transaction referred to was closed than a statement of fact as to conditions after a final disposition of the business

had been reached. If any defense is open to the defendant, we think it clear it can only be upon an accounting where all the equities of the parties can be reached.

Judgment is affirmed.

McALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

KELLEY v. EAST JORDAN CHEMICAL CO.

1. SALES—LOGS AND LOGGING—DESTRUCTION OF SUBJECT-MATTER. Under the provisions of an agreement of defendant to buy wood of plaintiffs at $2.10 a cord, and pay $1.10 in the woods after it was scaled, and $1.00 additional when it was delivered at the railroad, the defendants were liable for all wood cut, scaled, and paid for by them, although fire destroyed a part of the wood before plaintiffs delivered it at the track.

2. CONTRACTS—OFFER AND ACCEPTANCE—VOLUNTARY SERVICES. Services rendered at the expense of the vendor of wood in fighting fire to protect it, without the knowledge or direction of the vendee, are not recoverable of the latter, even though after receiving notice of the expense a written statement was rendered to the vendor showing credit for this item, but showing an erroneous balance due for money advanced to the vendor.

Error to Antrim; Mayne, J. Submitted April 5, 1910. (Docket No. 2.) Decided September 27, 1910.

Assumpsit by Frank L. Kelley and another against the East Jordan Chemical Company for goods sold and delivered. A judgment for the amount of a set-off claimed by defendant on a verdict directed by the court is reviewed by plaintiffs on writ of error. Reversed.

Nelson C. Weter, for appellants.

Nicholas & Nicholas, for appellee.

MOORE, J. This litigation grows out of a situation testified to by Mr. Kelley, one of the plaintiffs, as follows:

"The other plaintiff in the case is Mr. Shepard. We had some business relations with defendant company in 1908. We heard that they were buying wood along the line of the D. & C. R. R. I wrote to them, and in about two weeks from the time I wrote their man came to me. His name was Maddock. He came on and explained what he was there for. I told him we had 1,000 cords or better to be cut yet, a mile and half east of town, about 60 rods from track, and good banking ground there. I asked him price. He said $2.10. After he had got the location of timber, nearness to track, and there was good banking ground, I asked him specifications. He said they wanted their wood 50 inches long, as near as they could get it, and round wood, nothing less than 2 inches and nothing larger than 7 inches, larger should be split, piled in the woods 4 feet, 4 inches high, and that he would come and scale it as often as we had 100 cords, and would pay us a dollar ten a cord in the woods. When it was piled on the track, it was to be piled eight feet, eight inches high. He said: 'We will scale it, and give you a dollar a cord then.' 'Well,' I said, 'I think we will cut it on those terms. I will talk it over with Mr. Shepard, and, if we conclude to cut it, we will notify you, and we will cut it, and you can come and scale it.' So we did notify them, and they came all right and scaled it in the woods. We got our pay by a memorandum wood check, printed across bottom, 'Payable at East Jordan Bank.' I think the defendant's name was on the order. When the wood was ready I notified Mr. Maddock, the scaler. I did not notify the East Jordan Chemical Company direct at that time. The East Jordan Chemical Company was paying me. * * * The last payment that they made to us was on the 7th of September, for some wood that was at the track after the fires. We hauled some wood out after that. It was scaled, but I don't know when. I got notice of the scale made in October. It was 147¾ cords. Mr. Shepard got the notice, and made a kick on it, and they came back there and found Mr. Adams,

and he told them where there was more wood. They gave us the proper scale, which was 160⅝ cords. They have not paid us for that. The last scale they paid us for, September 7th, 79½ cords, was scaled after the fire. They paid us for that. * * *

"*Witness:* The $36 in the bill of particulars against the defendant company was for fighting fire in the woods to protect the wood that had been scaled in the woods. I sent them a statement charging them with the 160⅝ cords at $1 per cord, and in that statement was $36 for fighting fire, $18 of which was due Mr. Shepard for himself, men, and teams for fighting fire, making $36 in all. * * * We have not been paid for that 160⅝ cords. We have not been paid the $36 for fighting fire."

On the cross-examination he testified among other things:

"The contract in the first instance was made at my office. No one present but Mr. Maddock and myself. The agreement was that they would scale in the woods and pay us $1.10 per cord. We did not agree to deliver the wood at railroad for $2.10 a cord.

"*Q.* What prices did he tell you he would pay for that wood right there in your office?

"*A.* When he first came, I asked the price of wood, and he said $2.10 a cord, that was supposed to be delivered at the railroad track. No, sir; we did not agree to deliver the wood. We made no subsequent contract with Mr. Maddock in regard to this wood. The one we made at my office is the only one. At my office we did not agree to cut that wood and deliver it at the railroad or at the banking ground, as you call it, for $2.10 a cord. Two dollars and ten cents was the price he said they were paying for wood.

"*Q.* Did you accept that price?

"*A.* No; not on that terms, that we should deliver it at the track for $2.10. No, sir; we did not come to a final agreement that day anyway. I mean this: That we agreed that, as soon as I could see Mr. Shepard, we would notify him, and we did notify him that there was—I suppose, if we get right down to it, the contract was made then. We sent for him to come and scale it, and that would be the final deal in it. * * * When I was discussing the matter with Mr. Maddock, it was all standing timber yet. I am not acquainted with the members of

the defendant corporation that I know of, and I made no agreement with them in regard to this wood. Mr. Maddock is the only man I had any deal with. The stumpage belonged to Mr. Shepard and me. We were partners. At the time I had talk with Mr. Maddock we were partners. I was acting for the copartnership. * * *

"*Q.* What was the agreement as to the delivery of the wood. Didn't you agree to deliver that wood at the railroad for $2.10 a cord?

"*A.* No, sir.

"*Q.* You did not agree to deliver that wood?

"*A.* No, sir; we didn't agree to deliver it.

"*Q.* Did you make any subsequent contract with Mr. Maddock in regard to this wood?

"*A.* No, sir.

"*Q.* That is the only contract you ever made, the one you made at your office?

"*A.* That is the only one.

"*Q.* And at your office you didn't agree to cut that wood and deliver it at the railroad or banking ground, as you call it, for $2.10 a cord?

"*A.* No, sir.

"*Q.* You say that he agreed to give you $2.10 for the wood?

"*A.* That is the price he said they were paying for the wood.

"*Q.* Did you accept that price?

"*A.* No; not on that terms, that we should deliver it at the track for $2.10. No, sir; we didn't come to a final agreement that day anyway. * * *

"*Q.* Then you never made any contract at your office for this wood, is that right?

"*A.* I suppose, if you get right down to it, the contract was made then. We sent for him to come and scale it, and that would be the final deal in it. * * * I never offered to sell to defendant any wood delivered at the tracks at $1. I did not offer to sell, nor did I sell, any wood to the East Jordan Chemical Company at $2.10 a cord delivered at track. I did not sell to them under that proposition; no, sir. * * * No money was advanced to us that I know anything about. The $1.10 a cord was received as part of purchase price for wood, and was paid from time to time, as we asked for the scale of wood in the woods. We were to deliver it on the track. The

wood did not have to be delivered at the track before we got any pay for it; no, sir. We got $1.10 in the woods corded up. Had to be scaled first; yes.

"*Q.* And before you could be paid, or demand your pay for the wood, it had to be delivered at the track, and had to be scaled, did it not?

"*A.* The final payment; yes, sir. No, sir; we did not have to deliver at track and have it scaled in order to determine what amount of money was coming to us. It was partly determined in the woods. The wood was on 120 acres of land. I had a number of different wood choppers at work. Mr. Maddock was only notified by us the first time to come out and scale. After that, he came out every two weeks, without notice, and would scale all that was cut and piled up at that time in woods, and stamped it. It might have been letter 'C,' but I thought it was 'O.'

"*Q.* Then, when the wood was delivered at the track, didn't he mark it with another stamp?

"*A.* Yes, sir.

"*Q.* And the wood that was stamped with the letter 'C' was a guide that assisted you in determining what wood was cut and what was not cut?

"*A.* Yes, sir. The wood after it was stamped and paid for was theirs. We had an interest in it, of course, but we could not sell it to any one else. At the time the wood was destroyed in the woods it had all been scaled.

"*Q.* And the defendant had advanced this $1.10 on each cord that had been scaled?

"*A.* They had paid us $1.10 on it; yes, sir. They paid us on that scale as soon as they could figure it up at the office. Yes, sir; it was a cash deal up till the final wind up.

"*Q.* It had been a cash deal with you up to the time when this wood was destroyed by fire. Is that right?

"*A.* Yes; they made one scale after the fire that they paid for. No; they did not pay for that scale before they knew of fire. I think 1,085¼ cords were scaled in woods, and for that we received $1.10 a cord. They paid us for 535¾ cords, at $1 a cord."

No one else testified as to the contract. The attorney for the defendant said in part in his opening statement to the jury:

"I think, gentlemen of the jury, that it will be admit-

ted by all hands—that is, the parties to this case, and those interested—that this fire that occurred and destroyed the wood in question was not due to the negligence or carelessness of either of the parties. I do not think there is any claim of that kind made by either of the parties. The plaintiffs do not claim it, and we do not either."

There was some testimony as to fighting the fire, and the cost thereof, and of the circumstances of the $79 payment made after the fire. At the conclusion of the testimony, the judge suggested there was no question for the jury, to which suggestion the lawyers acquiesced except as to the item for fighting the fire. Later the judge directed a verdict in favor of defendant for $233.47. In Exhibit A there was a credit for the item in relation to fighting fire, but there was a claim of balance due defendant of $233.47. The case is brought here by writ of error.

It was and is the claim of defendant that the contract was an entirety for the sale and purchase of all the wood to be delivered at the railroad tracks at $2.10 a cord, and that defendant should be charged only with the amount of wood actually delivered, and should be credited with all moneys paid upon the scale in the woods so that all the loss from the destruction of the wood should fall upon the plaintiffs. This view was accepted by the trial judge. It is the claim of the plaintiffs that the agreement should be carried out as made; that when the wood was cut and piled and scaled and marked with the letter 'C' in the woods, and the $1.10 a cord was paid, that this money became the money of the plaintiffs because it was so agreed. It is further claimed that, when the wood was later drawn to the railroad and scaled, plaintiffs were then entitled to the further sum of $1 a cord because it was so agreed. It is further claimed that, as none of the parties anticipated forest fires and made no agreements in relation thereto, the parties should be left where the fire left them, the plaintiffs losing their interest in the wood which was destroyed by the fire, and the defendant losing the pay-

ments which had been made according to agreement when the scale in the woods was made. The agreement sworn to by Mr. Kelley is not ambiguous. It is not denied by any witness upon the stand. No testimony was offered by defendant as to that phase of the case. The agreement must control the case. Defendant should have paid for the 160 cords delivered at the railroad track.

The item of $36 for fighting the fire demands some attention. This expense was not incurred at the request of the defendant. It is said by plaintiffs that, when notified of the expense, defendant credited plaintiffs with the amount thereof, and thereby became liable to pay. This contention loses its force when it is stated that this credit appeared in a statement charging plaintiffs with all payments made and crediting them, in addition to the $36, with only the wood delivered upon the railroad, which statement claimed a balance due defendant of $233.47. We think this does not establish a liability for the $36 item.

Judgment is reversed, and a new trial ordered.

MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

In re FOX'S ESTATE.

COSTS—STATES—STATUTES.

An estate in process of probate is entitled to costs against the people on an appeal by the auditor general from an order of the probate court refusing to require the payment of an inheritance tax in an excessive amount asked by the State. 3 Comp. Laws, § 11277.

Case made from Kent; Sessions, J., presiding. Submitted April 13, 1908. (Docket No. 59.) Decided September 27, 1910.

Motion for allowance of costs in favor of the estate and against the people in case reported in 159 Mich. 420 (124 N. W. 60). Granted.

Kleinhans & Knappen, for the motion.

Franz C. Kuhn, Attorney General, and *Thomas Ambrose Lawler*, Assistant Attorney General, *contra*.

HOOKER, J. After the death of E. Crofton Fox, late of Grand Rapids, a question arose over the payment of the transfer tax, commonly called "inheritance tax," due to the State. The record does not show what measures were taken, if any, to set the probate court in motion to determine the amount of transfer tax chargeable; but we find that an order was made, and that it was not satisfactory to the auditor general, who promptly appealed to the circuit court, where the probate order was reversed. The cause was brought to this court on case made by the estate, and it was reversed and the probate order sustained, by an opinion reported in 159 Mich. 420 (124 N. W. 60), which was silent upon the subject of costs. No formal order has been made in the case, and counsel ask the settlement of a proposed order. We understand that the only dispute is over the question of costs.

The decision must depend on the applicability of section 11277, 3 Comp. Laws:

"SEC. 22. In all civil suits and proceedings by or in the name of the people of this State, instituted by any officer duly authorized for that purpose, and not brought on the relation, or for the use of, any citizen, or upon any penal statute, the people shall be liable for costs in the same cases, and to the same extent, as if such suit or proceeding were instituted by an individual."

That there has been "a civil suit or proceeding by or in

the name of the State by an officer duly authorized for that purpose" seems obvious. Our understanding is that the probate court was asked by the State authorities to make an order for the payment of a sum in excess of the amount chargeable under the law. If so, that was to all intents and purposes a civil proceeding instituted by such officer. But if we should hold that it was not, and that the probate judge had merely performed a routine duty in the settlement of the estate of his own motion or on request of the executor, the appeal from his order by the auditor general was the institution of a suit, or at least a civil proceeding, within the meaning of said section, and not within its exceptions, which has resulted in judgment in both the circuit and this court. The estate is entitled to costs to be taxed, and the order proposed containing this provision is approved.

MOORE, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

LAPIER *v.* BEAUBIEN ICE & COAL CO.

1. MASTER AND SERVANT—NEGLIGENCE—ASSUMED RISK.
   A fireman who willingly enters upon a journey in a tug at so late an hour that he would arrive in the dark at a place difficult of navigation, and who was familiar with the situation and difficulties likely to be encountered, assumes the risk of any alleged negligence for starting at an unseasonable time.
2. SAME—DUTY DEVOLVING ON SERVANT.
   Alleged negligence in the use of a towline full of kinks and turns, one of which caught and injured plaintiff, was not actionable, where plaintiff knew of the condition of the towline and might have remedied the defects.

3. SAME—INSUFFICIENT LIGHTS.

And plaintiff could not recover for failure to provide sufficient lights, where insufficient illumination resulted from the smoky condition of a light of which he and another servant were in charge.

4. SAME—NEW TRIAL.

The denial of a new trial on grounds which were disputed by affidavits of the opposing party was not an abuse of discretion.

5. SAME—NAVIGATION—CAPTAIN OF TUG.

With a crew of three persons besides the captain, and with two barges of ice in tow and the outfit aground in the dark, it cannot be said that the post of duty for the captain was in the pilot house, or the post of duty of the engineer in the engine house, all of the time.

6. SAME—MEDICAL ATTENDANCE—CARE.

No duty is imposed on a tug of under 30 tons burden, making trips of less than 40 miles on inland lakes, to have medical attendance and means of cure aboard for sick or injured seamen; and reasonable diligence is exercised where the captain puts into port without unnecessary delay and secures sufficient treatment and attendance.

Error to Wayne; Mandell, J. Submitted April 8, 1910. (Docket No. 46.) Decided September 27, 1910.

Case by Benjamin A. Lapier against the Beaubien Ice & Coal Company and others for personal injuries. A judgment for defendants on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

F. C. Moriarty and *Lehman, Riggs & Lehman*, for appellant.

George F. & Peter J. Monaghan, for appellees.

MOORE, J. This is an action in a plea of trespass on the case. The declaration contains two counts. The first count recites several concurring acts of negligence, which, it is claimed, caused the loss of the left leg of plaintiff. The second count charges unlawful neglect by defendants after the injury was received and before the limb was

amputated. There was but one witness sworn. This witness was the plaintiff. At the conclusion of the testimony for the plaintiff, the judge directed a verdict for defendant. Later a motion for a new trial was made, based not only upon the record as it then existed, but upon affidavits. A counter showing was made by defendant. The motion was overruled. The case is brought here by writ of error.

It is claimed by plaintiff that defendant was negligent in at least three respects:

(*a*) That they were absolutely reckless in attempting to navigate Baltimore Bay in the darkness of the night without a compass or other instrumentalities for such a journey.

(*b*) That they were negligent in the use of a towline full of kinks and turns.

(*c*) That they were negligent in making the trip at the time and under the conditions without proper supplies and necessary instrumentalities.

The plaintiff was about 48 years of age. He had been a fireman for more than 20 years, nearly all of the time on tugboats. The defendant had a tugboat of 27 tons burden, called the "Frank J. Haines." It was engaged in towing barges loaded with ice from Fair Haven, Mich., to Detroit, Mich., taking empty barges back to Fair Haven on the return trip. Fair Haven is on the west shore of Lake St. Clair, and about 37 miles nearly north of Detroit. In August the plaintiff became fireman on this tug, and continued in that capacity until his foot was caught in a towline, and he was drawn around the tow post on the 28th of October, 1904, and his leg badly crushed, so that it had to be amputated. With this general statement we may proceed with the groupings of claimed negligence.

(*a*) It is asserted that the captain of the tug was negligent in leaving Detroit at half past 8 o'clock in the evening, which would bring him into the vicinity of Fair Haven when it was dark, instead of at daylight, which, it is claimed, would have resulted if his departure had been

delayed until half past 11 o'clock. As to the suggestion that the boat was without a compass, we do not find anything in the record upon that subject. The record discloses that the tug had made the trip daily to Fair Haven and back, though not at the same hours as upon this occasion, during all the time plaintiff was in defendant's employ. Plaintiff knew the situation. He knew how long it took to make the trip and the difficulties likely to be encountered. There is nothing to indicate that he did not enter upon this journey willingly. The situation at the time of the accident will be dwelt upon more in detail later.

(*b*) Under this head it is said it was negligent to use a towline full of kinks and turns. It is stated the captain knew this line was full of kinks and turns before it was put upon the tug. Plaintiff testified to this effect, and that the captain directed the line to be put upon the tug in that condition. This was a month before the accident happened. If the captain gave this direction, it does not appear why he gave it; nor does it appear that he did not expect the kinks would be taken out later when there was time to look after them. The plaintiff testified that Mr. Coleman was hired, and generally did the same sort of work he did.

"The captain when in the discharge of his duty is in the pilot house on the front end of the tug. The engineer is about the middle of the tug in the engineer's room. The tug was 14 feet wide at its widest part. My place was just forward of the engine room. Mr. Coleman generally did the same kind of work I was doing. Mr. Coleman helped me fire; once in a while he attended to the lines. We attended to the lights, etc., and keeping them in their places, and if Mr. Coleman had to make a line fast or anything it was his duty to do so; of course, both of us had to attend to those lines. I had been given directions by the captain while Coleman and I were there on the subject of the lines, and about helping and showing him, and the captain said to me: 'This man here ain't been on the boat before in his life. Of course he is a little green at the work, and you show him all you can.' And

I said, 'Yes, I will show him all I can,' and he said the boy had never been on the boat before and didn't know much about it, and he said further than that: 'Show him how to fire. He don't know anything about firing.' And he says, 'Show him, maybe he will get handy around the boat.' So I showed him all I could while I was there."

The plaintiff's account of the accident is as follows:

"On the day in question we left Detroit at 8:30. It was very dark that night when we got up in that same vicinity. It was a very dark night. In hauling ice back and forth we took up an empty barge and went down with one loaded. The barges are a good deal larger than the tug. I should say a barge would be two or three times as large as a tug. On the night in question we were taking up two empty barges of about the same size. On that night we run aground twice in going up there, once opposite to Mt. Clemens, and we got off there and went on from there until we touched the mud bank. At that time we was somewhere around New Baltimore, as near as I can tell. We got stuck in the mud in the vicinity of New Baltimore. We then took the hind barge and brought her around in front of the tug and put her crossways in front of the tug, and after we got the barge in front of the tug they worked the engine slowly up against the higher barge, up against the mud bank, so while I had the ice barge in front the engineer says, 'You better go and fix the fire.' So I went down and fixed the fire and went up again and went in the back end of the tug, and after I went out of the fire hole I looked back and saw that the line was slipping away from Coleman, and I ran and grabbed the line so as to get another turn on the post to hold the line, and in doing that there was a turn in the line, and when I threw my foot back I threw it in the hole, and when the line drew up there around the post it drew up against my ankle tight, and I was about 2½ feet from the post, and I hollered and screamed and hollered and Coleman also. Before I got to the post I tried to get the axe to chop the towline. The axe was right back of the cabin, about three feet and a half above the deck, and I pulled at the axe to get the blade out of there, and I couldn't do it, and I kept hollering, and I said to Coleman, 'Go to the front end of the tug and see if you can get the captain there,' and he came back and said the captain ain't there, so I looked through a window in the

back part of the engine room, and I could not see any engineer there, and I hollered and hollered, and finally I went around the tow post twice, and after I was all crushed to pieces the captain and engineer came and said, 'What is the matter?' I said: 'I am all crushed to pieces; back the tug up so I can get the line off;' and they backed the tug right away and stood me up on my foot and took the line off the ankle. I was drawn around the tow post twice."

He testified that the engineer and captain were not in their places, and that if they had been, they could have saved him from having his leg crushed. He also testified that the light on the stern did not amount to anything; that it was smoked up. He further testified that after they got him out of the rope they put him upon the captain's bed; that they gave him no medicine, and did not bandage his wound; that he begged the captain to abandon the barges and to take him to Detroit; that during the five hours he was on the tug he lost nearly all his blood and suffered great pain. In other portions of his testimony it appeared that during the entire two months of his employment he and Mr. Coleman had charge of the lines, of placing them on deck after they had been in use; that he knew how to take out the kinks; that it could be done in 20 or 25 minutes; that there were times when the tug was idle at the dock when plaintiff had an hour or two at a time with nothing to do; that Mr. Coleman and himself had charge of the lanterns and lights; that the tug had the requisite number of each; that it was the duty of Mr. Coleman and himself to keep them cleaned and lighted. It is also apparent from his testimony that he regarded the pilot house as the post of duty for the captain and the engine house for the engineer, when he testified that if they had been at their posts of duty he could have been saved. His testimony, however, shows that the tug had two barges in charge, one in the front and one in the rear; that when the accident occurred they were aground for the second time; that it was very dark; that the navigation was difficult where they were; that they were lost and

did not know where they were. His testimony shows that he had known the captain many years; that he had known the engineer for two years; that they and Mr. Coleman were all friendly with him. He testified that he had been in and about this little tug from soon after the time he went to work upon her, and knew her equipment. He also testified that when it came daylight, so they could see where they were, they started for Fair Haven, where Mr. Coleman was left behind, presumably to remain in charge of the barges and tug, while the captain and the engineer took the plaintiff, and, after a delay of 5 or 10 minutes, boarded the first suburban car and started toward Detroit. At Mt. Clemens they took him from the car to a hospital and put him in charge of the doctors. We discover no claim in the record of any claim of negligence after this.

Upon the motion for a new trial, the captain, Mr. Coleman, and Mr. Thomas made affidavits that the leg of plaintiff was bandaged, that they gave him stimulants and did all for him that they knew how to do. As to the application for a new trial, in view of the countershowing, it is very clear the court did not abuse its discretion in overruling the motion.

In relation to the directed verdict upon the record as made, it is clear that the plaintiff knew the condition of the line and the condition of the lights, and he and Mr. Coleman were responsible for their condition. It is also clear that, with a crew of but three persons besides the captain, and with two barges in tow, with the outfit aground, in a dark night, with the parties lost, that it should not be said that the post of duty for the captain was in the pilot house all the time, and for the engineer was in the engine house all the time. The testimony of plaintiff indicates that all of the officers had been on one of the barges to learn the situation. Neither should it be said that under these circumstances it was negligence not to start back to Detroit. The injury is an unfortunate one, but the plaintiff knew as much about the situation as

anybody, and he assumed the risk of the conditions. *Kean* v. *Rolling Mills*, 66 Mich. 277 (33 N. W. 395, 11 Am. St. Rep. 492); *Hayball* v. *Railway Co.*, 114 Mich. 135 (72 N. W. 145); *Rohrabacher* v. *Woodard*, 124 Mich. 125 (82 N. W. 797); *Fischer* v. *Goldie*, 132 Mich. 574 (94 N. W. 5); *Goga* v. *Foundry Co.*, 142 Mich. 340 (105 N. W. 859).

Counsel say (we quote from the brief):

"In support of our contention under the second count, we desire to quote from 20 Am. & Eng. Enc. Law (2d Ed.), p. 201:

"'Under the maritime law, when a seaman becomes ill or receives an injury, in the performance of his duty, it is incumbent upon the master to furnish means of cure, and to use all reasonable exertions for that purpose. He must provide medicines and medical treatment, and must see to it that the disabled seaman is properly lodged, properly nursed, and provided with proper food. This obligation lasts until the end of the voyage, and even longer, if nursing and medical treatment are still necessary to effect a cure. If such medical or surgical treatment as is required cannot be given on board, and the vessel is within a reasonable distance from a port where it can be given, it is ordinarily the duty of the master to put into that port. For neglect to perform his duty in any of the above respects the master is liable for such damages as result therefrom; but when there are proper medicines and medical directions on board a vessel, to meet the needs of a particular case, and some person who is competent to carry out the directions, the master is probably under no obligation to send a seaman ashore for better medical treatment, or to have a physician from on shore sent for.'"

A case bearing somewhat upon this question is *Johnson* v. *Holmes*, 173 Mass. 514 (53 N. E. 1000). We hardly know what counsel have in mind by this quotation. Our attention has not been called to any statute or any authority requiring a tug of under 30 tons burden, making short trips of less than 40 miles on the inland lakes, to have means of cure aboard for the seamen who become ill or injured. It cannot be said that under the circumstances disclosed by this record there was any such delay after

daylight came, in putting into port, as to constitute negligence. As before stated, there is no claim of negligence after plaintiff arrived at the hospital.

Judgment is affirmed.

McALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

LONIER v. ANN ARBOR SAVINGS BANK.

1. PRINCIPAL AND AGENT — IMPLIED AUTHORITY — BILLS AND NOTES—INDORSEMENT.

   A traveling salesman having authority to collect accounts has no authority thereby to take a note in payment of an account and negotiate the paper at a bank by indorsing his employers' names.

2. SAME—NEGOTIABLE INSTRUMENTS—TROVER AND CONVERSION.

   In trover for the conversion of a promissory note claimed to belong to plaintiffs whose salesman indorsed their names and negotiated the paper at a bank, the case should be submitted to a jury upon testimony of defendant's witnesses that the paper was not discounted by the bank, but a loan was made on it to the maker direct; it also appearing that the cashier of the bank supposed he was dealing with one of the plaintiffs instead of their salesman.

Error to Washtenaw; Kinne, J. Submitted April 8, 1910. (Docket No. 37.) Decided September 27, 1910.

Trover by Louis Lonier and William J. Hoffer, copartners as Lonier & Hoffer, against the Ann Arbor Savings Bank. A judgment for defendant on a verdict directed by the court is reviewed by plaintiffs on writ of error. Reversed.

A. F. & F. M. Freeman, for appellants.

B. M. Thompson and *Arthur Brown*, for appellee.

MOORE, J. This is an action of trover against the defendant for the unlawful conversion of a promissory note in which the plaintiffs were named as payees, which, it is claimed by them, was unlawfully indorsed by their traveling salesman and collector. The case has been here once before and is reported in 153 Mich. 253 (116 N. W. 1088). A reading of the opinion then filed will make a long statement of facts unnecessary at this time.

Upon the second trial, there was less inconsistency in the testimony of Mr. Heusel than upon the first. It is the claim of defendant that, upon this trial, there was no inconsistency in his testimony. Upon the second trial, the cashier of the bank was sworn as a witness. He testified in substance that the loan was made to Mr. Heusel. In addition to this he testified in part as follows:

"I wrote the note that was made that day. After it was written I handed it to Samuel Heusel. He stepped over to the other gentleman at the customer's desk on the south side of the bank, and in the meantime I went to the teller's cage and got the money, and, when I came back, the note was there, and I also canceled the $500 note, and put it with the money in front of Mr. Heusel. He took the note itself, and paid the currency over to this man. I cannot recollect that I had any conversation with this other man."

On the cross-examination he testified in part as follows:

"* * * I said that Mr. Heusel came down to the bank and wanted some money, and he stated that he had a bill to pay Lonier & Hoffer. He had money enough to pay $400 on the $590 note. He said he wanted to borrow $367.29. That was the amount he owed Lonier & Hoffer as I understood it at that time, and he wanted to get money enough to pay that. He said, 'I want to borrow this money from the bank.'

"*Q.* Why did you write the name of Lonier & Hoffer in that note?

"*A.* I wrote it in there. In the first place, I took a note for $190 in Lonier & Hoffer—

"*Q.* That is on the other matter?

"*A.* And, that note being in my presence and the bill before me for $367.29, I wrote the name of Lonier & Hoffer in there, and handed this note back to Mr. Heusel, and I supposed at the time that this man was a member of that firm—he procured that indorsement, they took it away from my desk. I did not. Mr. Heusel brought it back to me with the indorsement on.

"*Q.* You wrote that note up then just as Mr. Heusel told you to, to Lonier & Hoffer, didn't you? You wrote the note?

"*A.* I wrote the note.

"*Q.* And you followed his directions, saying that it was to pay a bill of Lonier & Hoffer, and this note was to run to Lonier & Hoffer?

"*A.* I don't know as he said that.

"*Q.* He must have said it, or you would not have written it. You did not know Lonier & Hoffer unless Mr. Heusel told you who they were.

"*A.* I did not know this man. I had known of the name of Lonier & Hoffer before. I don't think Heusel stated, 'This is to pay this bill,' and I drew the note in favor of Lonier & Hoffer. I probably wrote the name of Lonier & Hoffer more to show that Sam Heusel had paid that bill than for any other reason. I don't think Heusel instructed me to write it in. I knew what to write because I had the old note before me. I had the bill before me, and I supposed this man whose indorsement he secured was a member of the firm.

"*Q.* So that, when he indorsed, you would have a genuine indorsement?

"*A.* I did not care anything about an indorsement. I made the loan to Mr. Heusel. Yes, sir; it is true that I knew the minute I wrote the name of Lonier & Hoffer in the note I would have to have the indorsement of Lonier & Hoffer. The maker procured the indorsement, and I did not go any further. I supposed that it was Mr. Hoffer standing there. I thought I was going to get his genuine indorsement. I handed the note to Heusel, and he procured the indorsement. It seemed they talked the matter over before. No, sir; if the note was to run to the Ann Arbor Savings Bank, it would not have Lonier & Hoffer's name.

"*Q.* So you handed him the note then for the purpose of getting Lonier & Hoffer's signature?

"*A.* And for himself to sign. We got the signature. I did not ask it because Mr. Heusel got this indorsement himself. I did suppose it to be correct. I think it has turned out that this was not Hoffer, but Donaldson. No; this man (pointing to Mr. Hoffer) is not the man who was there. No; Mr. Hoffer is not the man who stood there at all. It has turned out that it was Donaldson. I simply thought that, if the maker of the note procured the indorsement of the payee, I would look no further. If he was satisfied that was an indorsement of the paper, I certainly was. I presume I became satisfied that I had the indorsement of Lonier & Hoffer. Yes, sir; I have taken thousands of notes in behalf of the Ann Arbor Savings Bank; not always when taking such do I make the bank payee in the note. Yes; sometimes I make somebody else. They are required to be indorsed. Sometimes we have an indorser. No, sir; if Sam Heusel comes in and asks for a loan, I don't put somebody's else name in it. Yes, sir; I put the Ann Arbor Savings Bank in as payee. That is the universal custom except when he offers an indorsement."

At the conclusion of the case a motion was made to direct a verdict for defendant. In disposing of the motion the judge stated, among other things, as follows:

"There are two propositions that it seems to me ought to control it. The testimony is undisputed that the agent here of the plaintiff, Mr. Donaldson, had full authority to sell goods, the property of the plaintiffs, and to make collections, and, as I remember the testimony in this particular case as far as this particular bill is concerned, owing by Mr. Heusel, the matter was placed in his hands with full authority to collect. It seems to me that under those circumstances the law of agency must be that he would have the right to negotiate this paper even if it had been given by Mr. Heusel to the agent. The agent would be justified in taking that to the bank and having it discounted. It seems to me that must be the law as to implied authority in the absence of any knowledge coming to the bank of any restrictions upon his powers. It seems to me that would be the controlling law in this case, and I so suggested, but the Supreme Court did not pass upon that. But there seemed to be on the other trial some in-

consistency in the testimony of the plaintiffs as produced by Mr. Heusel, and the testimony of the cashier was not offered on the other trial. Now, the testimony of Mr. Heusel is produced, and it is entirely consistent. His statement is that this was a loan made by the bank to him, to nobody else, that this note was not discounted by the bank. There is no dispute about that. And the cashier is now introduced whose testimony is also uncontradicted and undisputed that this was a loan made by the bank to Mr. Heusel and nobody else, that they did not discount this paper"—and thereupon directed a verdict for defendant.

As appears in the former opinion, it was claimed by plaintiffs that, while their traveling salesman had authority to make collections, he had no authority to indorse and discount paper for them. We think it cannot be said that, because he had authority to make collections, this gave him authority, by implication or otherwise, to indorse the names of his employers to notes, nor to negotiate notes given to them.

As to the second proposition, it is true the cashier testified the loan was made to Mr. Heusel, but he also testified that the payees named in the note were the plaintiffs, and that he supposed when Mr. Donaldson indorsed the note that it was in fact Mr. Hoffer, one of the plaintiffs. This, taken with all the other testimony taken in the case, left the case where it could not be disposed of as a matter of law.

Judgment is reversed, and new trial ordered.

MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

HINKLEY *v.* WABASH RAILWAY CO.

RAILROADS—NEGLIGENCE—CROSSING ACCIDENTS.

It was proper to submit to a jury the respective claims of negligence and contributory negligence in the injury of plaintiff at a railroad crossing, at which plaintiff claims the occupants of her conveyance stopped and listened some distance from the track, and then proceeded with care, still looking and listening after the pause, but were struck by a train running at an excessive rate of speed, which failed to give the statutory signals: the testimony of either party being in dispute, and defendant claiming that the driver of the vehicle should have stopped at a different place where the highway crossed an adjacent parallel railroad track and the view was unobstructed.

Error to Lenawee; O'Mealey, J. Submitted April 11, 1910. (Docket No. 56.) Decided September 27, 1910.

Case by Ida B. Hinkley against the Wabash Railway Company for personal injuries. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Smith, Baldwin & Alexander, for appellant.

Fellows & Chandler, for appellee.

MOORE, J. On the morning of February 17, 1907, the plaintiff and her mother started to go from their farm to the city of Adrian in a single buggy. The horse was driven by Mr. Stamp, who worked the farm. He sat upon a blanket rolled up, which was placed between the two women, so he was a little higher up than they were. The highway ran north and south and crossed the tracks of the Detroit, Toledo & Ironton Railroad, and the defendant road, near Madison Center. The conveyance was going north. It passed over the track of the Detroit, Toledo & Ironton Railroad, and the horse had passed the

track of the defendant road, when a train coming from south of west struck the buggy and killed Mr. Stamp and the mother of the plaintiff. The plaintiff received injuries at this time, because of which she sued defendant and recovered a judgment, which is brought here for review by writ of error.

Counsel say in their briefs that only one error is urged, and that is the contributory negligence of plaintiff. Their claim is tersely stated in their brief, as follows:

"If the plaintiff, her mother, and the driver had looked at a time when to have looked would have been effective, they could have seen the train and avoided being injured; that the view was absolutely clear while they drove more than 40 feet. Therefore it is conclusively established that, whatever she may say about having looked and having listened, this court must say that she did not look with that attention or listen with that care which she should have done for her own safety, and that therefore she cannot recover. * * * And we insist that since there can be no other eyewitnesses to the accident, and that the plaintiff has stated all that she knew, she says, or can remember, and that the situation and evidence cannot be changed without taking a position contrary to the one taken by her in her testimony, that the case ought to be reversed without any new trial."

The serious question is not so much a question of law as one of fact. The printed record contains upwards of 200 pages. In addition to the oral testimony, many photographs, some blueprints, and some tracings, were offered in evidence. It is manifest that a detailed statement of the evidence cannot appear in this opinion. It is the claim of the plaintiff that the horse, which was a spirited one, but a gentle one, was stopped at the hay scales in the highway south of the railway crossing; that all the persons in the carriage looked and listened; that they heard and saw nothing of a train. It is her claim that this was the proper place to stop, look, and listen, and that the view from that point until the depot was passed was obstructed by an outbuilding, by a coal shed, by cars on a siding, and by the depot itself; that by the

side of the depot was a platform, by the side of that the track of the Detroit, Toledo & Ironton Railroad, and 18 feet from this track and parallel to it is the track of the Wabash road where the accident happened. It is the further claim that, from the time the carriage was stopped until it was struck, its inmates continued to look and listen; that it was unreasonable to ask that the conveyance should be stopped after it passed the station, because this would require it to stop on the track of another railroad, and too near the defendant road; that the train was running 60 miles an hour or more; and that no statutory signals were given. On the part of the defendant, it is claimed that there was a place between the scales and the depot where an approaching train could have been seen. It is denied that the train was running at a high rate of speed. It is claimed the statutory signals were given, and that plaintiff was guilty of contributory negligence, in that the conveyance was not stopped after the depot was passed, even though it was stopped on a railroad track which it was claimed by defendant was 30 or 35 feet from the Wabash track.

There was testimony given tending to sustain the diverse claims of the parties, but the testimony abounded in contradictions. We think, in view of the contradictory testimony, that the question of contributory negligence was a proper one for the jury. See *Hintz* v. *Railroad Co.*, 140 Mich. 565 (104 N. W. 23); *Corbs* v. *Railroad Co.*, 144 Mich. 73 (107 N. W. 892); *Wilbur* v. *Railroad Co.*, 145 Mich. 344 (108 N. W. 713); and the many cases cited in the opinions in those cases.

Judgment is affirmed.

OSTRANDER, HOOKER, MCALVAY, and BROOKE, JJ., concurred.

VERMONT MARBLE CO. *v.* SPAFFORD.

RECEIVERS—PARTNERSHIP—EXECUTORS AND ADMINISTRATORS.

Creditors of a partnership are entitled to the appointment of a receiver of the firm assets where, after the death of one partner, the other continued the business and made a contract with the heirs of the deceased partner, conveying to them his interest in the business which they continued until after the decease of the survivor, and where they subsequently procured the appointment of an administrator of the estate of the first deceased partner and turned over to him all the firm assets.

Appeal from Eaton; Smith, J. Submitted April 14, 1910. (Docket No. 112.) Decided September 27, 1910.

Bill by the Vermont Marble Company against Charles D. Spafford and others for an accounting and for the appointment of a receiver. From a decree dismissing the bill, complainant appeals. Reversed, and decree entered for complainant.

Elmer N. Peters, for complainant.

Lyman D. McCall, for defendants.

MOORE, J. The following statement of facts was prepared in the main by counsel for appellant; but it is borne out by the record: The complainant is a corporation organized under the laws of the State of Vermont. For several years previous to the 7th day of November, 1905, George W. Loomis and Richard Venn were copartners and engaged in business; the firm name being Loomis & Venn. In November Mr. Loomis died. At the time of his death the firm was indebted to various people, and owed the complainant $896.56, which still remains unpaid.

The surviving partner, Richard Venn, did not wind up the partnership business, but continued to carry it on

under the firm name of Loomis & Venn, with the consent and assistance of Adeline E. Loomis, widow, and Richard N. Loomis, son, of George W. Loomis, deceased. The last-named persons until the 1st of May, 1909, took part in the management and helped to conduct the business; Mrs. Loomis contributed some money, the amount as claimed by her being $336.65, and Richard N. Loomis contributing his personal services. In May, 1907, Richard N. Loomis and Adeline E. Loomis, parties of the second part, and Richard Venn, party of the first part, entered into a contract in writing, by the terms of which Mr. Venn conveyed to Mrs. Loomis and her son all of his interest in the partnership property—

"Now in and about the store and business occupied and used by the parties hereto in carrying on their business of manufacturing and selling monuments in the city of Charlotte."

By the terms of this agreement Mr. Venn, who was the father of Mrs. Loomis, was to be paid $12 a week during his life, and was to have in effect the right to assist and advise in the management of the business; and Mrs. Loomis and her son were to pay all of the firm debts, and, upon the death of Mr. Venn, and the performance of these conditions, were to be the owners of the property. The contract contained a mortgage clause to secure the performance of the terms of the contract. Mrs. Loomis and her son went into possession of the property under this agreement and continued in possession until about the 9th day of December, 1908. July, 1908, Richard Venn died. After his death Mrs. Loomis and her son continued in possession of the property, claiming to be the owners thereof under their contract with Mr. Venn.

After the death of Mr. Venn and on the 28th day of July, the defendants Richard N. Loomis and Adeline E. Loomis caused their attorneys to write letters to all of the creditors of the firm of Loomis & Venn, claiming to have been the partners of Venn in the firm of Loomis & Venn,

and claiming also to own Venn's interest in the firm business by virtue of their contract and to have performed all of the conditions of the contract except the payment of the firm debts, and asking creditors to forbear presenting claims against the estate of Venn and to grant to the Loomises an extension of time. The complainant in this case received one of these letters and agreed to withhold any action to enforce collection of their claim. On the 30th day of November, 1908, Adeline E. Loomis filed a petition for administration of the estate of George W. Loomis, deceased, and on the 9th day of December, 1908, one O. E. Packard was appointed special administrator of this estate; Richard N. Loomis and Adeline E. Loomis at once turning over to Packard all of the property then in their hands connected with the partnership business that had been conducted under the firm name of Loomis & Venn. On the 11th day of January, 1909, O. E. Packard, special administrator, turned this property over to Charles D. Spafford, who had been appointed general administrator of the estate of George W. Loomis. This property has been treated by both of the administrators as a part of the separate, individual estates of George W. Loomis, deceased, and Richard Venn, deceased. It was inventoried as such by the defendant Spafford, and all of it, with the exception of book accounts, was sold by Spafford under an agreement with Jordan, administrator of the Venn estate, for the sum of $1,750, and was divided equally as per previous arrangements between these two administrators; and the defendants Spafford and Jordan claim the right to hold this property as belonging to each of these two estates in equal shares, and assert that they expect to distribute it among creditors under an order of the probate court after paying the expenses and whatever allowances may be made for the widows of said partners. The total amount or value of this property that has come into the hands of these two administrators, as claimed by them in paragraph 25 of their answer, is the sum of $1,880, in addition to which they claim there is about

$566.96 in book accounts, estimated to be worth 50 cents on the dollar. A part only of the firm debts is shown by this record, of which $1,288.48 is owing to the complainant. The other indebtedness shown by this record brings the total up to about $2,773.56, which is several hundred dollars in excess of the total amount of the assets in the hands of the administrator. From the time of the death of George W. Loomis until the property was turned over to the special administrator of his estate, this business was conducted as a going business. After the agreement between Mr. Venn and defendants Richard N. and Adeline E. Loomis, in May, 1907, goods were sold, bought, and retailed in the regular way. Some of the old debts had been paid, and new obligations incurred, and the stock was larger at the time Packard took possession of it than it was on the 1st of May, 1907, the date of the contract between Venn and the Loomises.

This bill of complaint was filed for the purpose of having a receiver appointed who should take charge of the assets and distribute them among the creditors of the firm of Loomis & Venn. The trial judge was of the opinion that the various shifts that were made in the business was in effect a continuation of the business of the old firm of Loomis & Venn, and in no way affected the rights of the creditors of that firm. He further expressed himself as follows:

"I cannot see how complainant, or other creditors, can be harmed by permitting the probate court to close up and settle these estates. The property involved, viz., the avails of the sale of stock, book accounts, etc., in my view of the case is partnership property, subject only to partnership debts, and it is not to be inferred that illegal claims will be proven and allowed to stand as claims against the said fund of these estates, in the probate court."

He made a decree dismissing the bill of complaint. The case is brought here by appeal.

Counsel for defendants in his brief says:

"I shall take up but little space in discussing this most extraordinary case, for the reason that the complainant is contending in principle for the same thing that the defendants Spafford and Jordan are; that is, that this fund now in their hands is a fund belonging to the creditors of the late firm of Loomis & Venn and which they intend to so treat if they can be permitted to do so."

There is no serious dispute about the facts. It very clearly appears that, treating all these funds as assets of the firm of Loomis & Venn, there will not be sufficient to pay the creditors of Loomis & Venn. This being the situation, it is difficult to see how there is any fund which belongs to the administrator of George W. Loomis, deceased, as an individual, or to the administrator of Richard Venn, deceased, as an individual. It is also difficult to see how claims of the creditors of Loomis & Venn can be presented and allowed in the probate court against the individual estate of George W. Loomis or against the individual estate of Richard Venn. We think a receiver should have been appointed as prayed. See *Malone* v. *Malone*, 151 Mich. 680 (115 N. W. 716).

The decree is reversed, with costs. A decree may be entered in accordance with the opinion.

OSTRANDER, HOOKER, MCALVAY, and BROOKE, JJ., concurred.

MARQUETTE COUNTY SAVINGS BANK *v.* KOIVISTO.

1. FRAUDULENT CONVEYANCES—SALES IN BULK.
   The sale of a stock of merchandise in bulk, without a compliance with the statute requiring notice to the creditors of the vendor, and the making of an inventory, renders the vendee liable to the creditors of the vendor as a receiver.[1] Act No. 223, Pub. Acts 1905.

2. SAME—GOOD FAITH—IGNORANCE OF LAW.
   It is immaterial that the purchaser of the stock was ignorant of the requirements of the statute.

3. SAME—ESTOPPEL—WAIVER.
   Two years' delay by a creditor, which has not received the statutory notice, does not estop it from acting under the provisions of the "sales in bulk act," unless the purchaser has changed his position in reliance on the conduct of the creditor, even though an oral statement had been made to the creditor that the transfer had taken place.

4. SAME—WAIVER.
   A waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.

5. SAME—BANKS AND BANKING—DEPOSIT—PRINCIPAL AND SURETY.
   The fact that a bank which holds a note of the vendor failed to set off a deposit of the vendor against it, but permitted him to check it out, does not discharge the vendee from his liability under the statute.

Error to Marquette; Stone, J. Submitted April 14, 1910. (Docket No. 95.) Decided September 27, 1910.

Garnishment proceedings by the Marquette County Savings Bank against Matti Koivisto as garnishee of Adam Kangas. A judgment for plaintiff on a verdict directed by the court is reviewed by the garnishee on writ of error. Affirmed.

C. F. Button (*M. J. Sherwood*, of counsel), for appellant.

George P. Brown, for appellee.

[1] As to statutory requirements on sale of stock of goods in bulk, see note to *Everett Produce Co.* v. *Smith* (Wash.), 2 L. R. A. (N. S.) 331; note to *Young* v. *Lemieux* (Conn.), 20 L. R. A. (N. S.) 160.

MOORE, J. This is an action of garnishment by which the garnishee defendant is sought to be held liable for the debt of the principal defendant to the plaintiff, under the terms of the so-called "sales in bulk act" (Act No. 223, Pub. Acts 1905), which provides that sales of stocks of merchandise, etc., otherwise than in the ordinary course of trade, etc., shall be void as against the creditors of the seller, unless the seller shall make at least five days before the sale a detailed inventory showing the cost price, etc., and the purchaser demands and receives of the seller a certified list, under oath, of his creditors, and shall at least five days before taking possession or paying for stock notify personally or by registered mail, every creditor contained in the list, or of which he has knowledge, of the proposed sale and the price, terms, and conditions thereof. From a judgment in favor of plaintiff the defendant has brought the case here for review.

On the 20th day of February, A. D. 1906, Adam Kangas sold his stock of groceries to the garnishee defendant. The defendant took possession of the stock at once, and has continued the business in his own name. At the time of this sale the terms of the act were not observed. The purchase price was $2,000. The final payment of $192.27 was not made until March 13, 1906. It is claimed this was about two weeks after the plaintiff had knowledge of the sale. The plaintiff, however, claims it had no knowledge of the details of the sale. At the time of the sale Mr. Kangas was a depositor at the plaintiff's bank, and also owed the plaintiff $351.50 upon a note which came due the day of the sale. The plaintiff's cashier testified that at the time of the sale, and on the opening of business on this day, the deposit balance was $163.12. In each instance, when the renewal notes were given, the old note was canceled and delivered to the maker. Both the principal and garnishee suit was commenced in the court below on the 21st day of February, 1908. The trial judge found that the garnishee defendant did not know that the principal defendant owed the plaintiff's bank any-

thing until demand was made upon him for its payment just prior to the beginning of the suit. He also found that the garnishee defendant was a good-faith purchaser of this stock of goods, except as the sale was affected by the sales in bulk statute. The garnishee defendant offered to prove that at the time of his purchase he knew nothing about this sales in bulk statute, but the court below refused to allow such proof, claiming that the same was immaterial. On the 27th day of February, 1906, the principal defendant paid $151.50 on the note due on the 20th day of February, and gave a new note for the balance of $200 to become due March 22, 1906. On the morning of the 27th day of February, 1906, the principal defendant had on deposit with the plaintiff bank $316.88. On March 28, 1906, the principal defendant paid $100 and the accrued interest upon said note, which became due on March 22, 1906, leaving a balance due the plaintiff of $100, for which indebtedness he gave a new note dated March 22, 1906, to become due in 30 days, which is the note upon which the judgment in the principal case was rendered.

It is the claim of defendant that the sale is not void, but voidable. It is further claimed:

"Our position is that it is the creditor whose debt existed at the time of the sale, who is protected by this statute, and that a creditor who, after knowledge of the sale, wipes out the old debt and accepts part payment from his debtor, and a new obligation for the balance, thus extending the time of payment of his debtor, is not such a creditor as is contemplated by this statute."

It was further claimed that defendant was a good-faith purchaser, as he knew nothing of the statute; that plaintiff should have acted promptly, and not rested on his rights. It is further claimed that, as Mr. Kangas told plaintiff he had sold out to defendant, this accomplished the purpose of the statute. We quote from brief:

"When a creditor receives an oral notice from the purchaser, and if he thinks that this notice is not full enough, we do not think this statute would allow him to wait for

a period of years, and then attack the sale on the ground that the notice was not complete under the statute, but rather that the duty would devolve upon him (the creditor) to demand from the purchaser the particulars of the sale required to make the notice full and complete; and, if the creditor at the time of the notice, or subsequently within a reasonable time, does not ask for such fuller and more complete notice, he must be deemed to have waived the same."

That part of the statute material to the discussion reads as follows:

"SECTION 1. The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or the merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, transferror or assignor, shall be void as against the creditors of the seller, transferror, or assignor, unless the seller, transferror, assignor, and purchaser, transferee and assignee, shall at least five days before the sale, make a full detailed inventory, showing the quantity and, so far as possible with exercise of reasonable diligence, the cost price to the seller, transferror and assignor of each article to be included in the sale; and unless the purchaser, transferee and assignee demands and receives from the seller, transferror and assignor a written list of names and addresses of the creditors of the seller, transferror and assignor, with the amount of indebtness due or owing to each, and certified by the seller, transferror and assignor, under oath, to be a full, accurate and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee and assignee shall, at least five days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof.

"SEC. 2. Any purchaser, transferee or assignee, who shall not conform to the provisions of this act, shall, upon application of any of the creditors of the seller, transferror or assignor become a receiver and be held accountable to such creditors for all the goods, wares, merchandise and fixtures that have come into his possession by

virtue of such sale, transfer or assignment: *Provided, however*, That any purchaser, transferee or assignee, who shall conform to the provisions of this act, shall not in any way be held accountable to any creditor of the seller, transferror or assignor, or to the seller, transferror or assignor for any of the goods, wares, merchandise or fixtures that have come into the possession of said purchaser, transferee or assignee by virtue of such sale, transfer or assignment."

The language of the statute is clear and unambiguous. Its construction has been before this court. In *Spurr* v. *Travis*, 145 Mich. 721 (108 N. W. 1090, 116 Am. St. Rep. 330), its validity was sustained. This decision was cited with approval in *Farrar* v. *Coal Co.*, 149 Mich. 118 (112 N. W. 726). The act was again before the court in *Musselman Grocer Co.* v. *Kidd, Dater & Price Co.*, 151 Mich. 478 (115 N. W. 409); where it was held that the act was valid, and that the garnishee process might be used. The contentions of counsel for defendant which have heretofore been stated are so ably discussed and met by the opinion of the trial judge that we cannot do better than reproduce it here. We quote:

"That Koivisto did not conform to the provisions of said act is very plain. Action has been taken by the plaintiff as a creditor of the seller. This renders Koivisto a receiver, and makes him accountable to the plaintiff, unless the plaintiff has waived its rights, or by its conduct become estopped from invoking this statute. It is clear that if the creditor does not make application, or set the provisions of the statute in motion, then he waives his right. But this plaintiff has acted. When must the creditor move? It is evident that he must act within the five days when the purchaser has conformed to the provisions of the act, for when the purchaser has so acted he 'shall not in any way be held accountable to any creditor, or to the seller for any of the goods that have come into his possession by virtue of such sale.'

"I hold it not material for Koivisto to show that he was ignorant of this law. Suppose that both parties were ignorant of it, would that change their relation to it, or to each other? I think not.

"But it is urged that the plaintiff by its silence for two

years should be held to have waived its rights, and to be equitably estopped from taking these proceedings. It never received the notice contemplated by the statute. It is true that Kangas informed it that he had sold out, and that Koivisto was in possession. It never had notice of the price, terms, or conditions of the sale. It does not seem to me that Koivisto is in a position to invoke the doctrine of an estoppel. He did not pay over his money to Kangas and take possession of the stock relying upon the validity of Kangas' notice to the plaintiff, for he had no knowledge or notice of it. His position has not been injured by this delay of the plaintiff to garnish. Had the plaintiff by its conduct or language induced Koivisto to part with his money, another question would be before us. It is the essence of an estoppel that the person claiming its benefits was induced thereby to do the thing he did. One who has not changed his position in reliance on conduct or statement may not set it up. *State Sav. Bank of Ionia* v. *Montgomery*, 126 Mich. 327 (85 N. W. 879); *Hubbard* v. *Shepard*, 117 Mich. 25 (75 N. W. 92, 72 Am. St. Rep. 548); *Lilly* v. *Townsend*, 110 Mich. 253 (68 N. W. 136); *Maxwell* v. *Bridge Co.*, 46 Mich. 282 (9 N. W. 410). There can be no estoppel unless a party is misled to his prejudice by the one against whom it is set up, and does material acts relying upon the conduct well calculated to mislead him. *Murray* v. *Rugg*, 116 Mich. 519 (74 N. W. 878); *Palmer* v. *Williams*, 24 Mich. 328; *De Mill* v. *Moffat*, 49 Mich. 125 (13 N. W. 387); *Meisel* v. *Welles*, 107 Mich. 453 (65 N. W. 289). Had the plaintiff by anything it said or did induced Koivisto to pay over his money, then it could not assert a claim inconsistent with its conduct; but there is no such case before us. Neither do I see how the doctrine of waiver can be invoked by the garnishee. An implied waiver is akin to estoppel *in pais*. It is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. 29 Am. & Eng. Enc. Law (2d Ed.), p. 1091. Bishop on Contracts, at section 792, says:

"'Waiver, in a general way, may be said to occur whenever one in possession of a right conferred either by law or by contract, and, knowing the attendant facts, does or forbears to do something inconsistent with the existence of the right, or of his intention to rely upon it, in which case he is said to have waived it, and is estopped from claiming anything by reason of it afterwards. *United*

Firemen's Ins. Co. v. *Thomas*, 27 C. C. A. 42, 82 Fed. 406 (47 L. R. A. 450).'

"Koivisto did not comply with the provisions of the statute in question. It cannot be said that the plaintiff had full knowledge of all of the facts of this sale, of the price, terms, and conditions thereof. A thousand conjectures might be indulged why it did not act. It may have supposed that the terms of the sale were such that it would be protected. It may have been willing to rely upon the ability and willingness of Kangas to pay it. Would it thereby be precluded from the right to sue Kangas, and garnish anybody who held property as a receiver, and was accountable to it? Certainly not. So it seems to me that Koivisto cannot successfully invoke either the doctrine of estoppel or of waiver.

"I do not think that there was anything in the condition of the bank account of Kangas with the plaintiff which made it the duty of the bank to set off the amount of the note against the deposit indebtedness, for the reason, if none other existed, that the deposit account did not equal the amount of the note indebtedness at maturity at any time. But we may go a step further. Even treating Koivisto as a surety, there would be no such duty upon the bank even had the deposit account been larger. In the well-considered case of *Davenport* v. *State Banking Co.*, 126 Ga. 136 (54 S. E. 977, 8 L. R. A. [N. S.] 944, 115 Am. St. Rep. 68], it was held that the mere fact that a bank which is the owner of a note upon which there is a surety is at its maturity indebted upon general deposit account to the principal upon the note in a sum larger than that due upon the note, and fails to exercise the right to set off the amount of the note against this deposit indebtedness, and allows the deposit to be checked out by such depositor, does not discharge the surety on the note. So, in any view of the case which I am able to take, I think that upon the undisputed evidence the plaintiff is entitled to a verdict in this case."

The judgment is affirmed.

OSTRANDER, HOOKER, MCALVAY, and BROOKE, JJ., concurred.

SKEELS *v.* SNOW.

1. TRIAL—APPEAL AND ERROR—FINDINGS OF FACT AND LAW.
   Where a case is tried by the court without a jury, and he makes findings of fact, they will not be disturbed, on error, if there is evidence to support them.

2. BROKERS—CONTRACTS—ATTORNEY AND CLIENT.
   Evidence considered and *held* to support the findings of fact made by the trial court in rendering judgment against an attorney at law who claimed commissions for an attempted sale of real property under an agreement with his client.

Error to Oceana; Davis, J., presiding. Submitted April 15, 1910. (Docket No. 106.) Decided September 27, 1910.

Assumpsit by Rufus F. Skeels against Walter Snow for services rendered. A judgment for defendant is reviewed by plaintiff on writ of error. Affirmed.

Rufus F. Skeels and *F. C. Wetmore*, for appellant.

Cross, Vanderwerp, Foote & Ross, for appellee.

MOORE, J. This case was tried before the judge who made findings, the essential parts of which are as follows:

"(1) The plaintiff in this cause is a practicing attorney.

"(2) The defendant was a farmer and was on or about January first, A. D. 1905, the owner of (certain lands which are described in detail).

"(3) That on or about said date certain parties for whom one Morton B. Wheeler of Grand Rapids was acting, and with whom said Wheeler was interested, were contemplating the building of a dam on White river, in said county [Oceana], which might necessitate the use of said lands for the purpose of flowage, and it was contemplated and intended by the defendant in this action to

clear up, if necessary, such defects as there might be in the title to said lands, and to sell or dispose of the same to the said Morton B. Wheeler and his associates.

"(4) That, for the purpose of enabling said defendant to present a merchantable title to said lands and to procure the sale of the same to said Morton B. Wheeler and his associates, the defendant at about the time stated employed this plaintiff as his attorney in the matter of making his title in and to said lands merchantable, and to assist the defendant by his advice and services, as such attorney, in disposing of said property to said Wheeler and his associates.

"(5) For such purpose, at about the time named, plaintiff and defendant entered into an agreement, which, in substance, was as follows: Said plaintiff was to act for said defendant as his attorney in connection with perfecting the title to said lands, and in assisting said defendant to sell or dispose of the same to said Wheeler and his associates; said defendant agreeing to pay the plaintiff, and the plaintiff agreeing to receive therefor, such reasonable attorney's fees as the plaintiff might from time to time become entitled to for all of his services, so to be rendered as aforesaid. Said defendant, in addition to the payment of such fees for all such services rendered, was to pay said plaintiff all his expenses and expenditures in connection with such work. In addition to such payment for services so to be rendered, and expenses and expenditures so incurred, said defendant agreed with the plaintiff that in case he, said defendant, should be able to sell to said Wheeler and his associates his rights in said property for the sum of $25,000, defendant would give said plaintiff from the proceeds from said lands the sum of $1,000; that, if such sale should be made for the sum of $16,000, said defendant would give said plaintiff from such proceeds the sum of $500, either of which sums, respectively, was to be given plaintiff only in case such sale should be made in such manner to said Wheeler and his associates, or some other person, and the same was to be completed, and that such sum was to be given said plaintiff only out of the proceeds of the sale of such land.

"(6) It was also understood and agreed between said parties that said defendant was to retain control of all the negotiations connected with such deal and was to determine the price at which such property should be sold, and reserved and retained the right to use all legitimate means

to obtain as large a price therefrom as possible, said plaintiff only to furnish such assistance therein as he might be requested to furnish.

"(7) Plaintiff has been paid by defendant in full, and something more, for all such services, expenses, and expenditures that he has rendered to, or incurred in connection with, such deal, or pursuant to such agreement.

"(8) On or about the 30th day of September, A. D. 1905, plaintiff and defendant met at the village of Holton in Muskegon county with one Russell Updyke, who was then and there acting with limited authority in behalf of said Morton B. Wheeler and his associates who had authority at that time only to negotiate for an offer by defendant for the purchase of defendant's rights in the property named, but who did not have authority at that time to close a deal for the purchase thereof, having only the power and right to obtain from defendant a proposition for such sale and purchase, and which it was necessary for him to present and submit to his principal, Morton B. Wheeler, then in the city of Grand Rapids, for acceptance or rejection, at which meeting and interview at Holton aforesaid said defendant did make a proposition to said Russell H. Updyke, the same being oral and not in writing, who received the same for and on behalf of said Wheeler, and who took the same to said Wheeler at Grand Rapids, and presented the same to him on the following day, viz., October 1, 1905, at which time said Wheeler rejected such proposition, and, instead thereof, made and instructed said Updyke to make to said defendant a counterproposition, but which counterproposition was never presented or made to defendant. On Monday, October 2, 1905, this defendant instructed plaintiff herein to withdraw the proposition that had been so made by defendant at Holton on September 30, 1905.

"(9) The proposition made by defendant at Holton was thereupon and on October 2, A. D. 1905, withdrawn after said Morton B. Wheeler had on October 1st determined to and had rejected the proposition made by defendant at Holton on September 30th, and such deal was not closed, nor has there been any such deal closed for the disposal of such property, and defendant is still the owner of such interest therein as he had at the inception of these arrangements.

"(10) That no change was made at any time in the

terms of the agreement between plaintiff and defendant made as the court has hereinabove found.

"Much of the testimony offered in behalf of the plaintiff in this cause was objected to on the part of the defendant, but the same was admitted subject to the objection of said defendant. From all the testimony admitted in said cause, I find the facts as above stated, and I find as conclusions of law:

"(1) That defendant is not indebted to plaintiff in any sum of money whatsoever.

"(2) That plaintiff has no cause of action against said defendant.

"Let judgment therefore be entered for the defendant, with costs to be taxed."

A request was made for other and different findings, which request was refused and exceptions taken thereto. The case is brought here by writ of error.

It is the claim of appellant that he is entitled to $800 for services rendered in procuring an arrangement by which Mr. Wheeler was willing to buy the lands for $6,800, and leave thereon a quantity of timber valued at $500. This claim is made upon the theory that, though no sale in fact was made, a sale was prevented by the act of defendant, and that plaintiff is entitled to the $800 the same as though a sale had been made. The record is quite voluminous. We shall state sufficient of it to present the questions involved. The defendant was the owner of certain lands. Mr. Wheeler was engaged in an enterprise which caused him to write defendant in February, 1905, about one of the descriptions, as follows:

"This is a piece of property that it is necessary for me to have in connection with my water power properties, which, of course, you know about, and wish to ask what you will take for this piece."

The defendant's reply is as follows:

"HOLTON, MICHIGAN, February 8, 1905.

"Mr. MORTON B. WHEELER,

"Grand Rapids, Mich.

"*Dear Sir:* In reply to yours of Feb'y 6th, I have heard of your dam proposition through the Grand Rapids Press.

I own eight forties on White River and its tributaries and also own a saw mill and figure to sell them together. Would hardly care to break in on one forty. Any proposition you have to make will be given consideration it deserves. You may write my attorney at Hart, Mich., Mr. R. F. Skeels.

"Yours truly,
"WALTER SNOW."

Before sending this reply, he inclosed both letters in one addressed to Mr. Skeels, the material parts of which are as follows:

"HOLTON, MICHIGAN, February 8–05.
"Mr. R. F. SKEELS,
"Hart, Mich.
"*Dear Sir:* You will find inclosed letter from Mr. Wheeler and my answer thereto, but I was afraid to send it until you saw it, as they are trying to get some catch on me somewhere. If you do send it take a copy. * * * I figure that my knowledge, what land I own on White River, what I could buy on Manistee, would be worth good, big money to those people as I now control on White River two thousand horse power. I figure I ought to have $25,000. That would mean a $1,000 for you and the lowest would be $2,000 per forty and eight forties, $500.00 for the mill, which would be your money. I either get big money or none."

Mr. Skeels then did work for the defendant of a professional character for which he rendered bills, and payments were made to him by checks. He concedes he has been paid for these services, while defendant testified he had sent him payments amounting to $21.90 in excess of his bills. Negotiations were had with Mr. Wheeler, but he declined to pay $16,000 for the land.

Plaintiff testifies that the last of September, 1905, he received a letter containing the following:

"After you left. I think we had better deal if we can get six thousand and the timber on 29–32 and 33. Don't let the deal go down if you can help it.

"SNOW."

To which he replied:

"HART, MICH., Sept. 29, 1905.

"WALTER SNOW, Esq.,
"Holton, Mich.

"*My Dear Sir:* Yours at hand and contents noted. I have doubts about getting them up to $6,000.00, but I am of the opinion I could close a deal somewhere around $5,000. I will not write them however until I hear from you as I want to know just how far I can go. * * * Now it is evident we are not going to get any such figure as we first thought we would, and before I close the deal with them I think it would be well for us to understand each other as to just how the proceeds are to be divided between us. In other words, favor me with reply at once and state just what I am to have if I close deal at $5,000, and just what I am to have if I get over $5,000 and under six thousand, and what I am to have if I get over six and under seven, and again at over seven and under eight, and again at over eight and under nine, and again at over nine and under ten. As long as the deal will be consummated, if at all, on different lines than we figured on, I think these better be determined before we get a deal closed. * * *

"Yours truly,
"RUFUS F. SKEELS.

"P. S. Owing to the fact of my building and great expense I am to in connection therewith, kindly figure on whatever my portion is as being cash, and yourself handling whatever securities we see fit to take, if any."

He testified he got a reply by phone, and that he arranged an interview between himself, Mr. Snow, and Mr. Updyke, who represented Mr. Wheeler, at which time it was agreed the lands were to be taken by Mr. Wheeler at $6,800 and timber valued at $500 to be left for Mr. Snow. We now quote from his testimony:

"I stated to Mr. Snow, standing in front of the Temple, that I felt, inasmuch as I had got him $800 more than his letter had asked me to get, and that if I had closed at his figure he would have only received $5,500 out of it and I $500, according to his conversation with me by phone, that I felt I ought to have the $800. Mr. Snow then stated to me, if they would make the contract I suggested and close a deal in that manner, that he would give me $800. Mr. Updyke, Mr. Snow, and myself then went

into the parlors of the hotel at Holton, and we reduced the memorandum to writing. I have it here and offer it in evidence."

Mr. Updyke had no authority to sign the memorandum for Mr. Wheeler, and it is claimed Mr. Snow did not sign it because he had told somebody he would not sell until a later date. The memorandum was taken to Mr. Wheeler by Mr. Updyke and Mr. Wheeler at once addressed him as follows:

"This is October 2nd, 1905.
"R. H. UPDYKE.
"*Dear Sir:* In regard to the proposed deal with Mr. Snow, I have gone over the same very carefully and wish to say, that from my standpoint it will be absolutely impossible to make such a deal as he wants. If Mr. Snow is willing to go in with us now on the chance of getting something or nothing, I would be willing to make a deal with the following conditions."

Then follow the details of a proposition.

"I have gone over this matter very thoroughly, and this is the stand I must take and it is up to Mr. Snow to do business if he will. * * * I feel quite sure Mr. Snow will be able to look at the matter in this light, and that we will be able to go along and work the deal out to our mutual advantage.

"Yours respectfully,
"M. B. WHEELER."

It is claimed this letter was given for the purpose of obtaining better terms from Mr. Snow, and that Mr. Wheeler gave Mr. Holmes and Mr. Updyke secret instructions to close the deal if necessary, according to the terms stated in the memorandum. Before this letter was shown to Mr. Snow, he decided not to sell for less than $16,000, and so notified the plaintiff, who, in turn, notified Mr. Wheeler. The lands had not been sold at the time the case was tried. The defendant testified as follows:

"I have heard this correspondence all read. I made a contract with Mr. Skeels at one time to do some business

for me, about as it was read there. He was acting as my attorney. Presented me with bills from time to time. I think I paid all the bills. Think he owes me $21.90 now. Except this $800 he claims here, I think I overpaid him $21.90, money he received from me in excess of the bills that he rendered. I never at any time closed a deal with Mr. Updyke and Mr. Wheeler. I have heard the testimony of Mr. Skeels. There was no agreement of sale and purchase made between me and Mr. Updyke and Mr. Wheeler at Holton on the 30th of September, 1905. We talked there from early morning till way along towards night, and at last we made him a proposition. Mr. Updyke was to submit that proposition to his partner or company or whatever it was, for their acceptance or rejection. On that day there was no acceptance of that proposition that I know of. I didn't hear anything about it if there was. I never heard of any acceptance at any time of the proposition. I never made a sale of this property. I have it yet, and in the same condition that it was at that time. Never have sold or disposed of it to any one. In the negotiating or management of this affair as to the disposing of this property—securing it or disposing of it—Mr. Skeels was acting as an attorney for me. I don't know anything about the negotiations he made for the sale of this property except what he told me."

It is apparent from this record that plaintiff was not employed as a broker to find a purchaser for this land. Mr. Wheeler had opened negotiations contemplating a purchase. Mr. Skeels, in addition to his professional work, was to aid in closing the deal. The first letter from the defendant to the plaintiff indicated that compensation for this work depended upon the sale being made. Mr. Skeels' letter of September 29, 1905, indicates the same thing, and it is a fair inference from his testimony about the $800 fee that it depended upon the consummation of the deal.

It is a well-settled rule of law where the case is tried by the judge who makes findings of fact that, if there is evidence upon which to base the findings, they will not be disturbed. See *Cragin* v. *Gardner*, 64 Mich. 399 (31 N. W. 206); *Bateman* v. *Blaisdell*, 83 Mich. 357 (47 N. W.

223); *Smith* v. *Smith*, 144 Mich. 139 (107 N. W. 894); *Buckhout* v. *Browne*, 160 Mich. 460 (125 N. W. 370).

There is testimony tending to support the findings of fact.

Judgment is affirmed.

OSTRANDER, HOOKER, MCALVAY, and BROOKE, JJ., concurred.

LAKE *v.* VILLAGE OF CEDAR SPRINGS.

1. STATUTORY CONSTRUCTION—REPEALS BY IMPLICATION—REPUGNANCY.

   Repeals by implication are not favored, and the question of repeal by a subsequent inconsistent statute is largely one of intent, so that if the two statutes can stand, and both have effect, they must be allowed to do so.

2. INTOXICATING LIQUORS—MANDAMUS—VILLAGES—SUPPRESSION OF LIQUOR TRAFFIC.

   Under 2 Comp. Laws, § 2769, villages have authority to suppress the sale of intoxicating liquors, and the prior statute is not repealed by implication by Act No. 291, Pub. Acts 1909; wherefore, mandamus will not lie to compel the common council of a village to approve a liquor bond.

Certiorari to Kent; McDonald, J. Submitted June 7, 1910. (Calendar No. 24,068.) Decided September 27, 191

Mandamus by Orin Lake to compel the common council of the village of Cedar Springs to approve a liquor bond. An order denying the writ is reviewed by relator on writ of certiorari. Affirmed.

Dunham & Phelps (*Rodgers & Rodgers*, of counsel), for relator.

A. A. & H. A. Ellis and *T. B. Taylor*, for respondent.

BIRD, C. J. This is an application for a writ of mandamus to compel the respondent, the common council of the village of Cedar Springs, to approve the liquor bond of relator, Orin Lake. The sole question raised by relator's brief is whether subdivision 7 of section 2769 of the Compiled Laws of 1897, which gives villages the power to suppress saloons for the sale of spirituous and intoxicating liquors, was repealed by Act No. 291 of the Public Acts of 1909. The relator filed his application for a license with the respondent on March 23, 1910. The council on April 11th passed an ordinance suppressing saloons for the sale of spirituous and intoxicating liquors in the village, and provided it should take effect on May 1, 1910. The council refused to act upon relator's application and now relies on the ordinance as a defense to this proceeding.

It is the contention of the relator that, upon the taking effect of Act No. 291, it repealed by implication subdivision 7 of section 2769; and that the power given villages by this subdivision is so repugnant to, and inconsistent with, Act No. 291, that both cannot stand, and that, as Act No. 291 was the last expression of the legislature, it must prevail.

The village of Cedar Springs was incorporated under Act No. 3 of the Public Acts of 1895, providing for the incorporation of villages, and, among other powers conferred upon villages by this act, was the power, under subdivision 7, "to suppress saloons for the sale of intoxicating liquor and license taverns and eating houses." It is well settled in this State that repeals by implication are not favored, and that the question of repeal is largely one of intent, and if the two statutes can stand, and both have

effect, they must be allowed to do so. *People* v. *Gustin*, 57 Mich. 407 (24 N. W. 156).

The title to Act No. 291 of the Public Acts of 1909 is:

"An act to provide for the taxation, licensing and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving or delivering spirituous and intoxicating liquors and malt, brewed, or fermented liquors and vinous liquors in this State, and to repeal all acts or parts of acts inconsistent with the provisions of this act."

It will be observed that the object of this law is to tax, regulate, and license, while the power conferred upon villages is "to suppress." A law whose object is to tax, regulate, and license would not seem to be inconsistent with one giving the power "to suppress." It would hardly be contended that under Act No. 291 saloons could be suppressed except as incidental to its enforcement, or that under the village act the business could be taxed, regulated, or licensed.

It has been the law of the State for many years to permit the electorate of counties to prohibit the sale of intoxicating liquors and to permit villages, through their common councils, to suppress saloons for the sale of intoxicating liquors. Whenever the county or village has not seen fit to exercise this power, the business has been taxed and regulated by the general liquor laws of the State. These laws have been administered side by side for nearly 15 years with little or no difficulty on account of repugnancy or inconsistency. But it is said by relator that the amendments of 1909 to the general liquor law have made it so inconsistent with the subdivision 7 that both cannot stand. The cardinal feature which the amendments of 1909 have ingrafted on the general liquor laws is the license feature, and counsel argue that in adding this feature it was intended by the legislature to provide for the uniform license system throughout the State. Counsel is quite right in this conclusion; but how does the added license feature make it any more difficult to administer side by side with the village law than before the

amendments were added? The legislature of 1887 intended to and did make the general liquor laws passed in that year a uniform rule throughout the State as to taxation and regulation, and adding the license feature of 1909 does not increase or extend its uniformity.

Counsel cite the case of *People* v. *Furman*, 85 Mich. 110 (48 N. W. 169), to sustain their position. In that case the city of Adrian attempted to regulate by ordinance the closing of saloons on Sundays. This court held that the general liquor laws of 1887 covered the whole field of regulation, and that the ordinance was in conflict therewith, and therefore invalid. In other words, the council of the city of Adrian was attempting to regulate by ordinance that which the legislature had provided for by general law. No such attempt has been made by respondent. It has not invaded the field of regulation, taxation, nor license. It has simply exercised its power to suppress.

Has the legislature evinced any intention to repeal subdivision 7 by recent legislation? We have not been able to discover any, and none has been called to our attention. At the same session at which Act No. 291 was passed, Act No. 278 was also passed, and both acts were signed upon the same day, and the latter act validated all of the general and special charter provisions of villages in the following language:

"All villages within the State of Michigan heretofore incorporated by any general or special act of the legislature, shall continue their corporate character as such villages and any and all general or special charter provisions for the government of such villages shall continue in force until superseded, amended, or repealed, in accordance with the provisions of this act."

And by the terms of Act No. 278, which provides for the reincorporation of villages, the same power was again conferred upon villages that is contained in subdivision 7. This legislation clearly makes against the contention that the legislature intended, by passing Act No. 291, to deprive villages of the power to suppress saloons for the sale of intoxicating liquors.

Finding nothing in the language of Act No. 291 which would make it repugnant to, or inconsistent with, subdivision 7, and being unable to see any intent upon the part of the legislature to repeal subdivision 7, we are disposed to hold that Act No. 291 did not, by implication, repeal subdivision 7.

The order of the circuit court denying the prayer of relator's petition is affirmed.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

MORGAN v. PERE MARQUETTE RAILROAD CO.

1. RAILROADS — CROSSING — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE.

   Ordinarily when a traveler drives upon a railway track without stopping to listen, where his view is obstructed, and in consequence thereof he is injured, he is guilty of contributory negligence, but the rule that he shall stop is not imperative under all circumstances.

2. SAME—OPERATION OF TRAINS.

   Under testimony tending to show that plaintiff was struck by a train which was operated without lights, and with the engine running backwards, at a rate of speed in violation of a city ordinance, with no lookouts; that plaintiff before crossing the track stopped his horse to a very slow walk and looked and listened, the question of contributory negligence was for the jury.

3. SAME—SIGNALS.

   Travelers upon the highway have a right to assume that trains will be operated in the usual manner and that the customary warnings will be given.

4. SAME—STATUTES—OPERATION OF TRAINS.

Although the provisions of 2 Comp. Laws, § 6290, regulating the making up of passenger trains, were intended to protect not only passengers but travelers on the highway, they have no application to a case where the engine was at the head of the train but was running backward.

Error to Saginaw; Gage, J. Submitted June 7, 1910. (Docket No. 14.) Decided September 27, 1910.

Case by William J. Morgan against the Pere Marquette Railroad Company for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

Crane & Crane, for appellant.

Bills, Streeter & Parker, for appellee.

BIRD, C. J. The plaintiff, William J. Morgan, commenced this suit against the defendant, Pere Marquette Railroad Company, to recover for injuries to his person and property which were incurred while he was driving on Michigan avenue, at a point where it crosses defendant's main track in the city of Saginaw.

The record discloses that Michigan avenue extends east and west and crosses defendant's main track at nearly right angles. Four hundred and ninety-three feet north of the place of the accident two spur tracks lead off from the main track, and extend in a southwesterly direction, and cross Michigan avenue upwards of 200 feet west of the intersection of Michigan avenue with the main track. Superior street extends north and south, parallel with, and contiguous to, the defendant's main line right of way. On the morning of March 23, 1906, at about the hour of 6 o'clock, plaintiff was traveling east over this highway with his horse and covered milk wagon. The wagon top was provided with glass front and sides and glass rolling doors. The weather was frosty and foggy, and there was a slight covering of snow on the ground. When he came

to the west spur, he brought his horse down to a slow walk, and looked and listened. He neither saw nor heard anything, and he proceeded toward the second spur, 22 feet distant. Here he took the same precaution. Two hundred feet east was Superior street and the main track. When he reached Superior street, he brought his horse to a very slow walk and looked and listened. He neither saw nor heard anything indicating an approaching train, and he proceeded on his way across the main track. While in the act of crossing, his horse and wagon were struck by a south-bound engine hauling five or six passenger cars filled with miners on the way to the mines.

The engine was backing up, with no headlight, and practically without a lookout, as the engineer testified that sitting in his cab he could not see the track over the coal on the tender. The testimony further discloses that from 2½ to 3 feet west of the west rail of defendant's main track to the traveled portion of Superior street there was a dense growth of willows and underbrush from 2 to 12 feet high, which obstructed the view to the north for 48 feet before reaching the main track, and that for a distance of 200 feet west of the west line of Superior street the view to the north was more or less obstructed by the growth of willows and underbrush. The collision killed the horse, demolished the wagon, and threw plaintiff a distance of 40 feet, breaking his leg and otherwise injuring him. When the collision took place, the train was running from 18 to 20 miles an hour. An ordinance of the city of Saginaw was introduced, providing a maximum speed of six miles an hour for trains in the city. Testimony was given that neither the whistle was sounded nor the bell rung as the engine approached the crossing.

The grounds of negligence relied upon by the plaintiff were as follows:

First. In permitting willows, bushes, and underbrush to grow upon the railroad right of way so as to obstruct the view of approaching trains.

Second. The failure of the engineer to sound the whistle and ring the bell.

Third. For exceeding the maximum speed limit fixed by the ordinance.

Fourth. For running the locomotive backwards with no lights displayed.

At the conclusion of the plaintiff's testimony, defendant's counsel moved the court to direct a verdict for the defendant for the reason that the plaintiff's testimony disclosed that he was guilty of contributory negligence. The court took this view of the testimony, and granted defendant's motion.

Defendant's counsel do not insist very strenuously that the company was not negligent in some of the ways pointed out by the plaintiff, but they contend that, even if defendant were negligent, the plaintiff so far contributed to his own injuries that he is precluded from recovering. It is contended by defendant that plaintiff was possessed of more than the average intelligence, and was familiar with the crossing and knew that the view to the north of the crossing was more or less obstructed, that he knew that there was an early morning train which ran over that part of the road conveying the miners to their work, and that it was not enough for plaintiff to look and listen. He should have stopped and looked and listened when within a reasonable distance from the crossing before attempting to go across. Ordinarily, when a traveler drives upon a railway track without stopping to listen, where his view is obstructed, and in consequence thereof he is injured, he is under the law guilty of contributory negligence, but the rule that he shall stop is not imperative under all circumstances. *Guggenheim* v. *Railway Co.*, 66 Mich. 150 (33 N. W. 161); *Richmond* v. *Railway Co.*, 87 Mich. 374 (49 N. W. 621).

Viewing plaintiff's conduct in connection with the surroundings and the conduct of the defendant in operating its train without a headlight or lookout, we are unable to say, as a matter of law, that plaintiff so far contributed to

his own injuries that it will preclude a recovery. The plaintiff testified, and his testimony is corroborated by two witnesses, that his horse was walking very slowly when he approached the main crossing as well as the other crossings. He looked and listened at each of the crossings. He understood that a train ran in the early morning conveying the miners to their work, but he had never seen it at this crossing and was not expecting it. He also admits that he knew the conditions at the crossing. Plaintiff testifies that, when he approached the main crossing, he looked up and down Superior street, and listened, but saw no light, and, in fact, saw nothing indicating that a train was approaching. From this point he was 48 feet from the track. For this distance his view to the north was obstructed by the willows and underbrush. He had little reason to expect danger in going that distance.

We cannot say that reasonably prudent men would not do likewise under similar circumstances. Had there been no willows or underbrush on the right of way, he could have observed the train from his wagon before he reached the track. Had the engine been facing the direction in which it was going, and its headlight lighted, plaintiff might have seen the reflected light on the track in time to stop. Plaintiff had a right to assume that, if there were a train approaching, it would be operated in the usual and customary way; that is, that the customary warnings would be given and that a headlight would signal its approach. How far plaintiff was misled, if at all, by the failure of defendant to observe these customary methods of operation, we are unable to say. Therefore we think that the question of whether he should have stopped before attempting to go across was a proper question to submit to the jury, together with all the other facts and circumstances in connection with it. *Van Auken* v. *Railway Co.*, 96 Mich. 307 (55 N. W. 971, 22 L. R. A. 33).

Plaintiff insists that the defendant was guilty of gross

negligence in running its train through the city and across the streets with no headlight to warn travelers of its approach. Such a practice, to say the least, is an exceedingly dangerous one, and no excuse was offered by the defendant for so operating its train. On the trial, plaintiff's counsel insisted that operating the train in this manner was in violation of section 6290, 2 Comp. Laws. That section reads as follows:

"In forming a passenger train upon any railroad operated in this State, the engine shall be placed at the head of the train, and no baggage or freight car shall be placed in the rear of any passenger car; and any officer, agent or other employé who shall cause them to be so placed, or who shall knowingly suffer the same to be done, shall be deemed guilty of a misdemeanor and be punished accordingly."

The trial court held that this statute had no application to the facts in the case for the reason that the statute was passed for the protection of passengers only. We agree with the trial court that this statute has no application because the facts here disclose that the engine was attached at the head of the train. We are unable, however, to agree with the trial court that the statute was passed for the protection of passengers only. The beneficial effects of this statute to travelers upon the streets and highways are quite as apparent as they are to passengers. To require the engine to be placed at the head of the train would protect travelers at night, as the usual custom in the operation of trains is to place the headlight in front, and, if this were done, it would warn the travelers of its approach. In placing the engine at the head of the train, it would enable the engineer to command a better view of the travelers, and thereby enable him to afford them better protection against collision. Another reason which suggests itself is that the engine is provided with a pilot, which is specially designed to throw off at the side of the track, objects with which it comes in contact, instead of running over them, thereby in many instances preserving

human life. This statute is a police regulation, and its protection should be extended to travelers upon the streets and highways as well as to passengers. It will be unnecessary to determine whether this act of operation was gross negligence upon the part of the defendant, as we are of the opinion that the contributory negligence of the plaintiff should have been submitted to the jury upon the whole case.

There are other errors assigned, but, as plaintiff does not discuss them in his brief, no attention will be given them here.

The judgment is reversed, with costs, and a new trial ordered.

McALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

SNOW v. ESCANABA POWER CO.

1. MASTER AND SERVANT—WARNING AND INSTRUCTING SERVANT—HIDDEN DANGERS.

Deceased had been in the employ of defendant for three days, assisting in constructing a cement power dam to replace a wooden structure in the Escanaba river. His superintendent ordered deceased to take a scow of gravel and stop a leak in the new dam which was being built below the old one, but failed to warn the employé of the presence of submerged timber braces between the two structures, near the surface of the water. In attempting to propel the scow out of the current running through the sluiceway of the old dam, deceased caused it to collide with the timbers, concealed from his view, and the boat became unmanageable, the deceased attempted to save himself by swimming, but failed, was carried through the sluiceway of the cement dam and

drowned: *Held* that defendant's failure to warn him of the hidden dangers was negligence.

2. SAME—RISK ASSUMED—SCOPE OF EMPLOYMENT.
The servant assumes only such risks as are incident to his employment.

3. SAME.
The deceased did not assume the risk of the obstruction, which was not obvious, since it appeared that he was employed to stay on shore and wheel sand, in a place where the danger was not visible; and he had not been employed long enough to raise a presumption of knowledge.

4. SAME—CONTRIBUTORY NEGLIGENCE.
Deceased having met the known dangers with safety, it was for the jury to determine whether or not he was guilty of contributory negligence in the way he adopted to protect himself against the hidden danger.

5. SAME—ORDERS OF EMPLOYER.
That the superintendent instructed decedent to load the scow and not to leave shore until the superintendent returned, would not preclude a recovery, where the evidence disclosed the fact that the superintendent was present on the dam when the scow approached, and made no protest and gave no caution.

6. SAME—FELLOW-SERVANT.
Nor did the fact that a co-employé knew of the hidden timbers, but failed to inform deceased of them, although he accompanied deceased in the scow, operate to relieve defendant of its duty.

Error to Delta; Cooper, J., presiding. Submitted June 9, 1910. (Docket No. 31.) Decided September 27, 1910.

Case by Nellie Snow, administratrix of the estate of Harry Snow, deceased, against the Escanaba Power Company for the negligent killing of plaintiff's intestate. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

James H. Clancy, for appellant.

William P. Belden (*I. C. Jennings*, of counsel), for appellee.

BIRD, C. J. Nellie Snow, as administratrix, brought this suit under the statute to recover damages for the negligent death of her son and intestate, Harry Snow, a boy of 22 years, who met his death while in the employ of the defendant.

In July, 1908, the defendant was constructing, and had nearly completed, a cement dam in the city of Escanaba, extending from west to east, across the Escanaba river, about 38 feet below, and parallel with, an old wooden dam. At a point about 105 feet east from the west shore is a sluiceway in the new dam, and 34 feet farther east is a sluiceway in the old dam. On the west shore approaching the new dam is a power house, and west of that was a sand pile and mixer. Timber braces, 6x6, had been placed between the old dam and the "false forms" used in the construction of the new dam to keep them in place. These braces had served their purpose, and the lower or down stream ends had been loosened, and most of them had been removed. The remaining ones were located just east of the sluiceway in the old dam and were partially submerged. Mr. Huie was defendant's superintendent and had full charge of the construction work. In the latter part of June he employed the deceased "to wheel sand to the mixer and stay on shore." On the morning of July 1st a leak in the new dam near the east shore was discovered, and Mr. Huie ordered the deceased to load the scow with sand and take it over and stop the leak. This order involved his taking the scow in a southeasterly course to and through the sluiceway in the old dam, then turning to the left and going east between the dams until he came to the leak. The order was at once obeyed by the deceased, and an employé by the name of Tatro accompanied him. They made the journey to and through the sluiceway in the old dam without incident. When they turned to the left and attempted to go east, the scow ran into one of the timber braces spoken of, and the impact sent the scow back into the strong current running between the sluiceways in the two dams by reason of

which it soon became unmanageable. Tatro jumped and made the dam in safety. The deceased jumped into the stream, but found the current too strong for him, and again took hold of the scow, following it down through the sluiceway in the new dam, where it sank and deceased was drowned.

The negligence relied upon by the plaintiff was the act of defendant in ordering the deceased from his regular employment to do and perform a dangerous service without first instructing him of its attending dangers. Both plaintiff and defendant offered testimony, and after it was closed counsel for the defendant requested the court to direct a verdict for the defendant for the following reasons:

First. That under the undisputed facts no negligence has been proven or shown against defendant, and that if there was any risk it was so plain, open, and obvious that the plaintiff assumed it.

Second. That if there was a risk it grew out of the negligence of plaintiff himself in taking his boat out contrary to the orders of the defendant.

Third. That if there was in any way negligence of Mr. Tatro, if it can be said to be negligence contributing to the injury, it was that of a fellow-servant.

The court granted the motion and directed a verdict for the defendant. These reasons will be considered in their order.

First. Was any neglect shown on the part of the defendant? The testimony shows that on the morning of the third day of his employment, Mr. Huie, the superintendent, ordered the deceased to take the scow, with its load of sand, to the leak in the dam. There was only one route by which it could be delivered at that place. Mr. Huie knew this, and he also knew, or ought to have known, that across that route lay the submerged timbers. The testimony tended to show that the deceased did not know of them. It was his duty, therefore, to inform the deceased of the hidden obstruction which he would have to encounter in carrying out his order, and, if he failed to so inform the deceased, he was guilty of negligence, and

his negligence in this respect would be the negligence of the master. 26 Cyc. p. 1165; *Geller* v. *Briscoe Manfg. Co.*, 136 Mich. 330 (99 N. W. 281).

We are not impressed that the deceased assumed the risk if the plaintiff's testimony is to be accepted as true. The rule of law is that the servant assumes only such risks as are incident to his employment. *Chicago, etc., R. Co.* v. *Bayfield*, 37 Mich. 205; *Brown* v. *Railroad Co.*, 118 Mich. 205 (76 N. W. 407). If the deceased was employed "to stay on shore and wheel sand to the mixer," and he was afterward directed to perform this service with the scow, he was directed to do a service outside of his employment and did not assume the risk unless the risk was plain, open, and obvious. In view of the testimony that the timbers could not be seen unless one stood in the vicinity and nearly over them, we think it cannot be said the risk was obvious. The deceased had been employed only two days prior to his being directed to perform this service, and was employed during those two days west of the power house, where his view of the sluiceways and vicinity was obstructed. His brother Walter testified that the deceased did not go out on the dam during the time that he worked there. While defendant's testimony shows that deceased's attention was called to some of the dangers incident to the journey, there is no claim that any one ever informed him of the submerged timbers that lay across the path of the scow, and we do not think that his employment had continued long enough to raise a presumption that he had knowledge of them.

Second. Neither are we impressed with defendant's claim that deceased was guilty of contributory negligence. If the deceased knew nothing of the submerged timbers, he could hardly be called upon to protect himself against them. So far as the dangers were apparent, they were successfully met, and the journey was made in safety to and through the sluiceways, and it was not until he came in contact with the unseen timbers that any difficulty was

experienced. After the scow ran against the timbers, and their presence became known to him, whether he used such care and caution as a man of his years would be called upon to exercise was a question for the jury and not for the court.

Third. It is said that the deceased disobeyed orders; that he was instructed to load the scow but not to leave the shore until the superintendent returned. While the scow was taking its southeasterly course from the shore down to the sluiceways, Mr. Huie, the superintendent, stood on the dam, a few feet from the sluiceway, and must have seen the deceased and his companion approaching. He knew they were on their way. He made no protest. He asked no question. He gave no word of caution or warning, and it must, therefore, be presumed that their going had his full consent.

It is also contended that Tatro knew of the danger that would be encountered in carrying out the orders, and that the negligence, if there were any, was Tatro's, and the negligence of a co-servant. Tatro testified that he advised the deceased that the scow was loaded too heavily and suggested that some of the sand be taken out. This was done. He also testified that he advised the deceased that they had better get some rope and another pike pole; but his testimony nowhere discloses that he informed the deceased of the submerged timbers. In fact, his testimony does not show that he himself knew of them. Mr. Tatro's testimony was very contradictory and unsatisfactory, and it is difficult to determine from a reading of it how he desired to be understood upon some of the matters about which he testified. But even though Tatro was informed of the submerged timbers and their location, if he did not make it known to the deceased, the master would not thereby be relieved of his duty to inform the deceased of the hidden dangers he would have to encounter in carrying out his orders. *Noble* v. *Steamship Co.*, 127 Mich. 103 (86 N. W. 520, 54 L. R. A. 456, 89 Am. St. Rep. 461).

We are of the opinion that these questions were proper ones for the consideration of a jury.

The case is reversed, with costs of both courts, and a new trial ordered.

McALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

BACKUS v. COWLEY.

1. TAXATION—PURCHASE OF STATE—NOTICE TO REDEEM.
   One claiming title by quitclaim from the original purchaser of State tax lands, is limited to the amount and interest which she proves, and in case of her failure to show a tax deed for more than one year, will be limited to that year, although other taxes were unpaid at the time of the purchase.
2. SAME—DEEDS—QUITCLAIM—GOOD FAITH.
   Those who take by quitclaim deed are not bona fide purchasers, and take only the interest which their grantor had.
3. PRINCIPAL AND AGENT—TRUST RELATION—ADVERSE INTEREST OF AGENT.
   The purchaser of timber, upon land which is held for delinquent taxes that the owner directs the purchaser to pay, and charge to her account, becomes her agent for that purpose.
4. SAME—STATUTE OF FRAUDS—TRUSTS.
   The defense of the statute of frauds is not available to an agent that purchases, in his own name, without the knowledge or consent of his principal, State tax lands which he has been directed to redeem on behalf of the owner from funds to be paid her for timber purchased.
5. SAME—FRAUD.
   Such a purchase is a fraud on the principal.
6. SAME—TRUSTS—STATUTES.
   And would be governed by the exception to the statute prohibiting resulting trusts. 3 Comp. Laws, §§ 8835, 8836.

7. SAME—FIDUCIARY RELATIONS.
While the relation so created was not a strict fiduciary relation, the vendee of the timber owed the vendor loyalty and good faith.

8. TAXATION — STATE TAX LANDS — LACHES — BONA FIDE PURCHASER.
A purchaser of tax titles more than six years old, by quitclaim deed, who pays less than the amount required for redemption, cannot be considered a bona fide purchaser, and has notice of the stale character of the claim. Act No. 58, Pub. Acts 1907.

9. SAME—PRINCIPAL AND AGENT—ATTORNEY.
Such notice and knowledge is chargeable to the attorney and adviser, who accepted a conveyance of her interest from the purchaser of the tax interest.

Appeal from Alcona; Connine, J. Submitted June 7, 1910. (Docket No. 3.) Decided September 27, 1910.

Bill by Newton D. Backus, administrator of the estate of Sarah E. Backus, deceased, against Lilian N. Cowley, the Au Sable River Lumber Company, and John H. Killmaster to set aside certain deeds. Defendants Cowley and Killmaster filed an answer in the nature of a cross-bill to quiet title to said land. From a decree for defendants, complainant appeals. Reversed, and decree entered for complainant.

Albert McClatchey, for complainant.

John H. Killmaster (*Ward B. Connine*, of counsel), for defendants.

MCALVAY, J. The bill filed by Sarah E. Backus as complainant in this case prayed that a certain State tax deed be decreed void, and that the cloud upon her title created thereby be removed; she claiming to be the owner of the lands described in said deed. After filing her bill, and before a hearing of the cause, Mrs. Backus died. In the original bill of complaint the Au Sable River Lumber Company and Lilian N. Cowley were parties defendant.

After complainant's death, the cause was revived in the name of her administrator, and an amended bill was filed by him, setting up the fact of her death and the revival of the cause, and also making John H. Killmaster a party defendant by reason of a conveyance of part of the land in question to him by defendant Cowley. The bill of complaint was taken as confessed by defendant Au Sable River Lumber Company. Defendants Cowley and Killmaster answered separately, denying complainant's equities and each asked for affirmative relief. Upon the issues joined, the cause was heard, resulting in a decree dismissing complainant's bill, and granting defendants Cowley and Killmaster the affirmative relief prayed, decreeing and confirming title in said lands in fee in them, as claimed. Complainant has appealed.

Sarah E. Backus during the later years of her life resided with her son, Henry N. Backus, in Detroit. She owned about 2,000 acres of land in Alcona county, including the lands involved in this suit. Her son, Henry, attended to some of her business. Philip Curran had general charge of these lands for Mrs. Backus, and looked after her interests for 14 years. On November 2, 1901, Curran, in the name of H. N. Backus, entered into an agreement in writing with defendant Au Sable River Lumber Company for the sale and delivery of certain logs, posts, ties, etc., to be cut and delivered for the prices stipulated, and to be paid for by defendant company as fast as banked on Backus Creek. Under this agreement, Mr. Curran caused this timber to be cut from these lands and delivered according to its terms, beginning in November, 1901, and finishing in March following. While so engaged Curran was notified by the State trespass agent that there were unpaid taxes against the land which must be paid, or the cutting discontinued. Curran then went to the defendant company's office, and stated to its secretary that the taxes must be paid, and asked for an advance of money to pay them to be charged up to this timber contract. This was agreed upon, and the sec-

retary sent the money and paid these taxes to the amount of $354.88, being the amount of taxes on these lands for the years 1895 to 1899, inclusive, and charged that amount against this Backus timber contract account, and the same was paid in full by charging it as a payment made on the timber delivered under it. This also appears from a letter written by defendant company to H. N. Backus on January 11, 1902, stating that the above contract had been made, requesting a confirmation of it and asking advice as to how payment for timber should be made. The letter proceeds:

"Since buying the logs we have paid up $350 back taxes on the land after being asked to do so by Mr. Curran; this we have charged up to Mr. Curran. Since making the contract we have learned that this timber and land stands in the name of Sarah E. Backus. Such being the case, this contract should include her as one of the first parties and another very important thing for us to know is whether these scale bills are all to be paid to Phil Curran or whether you want us to hold back the stumpage."

It also appears that the timber account was kept in the name of Curran, and that a written statement of such account made out and delivered to Curran shows $354.88, amount paid for taxes charged by defendant company. After this statement more timber was delivered. On February 4th money was due and payable from defendant company on the above contract over and above the amount paid for taxes, which was withheld for instructions asked for in letters. Curran on that date telegraphed H. N. Backus:

"Wire Au Sable River Lumber Co. regarding their letters to you; they defer payment awaiting your reply."

Not satisfied with the answer to this telegram which evidently contained an error in transmission, defendant company on February 6, 1902, wrote Sarah E. Backus, acknowledging the receipt of the telegram, giving its wording as received and asking confirmation. The letter further stated:

"In reference to the pine and cedar you did not say anything about this. * * * Kindly advise us how the payments are to be made on white pine and cedar."

At the time operations under the contract ended, March 8, 1902, the defendant company had been paid all claims and owed $125 for a bridge torn down by its men, which it agreed to pay. Nothing was heard of this transaction relative to the payment of these taxes until about six years later, January 22, 1908, when Mrs. Backus received statutory notice from defendant L. N. Cowley to redeem from tax title these lands for the years for which defendant company had paid them for complainant, with a statement that she had acquired title by virtue of a conveyance from the Au Sable River Lumber Company, "said company having become the purchaser of the taxes against said lands for the years mentioned," the amount claimed as necessary to redeem being $642.94.

Defendant Cowley was dealing in tax titles. Defendant Killmaster is her attorney who advised her to buy these titles from defendant Au Sable River Lumber Company. The claimed interest of defendant company was conveyed to her for the aggregate consideration of $130 by two quitclaim deeds dated, respectively, January 4, and January 10, 1908. On January 31, 1908, defendant Cowley quitclaimed two of these descriptions of land to defendant Killmaster. In 1907 defendant Cowley purchased from the State tax titles on these lands for years 1902 to 1905, inclusive, gave notice to redeem to Mrs. Backus, redemption was made, and she conveyed her interest to her. In showing title from the State to defendant Au Sable River Lumber Company defendants put in evidence but one State tax deed dated January 6, 1902, which conveyed these lands to said company for taxes for the year 1897 for the sum of $68.44. No showing whatever was made by tax receipts, certificates, or deeds that taxes for the years 1895, 1896, 1898, and 1899 had been paid as a condition of purchase when the State deeded to the company. There is no dispute in this record upon the

facts. That the company was the agent of and acting for Mrs. Backus in paying taxes at the request of her agent as shown by this record is proved beyond dispute. The contesting defendants do not admit this.

Defendant company, by allowing this bill of complaint to be taken as confessed, has admitted, not only the allegation that it was a Michigan corporation, but also that all of the facts charged in the bill of complaint against it relative to its relations with complainant's decedent are true. Upon this branch of the case, it would be a waste of time to repeat the facts for the purpose of showing that a valid contract in writing was entered into between the parties by their agents relative to the sale of certain timber, the ratification of the contract by the principals, and its complete performance.

When at agent Curran's request defendant company paid the demand of the State against the lands in question and charged the amount paid as agreed against the logging contract, such act was in effect a payment and redemption by the owner, Mrs. Backus, and was so treated by defendant company and admitted in the letters written by it in relation thereto. *Hoffman* v. *Auditor General*, 136 Mich. 691, 692 (100 N. W. 180). As agent of Mrs. Backus to pay taxes and redeem her land, this defendant could not obtain title by purchasing in its own name because it owed duties to her which were incompatible with it. *Kimball* v. *Ranney*, 122 Mich. 160 (80 N. W. 992, 46 L. R. A. 403, 80 Am. St. Rep. 548). Defendant company never made any claim or asserted any right in said lands to the original owner or her representatives by reason of the purchase in its own name, and could not acquire a title by taking a deed, under the circumstances, in its own name, without the knowledge or consent of the owner. *Linsley* v. *Sinclair*, 24 Mich. 380; *McCreary* v. *McCreary*, 90 Mich. 478 (51 N. W. 545). It appears from the record that no such claim was ever asserted by putting its deed upon record. On January 8, 1908, defendant Cowley caused to be recorded a deed purporting

to convey to defendant Au Sable River Lumber Company the title of the State of Michigan to the lands in question for taxes for the year 1897. Said deed being dated January 6, 1902, and recorded on the same date, she caused to be recorded the first quitclaim deed from the company to her dated January 4, 1908. The second quitclaim to her was dated January 10, 1908, and recorded January 15, 1909. The only tax deed from the State to defendant company she produces was for taxes for the year 1897 in consideration of $68.44. Her notice to redeem dated January 16, 1908, claiming a payment aggregating $642.94, plus sheriff's fees, was served on Mrs. Backus in Detroit January 29, 1908. This was the first notice to her of the claimed title arising from the payment and redemption of taxes made as already recited for her by defendant company.

In proving her claimed title from the State, defendant Cowley has shown title for taxes of but one year. She claims through defendant company, however, tax titles for five years without other showing than the quitclaim deed to her. Her claim for the amount necessary to redeem is not supported or warranted by her proofs. Her right and title, if valid, is limited to such as she has proved. Whether she has shown title for one year or five years will not in this case affect the result. The real question is what interest defendant company conveyed to her by its quitclaim deeds.

In *Briggs* v. *Boardman*, 135 Mich. 329 (97 N. W. 767), the grantee by deed of the owner of a tax title was denied a writ of assistance because his grantor, who had in writing agreed with the attorney of the original owner to accept an amount less than provided by statute to redeem, on tender made of the amount, refused to accept before the time agreed upon or the statutory limit had expired. In that case the court said:

"It is immaterial whether the contract between Griffin and the respondents be called a contract relating to the sale of lands, or one relating to the payment of a tax lien.

The offer was in writing, the acceptance was in writing, and the agreed price tendered in time. The transaction was valid and its effect was to avoid the tax deed. The title was then in Mr. Griffin and the petitioner took no greater interest in the property by the conveyance than Mr. Griffin had, and he had no interest."

It is also well settled in this State that "those who take by quitclaim deed are not bona fide purchasers, and take only the interest which their grantors had." *Peters* v. *Cartier*, 80 Mich. 129 (45 N. W. 73, 20 Am. St. Rep. 508); *Moore* v. *Township of Kenockee*, 75 Mich. 332 (42 N. W. 944, 4 L. R. A. 555); *Beakley* v. *Robert*, 120 Mich. 210 (79 N. W. 193); *Messenger* v. *Peter*, 129 Mich. 98 (88 N. W. 209).

In our view of the case at bar already given, defendant company was the agent of the owner to pay taxes and redeem her land; consequently the defense of the statute of frauds is not available. The act of defendant company in taking title in its name without her knowledge or consent was a fraud upon the original owner, and there is no evidence in the record of any intention to create a trust; but, if considered as a case where a trust has resulted, complainant would not be prohibited from recovering by reason of the statute of uses and trusts (section 8835, 3 Comp. Laws), as defendants contend, for the reason that this case would be within the provisions of section 8837, 3 Comp. Laws, which qualifies the section relied on. It provides:

"The preceding seventh section shall not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance in his own name, without the knowledge or consent of the persons paying the consideration, or when such alienee in violation of some trust shall have purchased the lands so conveyed with moneys belonging to another person."

Linsley v. *Sinclair*, *supra*, and notes; *McCreary* v. *McCreary*, *supra*; *Connolly* v. *Keating*, 102 Mich. 4 (60 N. W. 289). The relations between Mrs. Backus and defendant company relative to this transaction have been

called fiduciary. Strictly speaking they were not, but were such as required loyalty on the part of the agent, and a duty resting upon it to deal in good faith with its principal, and is one of the relations within the statute and recognized by the authorities cited.

In addition to what has been said relative to the status of defendant Cowley under the quitclaim deeds as a bona fide purchaser, it may be added that there is evidence relative to the purchase by her which indicates want of good faith. She for less than the statutory amount necessary to redeem for the one year took the quitclaims, the next day making claim for the entire statutory amount for the five years. From this record there is no evidence of a right to make such demand.

She did this after a lapse of six years from the claimed purchase by defendant company, no demand or claim ever having been made under it. It was therefore on its face a stale claim, which was sufficient to put her upon her reasonable inquiry. She was acquainted with the owner in a business way. She had bought tax titles for subsequent years against these lands, had given Mrs. Backus notice to redeem, and on payment of her demands had made a reconveyance to her. She knew that the owner was protecting these lands against a later title than the one she was then buying, yet she made no inquiry of her as to this stale claim. The legislature had before that time fixed a limitation of five years as barring all right to assert such title or claim of lien by reason of a tax purchase. Act No. 58, Pub. Acts 1907. This is the limitation considered by the legislature as reasonable. We do not decide that this sale is within that statute, but we do hold that defendant Cowley cannot be considered a bona fide purchaser of this stale claim after the lapse of six years. What has been said relative to defendant Cowley and the title she acquired by the transfers to her is equally applicable to defendant Killmaster. He was her attorney and adviser, chargeable with her conduct and knowledge.

In all respects he must be considered in exactly her position and relation to these lands. He acquired by the conveyance from her no other or greater interest than she was entitled to assert.

It is not necessary to consider any further questions. In no view of the case can the decree of the circuit court be affirmed. It is reversed and a decree will be entered in this court in favor of complainant for all the relief prayed, and denying the defendants affirmative relief. If there are other tax titles claimed by these defendants, or either of them, against these lands which they desire to present for redemption, that course is probably open. It is not necessary to dispose of them in this case. The only titles here involved are those arising from the claimed sale by the State to defendant Au Sable River Lumber Company which are held by us to be absolutely void.

Complainant will recover costs of both courts against all of the defendants to be taxed.

BIRD, C. J., and BROOKE, BLAIR, and STONE, JJ., concurred.

BACKUS *v.* KILLMASTER.

1. EQUITY—PRACTICE—STIPULATION—EVIDENCE.
   Under a stipulation that testimony taken in one cause may apply to another so far as may be competent, it is proper to refer on appeal to the record in the related cause.

2. TAXATION—REDEMPTION—TENDER—REGISTER IN CHANCERY.
   Where the owner of land sold for delinquent taxes sends a post-office order for a sufficient sum to redeem the property to the register in chancery, who indorses the same, and tenders

it to the purchaser from the State, within the period of redemption, a sufficient payment was made to redeem the property.

3. SAME—REMEDIES—REGISTER IN CHANCERY.

If, by the conduct of the register in chancery, the tax purchaser has lost the money, his remedy is against the officer.

Appeal from Alcona; Connine, J. Submitted June 7, 1910. (Docket No. 18.) Decided September 27, 1910.

Bill by Newton D. Backus, administrator of the estate of Sarah E. Backus, deceased, against John H. Killmaster to set aside certain deeds. Defendant filed an answer in the nature of a cross-bill to quiet title to said land. From a decree for defendant, complainant appeals. Reversed, and decree entered for complainant.

Albert McClatchey, for complainant.

John H. Killmaster (*Ward B. Connine*, of counsel), *in pro. per.*

MCALVAY, J. This is a case in some respects similar to the case of *Backus* v. *Cowley*, *ante*, 585 (127 N. W. 775). From the record in that case we find that,

"By agreement between solicitors for both parties and the court, testimony was taken to apply in this cause and also in the case of Newton D. Backus, Adm'r, v. John H. Killmaster, as far as might be competent."

We also find a statement in this record to the same effect. In the certificate to the record in this case is contained a protest by counsel for appellee in a measure restricting the agreements of record made in both cases in open court by insisting that opposite counsel shall not in this case make reference to the first case. Counsel on both sides are bound by the above agreements upon which this court has acted in the examination and determination of both cases, and counsel have the right to make all proper and necessary references in each case to the other. The instant case involves two of the descriptions of land, the title to which was in dispute in the other case, and which

are the descriptions in that case stated to have been conveyed by defendant Cowley to defendant Killmaster. The determination of this court in that case declaring the title in Cowley void and that defendant Killmaster acquired nothing by the transfer from her makes it unnecessary in this case to consider that question.

Defendant Killmaster in this case also claims title to this land through other tax sales for the years 1902 and 1904 made by other parties and by quitclaim deeds from them to Killmaster. Afterwards he sent to Mrs. Backus, at Detroit, the statutory notice that he held a tax deed on the lands for the year 1902, giving the amount required to redeem each description. Within six months thereafter Mrs. Backus gave such notice with money sufficient to redeem to her son to send the required amount to make such redemption. For the purpose of transmitting this money, he obtained a post-office money order at Detroit for the full amount, payable to George Rutson, who was register in chancery, and the proper officer to receive such redemption money, and inclosed the same in a letter stating its purpose, and sent it to him. It was duly received and accepted by him, and he on the same day, and before the expiration of the six months, personally told defendant that he had received the same to pay for the redemption from said tax title. He indorsed the order and offered it to defendant for that purpose, but defendant would not take the money order for the reason that he claimed it was not legal tender and therefore refused to receive it. Defendant did not offer or tender to said officer any tax deed, receipt, or quitclaim deed, or reconveyance. The money order was retained by this officer during the balance of his term of office, and passed over by him to his successor in office. Mrs. Backus, hearing of this situation, and that defendant claimed title under the tax deed from which she thought she had redeemed, caused the bill of complaint in this case to be filed praying to remove the cloud of said tax deed from her title, and that such deed be decreed to be delivered up and canceled, and defendant

be decreed to convey to her all of his interest in said lands. Defendant answered, asking affirmative relief in the nature of a cross-bill. Issues were joined and a hearing had. The court denied complainant any relief, dismissing the bill of complaint, and granting defendant a decree confirming his title in fee simple to the land.

The only question necessary to discuss in this case is whether complainant's decedent complied with the law and redeemed her land and was entitled to a reconveyance. Defendant's contention and defense is entirely technical, and we think absolutely without merit. It is not disputed but that Mrs. Backus transmitted a sufficient amount of money within the required time to the proper officer to satisfy defendant's demand, and he was notified by such officer. She can be required to do nothing more if her method of transmission was legal. After notice of what she had done, the duty rested upon this defendant to offer his reconveyance and demand his money. The conduct of this register in chancery was not very creditable. He was an old officer, and, as he testifies, well acquainted with these transactions. He had received post-office orders before, and knew that, when he paid the money to a tax title holder, he should receive the deed, etc., as the law provides. Instead of taking the ordinary course, he indorsed the order to Killmaster, who declined to accept it. This the officer did contrary to the instructions of the letter of transmission. The inference from his testimony is strong that he did so because he was unfriendly with the Backus people. It is not to the credit of defendant that he was willing to take advantage of this conduct, evidently because the time for redemption expired the next day. It is a matter of common knowledge that the transmission of money by post-office order is lawful, customary, and safe. This post-office order received by the register in chancery, kept and indorsed by him, amounted to a payment by Mrs. Backus for the purpose indicated in the letter to him. Because of the conduct of this officer, she, having done all that was required by the law to redeem

her lands, will not be held to be in default, and, in such case—

"Equity will take notice of the facts as entitling the party to relief, and will hold the redemption which has failed in form, to have been effected for all purposes of protecting the estate against a forfeiture." 2 Cooley on Taxation (3d Ed.), p. 1048.

Whether defendant had the deeds as claimed or not to both descriptions of this land is of no consequence. Complainant so understood at the time, and acted upon such understanding.

The amount paid covered both descriptions. The statute provides that—"By such payment the tax title * * * shall become void and of no effect against the lands thus redeemed." Act No. 226, Pub. Acts 1905, § 141. Consequently complainant was entitled to the relief asked. The decree dismissing complainant's bill of complaint and granting defendant affirmative relief is reversed, and a decree will be entered in this court granting complainant full relief, declaring the tax title of defendant a cloud upon her title, and declaring it void and to be delivered up to complainant for cancellation, and that defendant do reconvey all of his claimed right, title, and interest in said lands and produce and surrender all deeds and papers as provided by law in case of payment, and, in default thereof, that such decree duly recorded shall stand as and for such reconveyance, and, if by the conduct of the register in chancery complainant has lost the money sent to him, defendant be left to his remedy, if any he has, against said officer, if otherwise, complainant do pay into court for said defendant that amount less costs of this suit, and that complainant recover against defendant costs of both courts, to be taxed.

BIRD, C. J., and BROOKE, BLAIR, and STONE, JJ., concurred.

BROOKS v. HARGRAVE.

APPEAL AND ERROR—QUESTIONS REVIEWABLE—MOTIONS—DISMISSAL AND NONSUIT—JURISDICTION.

The denial of a motion to dismiss, for want of jurisdiction, a bill of complaint in chancery against an executor, for an accounting, to which he had filed an answer, subsequently presenting in probate court his final account covering the same matter, may not be reviewed on appeal, since the order is not a final adjudication of rights.

Bill by Rae Brooks and another against Edward C. Hargrave and others for an accounting. From an order denying a petition to dismiss the bill for want of jurisdiction, defendant Hargrave appeals: On motion to dismiss. Submitted June 7, 1910. (Calendar No. 24,056.) Motion granted September 27, 1910.

Weadock & Weadock (*Miles J. Purcell*, of counsel), for the motion.

M. L. Courtright (*Gillett & Clark* and *F. W. Defoe*, of counsel), *contra*.

MCALVAY, J. Complainants filed their bill of complaint in the circuit court for Saginaw county in chancery, asking for an accounting with defendant Edward C. Hargrave, as executor, individually, and as surviving partner of E. J. Hargrave & Son, charging fraud against him in his management of the estate, and the affairs of the partnership. This defendant was appointed executor of his father's estate in 1887. He filed an inventory and appraisal of the estate, showing property of the value of $50,000, since which time he had filed no account whatever. Complainants are grandchildren of E. J. Hargrave, deceased, having an interest in his estate.

Defendants are all the other parties in interest. De-

fendant Edward C. Hargrave, as executor, individually, and as surviving partner, answered the bill of complaint, as also did some others of the defendants. Some were defaulted. The cause, being at issue, was duly noticed for hearing in open court, and was set down for a certain day. On motion of defendant Edward C. Hargrave the time for the hearing was extended to a later date. He then filed what purported to be his final account in the probate court for Saginaw county as executor, and at once filed a petition in this case showing that he had filed a final account, praying that the bill of complaint be dismissed because of want of jurisdiction in the court to proceed against him as executor for an accounting. Upon a hearing this petition was denied. He then took a general appeal to this court from the order denying such petition.

Complainants have made a motion before this court to dismiss the appeal. It would seem that appellant, after answering fully complainants' bill, in which he denied that he had any assets, and expressed a willingness to have an accounting, now desires, after he has filed an account in probate court, by this motion, to have a question arising in that suit determined in advance, and in the brief filed this is admitted. In chancery cases an appeal will only lie to this court from a final order. He did not elect to raise the question by demurrer, in which case he would have been strictly within the statute and entitled to an appeal, if his demurrer was overruled. The order is not a final one. Appellant is not deprived of any supposed right, nor does it fix upon him any liability. *Kingsbury* v. *Kingsbury*, 20 Mich. 212. The cases of *Hitchcock* v. *Wayne Circuit Judge*, 144 Mich. 362 (107 N. W. 1123), and *Warren* v. *Lenawee Circuit Judge*, 160 Mich. 572 (125 N. W. 712), cited by appellant, are not in point, nor is there any indication in either of them that such an order as the one here appealed from is a final order. This court has recently held that an order denying a motion to strike a bill of complaint from the files was not a final order. *Williams* v. *Olson*, 151 Mich. 265

(114 N. W. 1031). The fact that by the petition the jurisdiction of the court was challenged does not determine the question whether the order made was a final and appealable order. As was said in the case last cited, that is determined by its effect upon the rights of the parties.

This has always been the rule in this State. The motion to dismiss is granted.

BIRD, C. J., and BROOKE, BLAIR, and STONE, JJ., concurred.

HANNA v. HURLEY.

1. FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION.
   A bill of sale of a stock of merchandise, made without a compliance with the bulk-sales law (Act No. 223, Pub. Acts 1905), executed soon after the grantor executed a bond for costs of an action, which he subsequently became liable to pay, the conveyance being placed on record only the day after judgment was rendered on the bond, and not being accompanied, at the time of executing the transfer, by a change of possession, is properly *held* to be fraudulent as to the obligee in the bond.[1]

2. SAME—CREDITOR—BULK-SALES LAW.
   A creditor is one who has a right to require of another the fulfillment of a contract or obligation.

3. SAME.
   A bond to pay a judgment and costs on appeal from justice's court creates the relation of debtor and creditor between the surety and obligee, before the breach of its condition, within the meaning of the provisions of Act No. 223, Pub. Acts 1905.

Error to Kent; McDonald, J. Submitted June 8, 1910. (Docket No. 26.) Decided September 27, 1910.

[1] As to statutory requirements on sale of stock of goods in bulk, see note to *Everett Produce Co.* v. *Smith* (Wash.), 2 L. R. A. (N. S.) 331; and note to *Young* v. *Lemieux* (Conn.), 20 L. R. A. (N. S.) 160.

Replevin by George N. Hanna against William J. Hurley. A judgment for defendant is reviewed by plaintiff on writ of error. Affirmed.

S. Wesselius, for appellant.

George C. Brown, for appellee.

BROOKE, J. This case was tried by the court without a jury. Certain findings of fact and law were filed by the court, which sufficiently disclose the nature of the controversy. They are as follows:

"Facts.

"(1) I find that on April 22, 1908, George D. Hanna became surety upon an appeal bond on appeal to this court from the justice court of Grand Rapids by Joseph Dahrooge from a judgment rendered against him in favor of Nathan Kronman. Said bond was in the usual form. Plaintiff in this cause, George N. Hanna, was engaged in business in the city of Grand Rapids. Said George D. Hanna was a cousin of George N. Hanna, of the age of 24 years or thereabouts, and was prior to the 22d day of April, 1908, engaged in the retail grocery business in the city of Grand Rapids, and was indebted to divers and sundry wholesale houses for goods and merchandise.

"(2) Judgment in said appeal case was rendered by this court against said Dahrooge and said George D. Hanna as surety on January 19, 1909.

"(3) On February 10, 1909, execution was issued against said Dahrooge and George D. Hanna on said judgment, and on March 9, 1909, defendant in this action, the sheriff of Kent county, by virtue of said execution, levied on the property involved in this action as being the property of said George D. Hanna. Said property consists of a retail stock of groceries and kindred articles and the fixtures pertaining thereto.

"(4) On March 10, 1909, the plaintiff in this action, George N. Hanna, replevined the property in question from the sheriff, claiming to own the same by virtue of bill of sale executed to him by said George D. Hanna May 13, 1908 [and recorded January 20, 1909].

"(5) I find as to this sale from George D. Hanna to George N. Hanna, as evidenced by the bill of sale referred

to, that this sale came within the terms of the bulk-sale law of this State, being Act No. 223 of the Public Acts of 1905, and that its provisions were not complied with in this sale.

"(6) I further find that at the time of said sale the said George D. Hanna was personally in possession of the said property, and continued in possession thereof personally from the date thereof until the levy of the said execution on said property by the defendant in this action, and that the said sale was not accompanied by an immediate delivery and followed by an actual and continued change of possession of said property, and that the said vendee, George N. Hanna, has not made it appear that said sale was made in good faith and without any intent to defraud the creditors of said George D. Hanna so as to overcome the presumption of fraud as provided by section 9520, 3 Comp. Laws.

"(7) I further find that said sale was not made in good faith, but was made with the intent to hinder, delay, and defraud the creditors and other persons within the terms of section 9533, 3 Comp. Laws, and that both George D. Hanna and George N. Hanna participated in such intent.

"Conclusions of Law.

"(1) I find as a conclusion of law that Nathan Kronman was a creditor of George D. Hanna, within the terms of Act No. 223 of the Public Acts of 1905 at the time of the sale of said property to George N. Hanna, May 13, 1908, and that, the provisions of said act not being complied with, said sale was void as to him, and therefore as to him said property remained the property of George D. Hanna, and was subject to said execution at the time of said levy.

"(2) I find as a further conclusion of law that Nathan Kronman was a creditor of George D. Hanna within the terms of section 9520, 3 Comp. Laws, and that said sale not having been accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold, and said vendee, George N. Hanna, having failed to make it appear that the same was made in good faith and without any intent to defraud the creditors of said George D. Hanna, so as to overcome the presumption of fraud arising by virtue of the provisions of said section, such sale is held void as to the said Nathan Kronman, and said property, therefore, remained the

property of said George D. Hanna subject to said execution at the time of said levy.

"(3) I find as a further conclusion of law that Nathan Kronman was a creditor of George D. Hanna within the terms of section 9533, 3 Comp. Laws, and that said sale, having been made with the intent to hinder, delay, and defraud the creditors of the said George D. Hanna, was void as against the said Nathan Kronman, and said property was therefore subject to said execution at the time of the levy thereof as the property of said George D. Hanna."

It would serve no purpose of value to the profession to set out or examine the evidence upon which the court below based its conclusions as to the facts. Upon this point, it is sufficient to say that we think the evidence fully warranted the finding of the trial court that the sale in question was made for the express purpose of avoiding liability upon the appeal bond. Two facts only will be noted as bearing upon the good faith of the parties: *First*, the bill of sale was made within a few days after George D. Hanna had become surety upon the appeal bond, and after he had been advised by counsel that he might in consequence thereof be obliged to pay the judgment; and, *second*, the instrument was kept from record until the day after judgment had been rendered against him upon said bond.

The only question of law requiring consideration is: Was Kronman, the obligee in the appeal bond, a creditor of George D. Hanna, the surety on such bond, prior to the conditions of the bond becoming absolute within the terms of Act No. 223, Pub. Acts 1905, commonly called the "bulk-sales act?" It is urged by appellant that George D. Hanna's liability upon the bond could not be fixed until judgment upon appeal, and therefore that the obligee in the bond was not, at the time of the sale, one of his creditors. A creditor is "one who has a right to require of another the fulfillment of a contract or obligation." 11 Cyc. p. 1193, and cases cited in the note. It cannot be said that George D. Hanna's liability was not fixed at the moment he signed the bond. It was fixed in amount,

though contingent upon the failure of his principal to prosecute his appeal, and reverse or pay the judgment. A similar question was considered in *Cutler* v. *Steele*, 85 Mich. 627 (48 N. W. 631), where the court said:

"But complainant insists that Steele did not become a debtor to the bank until the maturity and protest of the note. It is true that the ultimate liability of Steele depended upon a contingency; still he had made a contract fixed and definite. The bank was under no obligation to pursue the maker of the note, but might look solely to the indorser. It is just as important in commercial transactions that the financial condition of indorsers, guarantors, and sureties be known as that of the principal debtors. In fact, credit is often given in reliance upon their standing rather than upon that of the principal debtors. We are therefore of the opinion that the term 'creditors,' used in the statute, includes those who have entered into contracts with parties as indorsers, guarantors, or sureties."

See, also, *Jackson* v. *Seward*, 5 Cow. (N. Y.) 67; *Karst* v. *Gane*, 61 Hun (N. Y.), 533 (16 N. Y. Supp. 385); *Bowen* v. *State*, 121 Ind. 235 (23 N. E. 75); *Carlisle* v. *Rich*, 8 N. H. 44; *Russell* v. *Stinson*, 4 Tenn. 1; *Kerber* v. *Ruff*, 4 Ohio S. & C. P. Dec. 406; *In re Appeal of Surety*, 5 Ohio S. & C. P. Dec. 571. George D. Hanna was accepted as surety upon the appeal bond solely on account of his ownership of the stock of goods in question. To permit him to dispose of his stock immediately thereafter, without notice to the obligee in the bond, thus rendering the bond worthless, would result in encouraging the very fraud which the statute was designed to prevent. The statute is remedial in character, and should be given such a construction as will effect the plain legislative intent.

The judgment is affirmed.

BIRD, C. J., and MCALVAY, BLAIR, and STONE, JJ., concurred.

HERPEL *v.* HERPEL.

1. APPEAL AND ERROR—SAVING QUESTIONS FOR REVIEW.
   On appeal from a decree in chancery no modification will be made in favor of a party who does not appeal.
2. STATUTE OF FRAUDS—LIFE ESTATE—CONTRACTS.
   As between a grantor who has reserved a life estate in real property, and the remainderman, an oral agreement evidenced by no writing modifying the terms of the original conveyance, by providing for possession by the remainderman and for the support of the tenant for life is invalid.
3. LIFE ESTATE—REMAINDER—LANDLORD AND TENANT—IMPROVEMENTS.
   Permanent improvements made by a remainderman of his own accord, who assumes possession and cultivates the property for the life tenant, are presumed to be made for his own benefit.
4. SAME—VENDOR AND PURCHASER—REMEDIES—WAIVER.
   Where premises were conveyed subject to a life lease, and possession reserved in the grantor, failure to institute ejectment proceedings to dispossess the remainderman, who assumes to take possession of the premises, does not operate as a waiver of the stipulated installments constituting the agreed purchase price.
5. SAME—RENTAL—EVIDENCE.
   A decree for rent due from the remainderman in possession to the life tenant, is improper, where the evidence is insufficient to determine the rental value of the premises.

Appeal from Saginaw; Gage, J. Submitted June 9, 1910. (Docket No. 33.) Decided September 27, 1910.

Bill by Ernst Herpel against John C. Herpel to set aside a deed. From a decree for complainant, defendant appeals. Modified and affirmed.

George B. Brooks (*James H. Davitt*, of counsel), for complainant.

Eugene Wilber and *Fred L. Eaton*, for defendant.

McALVAY, J. Complainant and his wife were the owners of a farm of 250 acres in Saginaw county; the title of 75 acres of which was in the husband and wife jointly and the balance in the wife. This land was conveyed by them jointly to defendant December 24, 1904, subject to a certain incumbrance of $200. As part of the same transaction, and in consideration of such conveyance, defendant at the same time made, executed, and delivered to complainant the following written agreements:

"SAGINAW, MICH., Dec. 24, 1904.

"I hereby agree to pay the taxes on the Herpel farm, to pay $25.00 per month to Ernest Herpel and Katherina M. Herpel as long as they both or either of them do live, in consideration of their deeding to me free of all incumbrance, except mortgage now on file, their farm known as the Herpel Farm, and on which they now live.

[Signed] "JOHN C. HERPEL."

"SAGINAW, MICH., Dec. 23, 1904.

"In consideration of one dollar to me in hand paid and other valuable consideration, I hereby agree to lease and rent to Ernest Herpel and Katherina M. Herpel, his wife, the following described farm being situated in the township of Taymouth, county of Saginaw and State of Michigan, and described as follows: Lots 2 and 3 except the north 15 acres thereof, and all of lots 4, 5, 9 and 10 in section 7, town 10 N., Range 5 East, they, the said Ernest Herpel and Katherina M. Herpel his wife, to have and to hold peaceable possession of the same and to have the entire use of the entire premises above described, including all of the buildings and appurtenances thereunto belonging as long as they both or either do live.

"In witness whereof, I have hereunto set my hand and seal this 23rd day of December, 1904."

Complainant and his wife were old people, of the age of about 80 years, at the time of this transaction, and it is charged in the bill of complaint filed asking that the conveyance be set aside that it was procured by fraud and undue influence, that the grantors did not understand that they were making conveyance of their property, and that

the wife at the time was mentally incompetent to transact business, and weak from long sickness caused by an incurable malady. Complainant also charged that defendant was financially irresponsible. The bill contained a prayer for general relief. The value of this land conveyed to defendant was about $6,000.

Defendant was not related to complainant and his wife. They had no children. Defendant at the age of two years was left with them by his father in 1857, and was brought up by them as a member of the family, until he was married in 1879, and went to live upon 69 acres of land complainant's wife had given him. He lived on this farm about a year, and then came back and was furnished a house to live in on the farm of complainant and his wife. In 1882 he sold the land which had been given him and moved to South Dakota, where he engaged in the implement business. He afterwards went through bankruptcy, and had nothing left over and above exemptions. The date of bankruptcy is not fixed by defendant, who thinks it was 1899. After the papers above set forth were given, defendant returned to South Dakota, leaving complainant and his wife in possession of the farm, and the record shows that he made payments as agreed. He came back on account of the illness of complainant's wife shortly before her death, which occurred January 8, 1906. During that visit, he claims that he made a verbal agreement with complainant, at his request, to come back and take the farm and certain personal property, and take care of complainant and give him a home for the rest of his life. Defendant did return in March, 1906, and claims he did this at great financial loss, and that under this verbal agreement he has since operated the farm and cared for the complainant. Complainant denied that any subsequent agreement was ever made, claiming that defendant returned and took charge of the farm without authority, and assumed to make repairs and improvements without consulting him; that on account of harsh and violent treatment complainant left the farm in September, 1908,

and went to live with a relative of his deceased wife, and remained away until June, 1909, when defendant brought him back about two weeks before this case was heard. After defendant took charge of the farm in April, 1906, no monthly payments were made by him to complainant. In November, 1907, defendant, alleging that he was interested as a son, petitioned for, and secured the appointment of, a special guardian of complainant's estate on the ground of mental incompetency; the petition stating that there was no real estate, and $433 personal estate, and that an application for a general guardian was then pending.

Upon the hearing in this case a decree was granted complainant, determining that he held a life estate in said lands, and also that there was due him $717.53 unpaid payments under his written agreement from the time defendant took possession under the claimed verbal agreement; and it was also decreed that defendant pay $25 monthly during complainant's lifetime, and that defendant pay to complainant $150 as rental of the farm from September, 1908, to June, 1909, and $100 per year thereafter as long as he remained in possession, and also that these and all amounts due and to become due from defendant were declared a lien upon the land. Defendant has appealed. The complainant has not appealed.

From an examination of this record we are satisfied that the court below in the main determined the case correctly. There is no dispute but that the conveyance and written agreements were entered into as alleged. Complainant has not appealed from a decree establishing and affirming such conveyance, and it will therefore not be modified or changed in his favor. *Proctor* v. *Robinson*, 35 Mich. 284, and notes. As between these parties, a life estate was reserved by complainant and his wife, and the survivor of them, by the terms of the written agreements. The later verbal agreement claimed by defendant is not satisfactorily established by his testimony, and, if established under the circumstances of this case, would be in-

valid, and would not operate to divest the complainant of his interest in these lands, because not in writing.

Defendant upon this appeal makes but two objections to this decree. The principal objection is that the court should not have charged him with the aggregate amount of the payments due under his written agreement after he took charge of the farm. This claim is founded upon his claimed verbal agreement, and that he has made permanent improvements upon the farm and taken care of complainant. We have already disposed of the verbal agreement, and it requires no further consideration. Since he assumed charge of this farm, defendant has had all the benefit of all the income therefrom without accounting to complainant. The complainant under his life lease was entitled to the full and absolute possession of the premises, and to the monthly payments of the consideration for the conveyance agreed to be made by defendant. The fact that during that time no proceedings were instituted to eject defendant is no waiver of the complainant's right to the payments. Complainant did not make, and on account of his weakened mental and physical condition as shown by defendant could not have made, any binding agreement waiving these payments. During nine or ten months of the period complainant did not reside with defendant and was not supported by him. The record shows that he has paid no more money to complainant on this agreement since April, 1906, than was credited to him by the court in its decree. He has expended money in permanent improvements. As the remainderman, subject to the life estate of complainant, such improvements having been made of his own accord, will be presumed to have been made for his own benefit. All the money paid by defendant since the conveyance to him is but a small part of the value of the premises. The court was justified from the record in finding the amount stated in the decree as a balance on account of the agreed monthly payments.

The other objection is to that part of the decree requiring defendant to pay a rental of the farm of $150 from

September, 1908, to June, 1909, and afterwards at the rate of $100 per year. It is claimed that this is not supported by the evidence, nor warranted under the bill of complaint. While we are satisfied that under the general prayer for relief the court might dispose of all matters between these parties arising out of the relations between them in their dealings with this property, yet, we do not think that, from the evidence in this record, the court could say what would be a reasonable amount per annum which complainant should receive as the value for the use and occupation of these premises, and therefore in that respect the decree should be modified. The court correctly decided that, under the written agreement between the parties, the complainant held a life estate in the premises with full right to possession. He had been deprived of that possession by defendant, and under the rule adopted by this court, where a court in chancery has jurisdiction of the parties and of the subject-matter, complete relief will be granted, and all questions arising out of the controversy will be disposed of, this matter should be passed upon in this case. The court will therefore remand the cause to the circuit court for the sole purpose of taking proofs as to the value of the use and occupation of the premises during the time actually occupied by defendant, the court to find said amount from said proofs and charge the same against defendant to be added to the amount already found due complainant. In other respects the decree of the circuit court is affirmed, with costs of both courts in favor of complainant.

BIRD, C. J., and BROOKE, BLAIR, and STONE, JJ., concurred.

ATTORNEY GENERAL, *ex rel.* LINNELL, *v.* GAY.

1. CORPORATIONS — FRANCHISE — TERMINATION — CONSTITUTIONAL LAW.

   A mining corporation, organized in 1853, ceased to exist as a corporation *de jure* at the expiration of 30 years, at which time there was no constitutional method of extending the term of its franchise.

2. SAME—LACHES OF STATE—QUO WARRANTO.

   No right to exercise the corporate franchise could be gained by estoppel or laches on the part of the State officials, since there was no authority under statute or otherwise to revive the corporation.

3. SAME — DE FACTO EXISTENCE — REINCORPORATION — CONSTITUTIONAL LAW.

   An invalid attempt to extend the life of the corporation, made in 1882, was not validated by the constitutional amendment of 1889, and the enactment of Acts Nos. 129 and 142, Pub. Acts 1889, which require specific action to renew corporate life. Const. of 1850, Art. 15, § 10.

4. QUO WARRANTO — RIGHT TO INSTITUTE — PARTIES — PUBLIC GRIEVANCE.

   A plea to an information in quo warranto, claiming in defense to the writ that no public grievance exists, and the writ is prosecuted for the private benefit of relator, and that he is estopped to assert any defects arising from the expiration of the corporate charter, does not constitute a sufficient defense to the information.

Quo warranto proceedings by John E. Bird, attorney general, on the relation of John W. Linnell, Jr., against Joseph E. Gay and others to determine their right to exercise the franchises and privileges of a corporation: On demurrer to certain pleas filed by defendants. Submitted June 14, 1910. (Docket No. 49.) Demurrer sustained September 27, 1910.

Miller, Smith, Paddock & Perry, for relator.

Robson & George, for respondents.

HOOKER, J. An information was filed by the attorney general upon the relation of John W. Linnell, Jr., against a number of persons, charging them with exercising the franchises and privileges of a corporation of this State without authority of law. Several defendants united in four pleas, to which the attorney general has demurred. The question before us is, therefore, whether these pleas state a good and valid defense to the charge.

A brief statement of the allegations of these pleas will suffice to show the nature of the case and the questions to be decided. The Evergreen Bluff Mining Company, a valid corporation, was organized in this State in August, 1853, for the purpose of mining copper. It carried on business until the expiration of the constitutional period, when it had a tract of valuable land and perhaps other property. It has never parted with the land unless it be by operation of law. In March, 1883, it undertook to extend its corporate life for a further period of 30 years under the provisions of Act No. 16, Pub. Acts 1882, by a full compliance with the provisions of said act. From that time to this the stockholders have exercised the rights, powers, and privileges, and fulfilled the duties and liabilities of a corporation, all of which has been well known to the attorney general, the people, and the relator. Act No. 16 aforesaid has been amended twice by the legislature, but has been held by this court to have no application to a corporation, which had been organized and exercised corporate powers for the constitutional period of 30 years. *Mason* v. *Perkins*, 73 Mich. 303 (41 N. W. 426). In April, 1889, the electors of the State adopted the following amendment to the Constitution:

"SEC. 10. No corporation except for municipal purposes or for the construction of railroads, plank roads and canals, shall be created for a longer time than thirty years; but the legislature may provide by general laws applicable to any corporations for one or more extensions of the term of such corporations while such term is running not exceeding thirty years for each extension, on the consent of not less than a two-thirds majority of the cap-

ital of the corporation; and by like general laws for the corporate re-organization for a further period not exceeding thirty years, of such corporations whose terms have expired by limitation, on the consent of not less than four-fifths of the capital: *Provided*, That in cases of corporations where there is no capital stock the legislature may provide the manner in which such corporations may be reorganized." Const. art. 15, § 10.

In June, 1889, the legislature enacted such a law as was contemplated by said amendment. Apparently respondents have not since taken the prescribed steps to reorganize under such statute. Act No. 129, Pub. Acts 1889. Meantime said stockholders in the name of and as such corporation have regularly elected officers, filed reports, transferred stock on its books, and sold and conveyed property, and claimed to be a corporation, all of which the attorney general and other State officers and relator knew. The pleas allege, further, that, knowing these things, relator, who was a stockholder of the Mass Consolidated Mining Company, which had for five years tried to purchase the mining lands and property of the Evergreen Company by direct purchase, or by obtaining a controlling interest in its capital stock, in order to accomplish that at such price and on such terms as he should dictate, has purchased 4,958¾ shares of the stock of said corporation, and caused the same to be transferred on the books of the corporation, and on the same day asserted that respondents were not a valid corporation, and, failing to obtain respondent's stock, threatened to institute these proceedings through the attorney general to cause the winding up of the concern and the sale of its property. It was alleged, further, that the former owners of said 4,958¾ shares of said stock remained stockholders and participated in the acts of said corporation until they sold their stock to relator and his associates.

Counsel for respondents contend that the information should be quashed for the following reasons:

(1) The acquiescence, delay, and laches of the State.

(2) There is, in fact, no public grievance and the writ is prosecuted for the private benefit of the relator.

(3) There being no public grievance, relator is estopped from asserting the alleged defects in the mining company's charter.

The pleas in the case show that the defendant corporation existed as such for the full constitutional period of 30 years, and that, while it attempted to continue its life through a reorganization, that was not accomplished because the Constitution forbade. It is obvious that it is not and has not been a corporation *de jure* for many years, although it has gone on conducting its business as a corporation, and claims to be at least a corporation *de facto*. It is certain that the life of this corporation ended when the constitutional period of 30 years expired, and it is no less certain that at that time there was under the Constitution no lawful method of extending its life or reviving it. *Mason* v. *Perkins*, 73 Mich. 303 (41 N. W. 426). It would seem as obvious that, if there was no authority anywhere to do either of these things, the same could not be accomplished through estoppel or laches, for it would be extraordinary if a person or officer could accomplish by recognition an act which he was not authorized or was forbidden to do by express and unqualified direct action. See *Attorney General* v. *Marr*, 55 Mich. 445 (21 N. W. 883).

The contention that the action of the legislature at the session of 1889 after the adoption of the amendment had the effect to validate the action taken in 1882 to extend the corporate life does not appeal to us. Aside from any question of vested legal or equitable rights in the stockholders after the expiration of corporate life and the effect thereof on the validity of legislation attempting to subject interests of nonconsenting stockholders to the action of others, we find intrinsic evidence in these acts indicating an absence of such intention, as they expressly require action of specific kind to accomplish a renewal of corporate life. See Acts Nos. 129 and 142, Pub. Acts 1889. We think it unnecessary to discuss the claim that this is a *de facto* corporation. *Eaton* v. *Walker*, 76 Mich. 579 (43 N. W. 638, 6 L. R. A. 102).

The remaining question requiring notice is the claim that there is no public grievance, and we may add the claim that the action of the relator is inequitable.

We cannot say that there is no public grievance when the stockholders of a corporation continue to act as such after the limitation prescribed by the Constitution has been reached, thereby usurping powers not belonging to them. The attorney general is expressly authorized (not to say required) to file an information upon his own relation, or upon relation of any private party,—

"When any association or number of persons shall act as a corporation within this State without being legally incorporated." 3 Comp. Laws, § 9939, subd. 3.

In a sense there is always a public grievance when corporate powers are being unlawfully exercised, and we are of the opinion that we should not ordinarily question the exercise by the attorney general of the discretion which the law cited confides to him. We do not say that in no case can we refuse judgment of ouster, but it would be a very exceptional case that should lead us to deny such judgment to the State where the infraction of law is clear and undisputed. We do not mean to imply that there is any obligation upon the attorney general under this section to file an information when, in his judgment, there are proper reasons of policy for not doing it, or any obstacle to a refusal to do so when solicited by private persons in the furtherance of their own interests, provided State interests do not require it. See 32 Cyc. pp. 1432, 1433.

There is nothing in these pleas that, if proved, would constitute a valid defense to the information. What judgment should be rendered may depend upon the proofs taken in the case. 32 Cyc. p. 1434. It follows that the demurrers should be sustained. A period of 30 days is allowed to defendants to file other pleadings in the cause.

OSTRANDER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

SWANTEK *v.* JARMOSZKI.

1. JUSTICES OF THE PEACE — APPEAL — PLEADING — PLEA PUIS DARREIN CONTINUANCE—SPECIAL DEFENSE.
   The defense, on appeal from justice's court, that the judgment in the court below was rendered while the justice was absent from the jurisdiction, should not be presented by a plea *puis darrein continuance*, but by a special notice of defense.

2. SAME—CERTIORARI—APPEAL—JURISDICTION.
   The circuit court has no jurisdiction to review by certiorari a justice's judgment which has been removed by appeal of the opposite party to the circuit court, before the writ of certiorari was issued.

3. SAME—CERTIORARI—DISCRETION.
   The circuit court may exercise some discretion in refusing to permit an appeal from justice's court to be dismissed by the appellant.

4. SAME—JUDGMENT—DEFENSES—RECORD.
   The entry of judgment upon the docket of the justice imports the presence of the justice within the jurisdiction, constitutes the best evidence of such presence, and may not be disputed on appeal.

Error to Kent; McDonald, J. Submitted June 14, 1910. (Docket No. 62.) Decided September 27, 1910.

Assumpsit by Peter Swantek against Stephan Jarmoszki for work and labor. Plaintiff recovered judgment for an insufficient amount, and appealed to the circuit court. A judgment sustaining defendant's plea *puis darrein continuance*, and dismissing the appeal, is reviewed by plaintiff on writ of error. Reversed.

George Hollway, for appellant.

Hatch & Raymond, for appellee.

OSTRANDER, J. Plaintiff appealed to the circuit court

from a judgment in his favor rendered in justice's court. The return on appeal was made and filed May 19, 1908, and shows a valid judgment rendered May 11, 1908. Thereafter, on June 9, 1908, the attorney for the defendant made an affidavit for a writ of certiorari which was allowed and issued June 10, 1908, and to this writ the justice made a return dated June 30, 1908. The use first made of the return to the writ of certiorari and the effect given to it in the circuit court is indicated by the opinion of this court reported in 159 Mich., at page 99 (123 N. W. 573). The cause, having been remanded, came on for trial of the said appeal on March 8, 1910, at which time defendant filed a plea *puis darrein continuance*, setting up that after the last continuance of the cause—that is, after January 25, 1909, and on May 5, 1909—said judgment of the justice had been reversed and annulled by the judgment of said circuit court in said certiorari proceedings, which said judgment of the circuit court was in force. It set up also that the judgment was void and the justice lost jurisdiction "to make and return the appeal" because, after the cause was submitted, on May 8, 1908, and before he decided the case, the justice left the city of Grand Rapids and did not return thereto within the time limited by law for deciding the case, but decided the case "and rendered said judgment" when in the county of Benzie, in Michigan, beyond his territorial jurisdiction. In support of this plea, and over the objections of the plaintiff, the defendant offered in evidence the return of the justice to the writ of certiorari, the judgment in certiorari, and the testimony of the justice's clerk. The court dismissed the appeal, finding that the justice had no jurisdiction to render the judgment. The return of the justice of the peace to the writ of certiorari states that he was in fact absent from the city of Grand Rapids, in another county of this State, on the day the judgment was rendered, and that he transmitted his decision, by mail, to the clerk of his court, who entered the same in the docket, which was later signed by

the justice. He returns, also, that, after the cause was submitted to him, he announced that he would take four days in which to decide it, and that his letter to his clerk, containing his decision, dated May 11th, reached the clerk on May 12th, and that he did not return to Grand Rapids until more than the four days had elapsed.

The case now presented is not, in its facts, precisely the case considered by this court at the former hearing, in this, that there has since been a judgment rendered in the certiorari proceeding. The practice was, in any event, irregular. The matter set out in the plea *puis darrein* should have been treated as special matter of defense (*People, ex rel. Esper*, v. *Plank-Road Co.*, 125 Mich. 366 (84 N. W. 290); *Burt* v. *Wayne Circuit Judges*, 90 Mich. 520 (51 N. W. 482); Circuit Court Rule 9, Stevens' Notes), and the trial should have proceeded upon the issue theretofore joined and the alleged special matter.

The meritorious question was, if not directly, at least practically, determined by the former opinion of this court. The circuit court became possessed of this cause when the return to the appeal was filed, "the same as if it had been originally commenced in said appellate court, subject to the same rules and regulations." 1 Comp. Laws, § 918. There was then no judgment of the justice to be affected by any other proceeding. The right to review the judgment of the justice in certiorari proceedings did not exist because there was no judgment to be reviewed. The circuit court had no jurisdiction in certiorari, and this appears, affirmatively, by the record. The judgment in certiorari is therefore void. It is suggested that in a similar case the plaintiff may dismiss his appeal, and the justice's judgment may be thus revived after the time limited for suing out a statutory writ of certiorari has expired. We apprehend no trouble will ever arise out of such a state of facts. The common-law writ of certiorari issues in proper cases, and the circuit court may also exercise some discretion in refusing to permit an appeal to be dismissed. The law contemplates a trial upon the

merits, in some court, in cases like the one before us, and such a trial this defendant may have in the circuit court.

The judgment is reversed, and the record remanded so that a trial may be had.

It is inferred from the course pursued in this case that the matter now twice successfully urged in the circuit court by defendant will again be urged, if it is possible to do so, as special matter of defense, or otherwise, upon the trial of the cause. It is therefore proper to say that the alleged controlling fact upon which defendant relies, namely, that the judgment was rendered by the justice at a time when he was not in the jurisdiction, is not available to defendant on the trial of the appeal. The day on which a justice renders judgment is required to be entered on his docket. The entry, when made, imports his presence within the jurisdiction, as well as the fact and amount of the judgment. As to such occurrences the docket is the best evidence and may not be disputed by him. *Weaver* v. *Lammon*, 62 Mich. 366, 368 (28 N. W. 905). The opinion of this court in *Toliver* v. *Brownell*, 94 Mich. 577 (54 N. W. 302), emphasizes the rule, but in the conclusion appears to treat the fact of the presence or absence of the justice, on judgment day, one which may be established by parol. We approve the doctrine stated, but not the conclusion which was reached.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

GODA v. MAURER.

1. APPEAL AND ERROR—DIRECTING VERDICT—QUESTION OF FACT.
In cases where a verdict has been instructed, the case made by the party ruled against must be taken as true in determining, on error, whether there was anything to be submitted to the jury; and the strength or weakness of the evidence presented by the opposite party need not be considered.

2. MASTER AND SERVANT — ASSUMED RISK — SCAFFOLDS — NEGLIGENCE.
A common laborer employed to wheel brick, does not assume the risk of negligence in constructing a scaffold built according to the employer's direction, by a method which was insufficiently strong, although the employé himself aided in the work and observed the method, but had no knowledge of how scaffolding should be constructed.

Error to Monroe; O'Mealey, J. Submitted June 14, 1910. (Docket No. 52.) Decided September 27, 1910.

Case by John Goda against John Maurer and Charles Maurer, copartners as Maurer Bros., for personal injuries. A judgment for defendants on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

Willis Baldwin and *Ira G. Humphrey*, for appellant.

E. R. Gilday and *Thornton Dixon*, for appellees.

MCALVAY, J. This was an action for damages for personal injuries received by plaintiff, as he claims, by reason of the negligence of defendants. Defendants were copartners, engaged in business as contractors and builders, and, at the time plaintiff was injured, were engaged in the construction of a brick building in the city of Monroe. Plaintiff, a common laborer, had worked for defendants prior to his injury for over two months, while they were engaged upon other contracts. On this building his work, that of a common laborer, was wheeling brick.

While so employed on the day in question, he was ordered by one of the defendants to assist in building a scaffold in said building, under the direction and in the manner ordered by said defendant, and afterwards was ordered by said defendant to go upon said scaffold, to work in placing brick which were tossed up to him, and while so employed about 30 feet in length of the scaffold gave way, as he claims, because of insufficient nailing, and plaintiff was precipitated about 12 feet to the floor, with the brick upon him, and was severely and probably permanently injured.

After hearing all of the evidence of the parties, the court instructed a verdict in favor of defendants, on the ground that plaintiff had assumed the risk. Judgment was accordingly entered, and plaintiff, upon writ of error, asks for a reversal, upon the ground, principally, that the court erred in instructing a verdict for defendants.

As has been very frequently stated by this court in cases where a verdict has been instructed, the case made by the party ruled against must be taken as true in determining whether there was anything to be submitted to the jury. The strength or weakness of the evidence presented by the opposite party need not be considered.

The evidence of the plaintiff and his witnesses tends to show that he was a common laborer, employed up to the day of the accident in wheeling brick or other common labor; that on this day he was ordered to assist this defendant in building this scaffold, under his direction and orders and in his presence; that he was ordered by him not to use more than three nails in nailing the support of the scaffold called the "ledger board," and not to drive them clear up, but to leave sufficient to get the hammer claw under the heads of the nails, so that they could be easily drawn without splitting the boards; that plaintiff followed such instructions; that this was the first scaffold he had ever built, and he had no knowledge of how scaffolding should be built to be sufficiently strong, and did this work and went upon the scaffold relying upon the judgment and obeying the

orders of defendants, without any knowledge of its weakness; that this defendant assured plaintiff the scaffold was strong enough to hold an elephant, and he thought that was enough; that a scaffold so nailed, to be used for the purpose this one was used, was not sufficiently nailed, and not safe; and that it fell because this nailing pulled apart and let it down. This brief outline of plaintiff's case is sufficient to show that there was a case proper to be submitted to the jury. This should have been done by the court under proper instructions. It was error for the court to instruct a verdict for defendants.

The judgment is reversed, and a new trial ordered.

OSTRANDER, HOOKER, MOORE, and BROOKE, JJ., concurred.

CHAPMAN v. STRONG.

1. HIGHWAYS—AUTOMOBILES—MOTOR VEHICLE LAW—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

   Under conflicting claims and evidence of the respective parties, in an action for negligent conduct in operating an automobile, resulting in plaintiff's horse becoming frightened and overturning his buggy, the question of contributory negligence *held* to be a question of fact.[1]

2. SAME—NEW TRIAL—WEIGHT OF EVIDENCE.

   On motion for a new trial the verdict is *held* not to be against the weight of the evidence.

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[1] As to duty and liability of operator of automobile with respect to horses encountered on highways, see note to *Mahoney* v. *Maxfield* (Minn.), 14 L. R. A. (N. S.) 251.

As to law governing automobiles generally, see note to *Christy* v. *Elliott* (Ill.), 1 L. R. A. (N. S.) 215.

3. SAME—NEGLIGENCE—DIRECTING VERDICT.
Evidence that defendant did not stop his automobile when plaintiff signaled to stop, and that he failed to turn out sufficiently to permit plaintiff to pass, although contradicted by defendant's witnesses, raises an issue of fact as to the negligence of the defendant.

4. TRIAL—INSTRUCTIONS TO JURY—REFUSAL.
No error is committed in refusing requests to instruct the jury, which are covered by the general charge.

5. SAME—SPECIAL QUESTIONS—STATUTES.
It is proper to refuse to submit a special question which does not meet the statutory requirements. 3 Comp. Laws, § 10237.

6. SAME—CROSS-EXAMINATION.
The circuit judge did not abuse his discretion in permitting cross-examination of defendant and his witnesses relative to their whereabouts on the day of the injury and the amount of intoxicants used by them.

Error to Kent; McDonald, J. Submitted June 14, 1910. (Docket No. 5.) Decided September 27, 1910.

Case by Charles M. Chapman against James M. Strong for personal injuries. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Powers & Eardley, for appellant.

Myron H. Walker, for appellee.

MOORE, J. Plaintiff, in July, 1908, was driving his horse down a long hill, when he met an automobile driven by the defendant. His horse became frightened. The buggy was overturned. The plaintiff was hurt. Claiming it was the negligence of defendant which caused the injury, the plaintiff sued him. The case was tried before a jury. A judgment of $550 was recovered by the plaintiff, and the case is brought here by writ of error.

In view of the questions raised, the charge of the court becomes important. After stating the claims of the parties, the jury was instructed:

"The burden of proof is on the plaintiff to establish by a fair preponderance of the evidence every fact necessary for his recovery in this action. Before he can recover he must satisfy you by a fair preponderance of the evidence of two things: *First*, that the defendant was negligent, and that such negligence was the proximate cause of the injury which the plaintiff received. *Second*, that he himself was not guilty of negligence which contributed in any degree to the injury. Unless the plaintiff has established both of these propositions by a fair preponderance of the evidence, he cannot recover.

"When an injury is received by one person which is in part due to the negligence of another person, but it also appears that the person injured contributed to the injury in some degree by his own negligence, the law does not undertake to compare the relative negligence of each, but lays down the rule that, if the person injured contributed in any degree to the injury by his own negligence, he cannot recover, even though the other person was more negligent. For that reason the plaintiff in this case must show that the injury was caused by the negligence of the defendant, and that his own negligence did not contribute thereto.

"Negligence is defined as a failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. It is sometimes defined as a failure to perform a duty implied by law which one person owes to another person; it is in another sense the want of ordinary care. Ordinary care is such care as an ordinarily prudent person would take under the same or like circumstances. An automobile has the same right upon our public roads as carriages and other conveyances, but their construction and operation is such as to make them objects of fright to horses and other animals. To insure the safety of travelers and those who have to use the horse as a means of conveyance upon the highways, our legislature has defined the duties of a man who uses the automobile, and I will read to you some of those sections of the laws of 1905 and 1907 which have any application to this case. Section 14 provides:

"'Upon approaching a person walking in the roadway of a public highway, or a horse or horses, or other draft animals, being ridden, led, or driven thereon, a person operating a motor vehicle

shall slow down to a speed not exceeding ten miles per hour and give reasonable warning of its approach, and use every reasonable precaution to insure the safety of such person or animal, and in case of a horse, or horses, or other draft animals, to prevent frightening the same.' [Act No. 196, Pub. Acts 1905.]

"Section 15, which has more particular application to the case we have before us, reads as follows:

"'Any person operating a motor vehicle shall at request or on signal, from a person riding, leading, or driving a horse or horses, or other draft animals, guide such motor vehicle to the right of the wrought or traveled portion of the highway, and immediately bring such motor vehicle to a stop, and if requested, shall cause the motor of such vehicle to cease running so long as shall be reasonably necessary to prevent accident, and insure the safety of others. And it shall also be the duty of any male chauffeur or driver of any motor vehicle, and other male occupants thereof, over the age of fifteen years, while passing any horse or horses or other draft animals which appear badly frightened, or upon the request of the person in charge of and driving such horse or horses or other draft animals, to give such personal assistance as would be reasonable to insure the safety of all persons concerned to prevent accident.' [Act No. 196, Pub. Acts 1905.]

"Section 16 reads as follows:

"'Whenever a person operating a motor vehicle shall meet on a highway any other person riding or driving a horse or horses or other draft animals or any other vehicle, and there being no occasion to stop as above provided, the person operating such motor vehicle shall seasonably turn the same to the right of the center of the traveled portion of the highway; while the person approaching shall likewise turn from the center of the traveled portion of the highway so as to pass the motor vehicle on the opposite side of the center of the highway to which the motor vehicle has been turned. And any person so operating any motor vehicle shall, at the intersection of a public highway, keep to the right of the intersection of the centers of such highways, when turning to the right and pass to the right of such intersection when turning to the left.' [Act No. 196, Pub. Acts 1905.]

"That has not so much application to this case as section 15, which I have referred to in regard to signals and the warning to automobiles.

"Now the plaintiff claims that the defendant that day on the highway near Sparta disregarded and neglected the duties imposed upon him by the law, which I have just

read, that is, that he didn't stop his machine when signaled so to do; that he did not guide it to the right side of the traveled portion of the highway and give the plaintiff an opportunity to pass safely.

"If you find that he was thus negligent, and that such negligence caused plaintiff's injury, the plaintiff would be entitled to recover, providing he himself was not guilty of any negligence which contributed to the injury. But independent of these acts of the legislature which I have just read to you, the law imposes the duty upon the defendant of using reasonable care and caution in managing his automobile upon the public road. He is held to an exercise of ordinary and reasonable care in the management of his automobile so as to save others from injury.

"Now, then, if, in applying these rules to this case, you find that plaintiff's claim is true, namely, that his horse became frightened at defendant's automobile, and that he and his companion Rhodes signaled and called to the defendant, and that defendant saw or should have seen and heard them, but did not guide his automobile to the right side of the road and stop it and give plaintiff an opportunity to pass, he, the defendant, would be guilty of negligence, and if such negligence was the proximate cause, that is, the cause which produced the injury, the plaintiff would be entitled to recovery, provided, of course, as I have stated, that he himself was not guilty of any negligence that contributed to the injury. If the plaintiff has failed to show by a fair preponderance of evidence that the defendant was negligent, and that such negligence was the proximate cause of the injury—I say if the plaintiff has failed to show that, then you need not give the case further consideration, and your verdict should be for defendant.

"But if you find that the defendant was guilty of negligence that caused the injury, you will then consider the second question, namely, Was the plaintiff himself guilty of any negligence that contributed to the injury? The plaintiff is held to the exercise of ordinary care for his own protection, such care as an ordinarily prudent man would use for his own protection under the same circumstances. This care should be commensurate with the apparent danger. Did the plaintiff, Chapman, at the time of this accident use ordinary care in protecting himself against danger? In determining this fact you must consider the nature and disposition of the horse as shown by

the evidence and the plaintiff's knowledge of it. Also the danger as it appeared to him at the time, the character of the hill and road, and the appearance of the automobile, are all important matters for you to consider in determining whether the plaintiff used ordinary care in avoiding every apparent danger.

"If the plaintiff's horse was fractious, and plaintiff knew it, and if he believed that defendant would exercise ordinary care in managing his automobile, and yet danger to him was apparent, he would be negligent in driving toward the automobile under such circumstances. But plaintiff had a right to drive down the hill, and that act would not be negligent, providing he exercised ordinary care for his own safety in doing so. The plaintiff had a right to assume that the defendant would obey the law and stop his machine when requested, or when he saw evidence of fright in the horse, and so plaintiff had a right to continue down the hill if he believed he could safely do so by the exercise of ordinary care.

"These are questions for you to determine from the evidence. Did the plaintiff use ordinary care in protecting himself from apparent danger and dangers as they appeared to him under the circumstances at that time? As I have stated, if you find that the plaintiff was himself guilty of any negligent act, which in any degree contributed to his injury, he could not recover, and your verdict should be for the defendant. I also said that if the defendant was guilty of negligence, and such negligence was the proximate cause of the injury, and the plaintiff was free from negligence, then your verdict should be for the plaintiff."

Three special questions were submitted to the jury, which were answered by them as follows:

"(1) Was plaintiff entirely free from negligence even the slightest at time the accident occurred?

"*A.* Yes.

"(2) Could the plaintiff by the exercise of ordinary care have avoided the accident?

"*A.* No.

"(3) How far was the plaintiff from defendant when defendant first discovered the horse was frightened?

"*A.* About 60 feet."

A motion was made for a new trial, which motion was overruled.

The errors relied upon are stated by counsel to be the following:

"(1) The court erred in denying defendant's motion to direct the verdict for defendant on the ground that the testimony showed plaintiff guilty of contributory negligence which contributed to the injury and precluded him from recovering damages therefor.

"(2) The said judgment and verdict is erroneous, because the evidence shows the plaintiff guilty of contributory negligence and precludes his recovery.

"(3) That the said judgment and verdict is erroneous in that it is against the weight of evidence in the case.

"(4) That said judgment and verdict is erroneous, because there is no evidence showing negligence on the part of the defendant.

"(5) The court erred in refusing to instruct the jury as requested by the defendant in his fourth request.

"(6) The court erred in refusing to instruct the jury as instructed by the defendant in his sixth request.

"(7) The court erred in instructing the jury that the plaintiff was entitled to damages for the loss of his time.

"(8) The court erred in refusing to submit to the jury special question No. 4 as requested by the defendant.

"(9) The court erred in allowing counsel for plaintiff, against defendant's objection, to ask the witnesses Strong, Noble, and Ryan as to their whereabouts and as to whether or not they were drinking and intoxicated on the day of the accident, subsequent to the time it occurred.

"(10) The court erred in saying in the presence of the jury, while defendant's counsel was asking the plaintiff on cross-examination this question:

"'*Q.* You thought and believed Mr. Strong should have stopped, and you did not have to stop, is that it?

"'*The Court:* What difference does that make?

"'*Mr. Powers:* It is bearing on his negligence.

"'*The Court:* I don't see how it has any bearing on this case at all, and I will sustain the objection. (Exception taken by Mr. Eardley.)'

"These remarks of the court were prejudicial and led the jury to believe that it would not be the duty of the plaintiff to stop, even if he knew his safety demanded it.

"(11) Because the verdict and judgment is the result of bias and prejudice on the part of the jurors against owners of automobiles."

1 and 2 may be considered together. They are based upon the claim. We quote from the brief of counsel:

"Plaintiff did not know, as he admits, whether defendant saw him signal or not. He knew his horse was afraid and knew he would have trouble, but still he drove on toward the oncoming automobile in a dangerous place, where the road is only 15 to 20 feet wide, and an embankment on the side of the road. The plaintiff did nothing whatever to apprise the defendant of the frightened condition of his horse. We submit that he should ask Mr. Rhodes to help him in controlling the horse, or that he should have had Mr. Rhodes get out and warn defendant, or that he should have stood up or in some way attracted the attention of the defendant. As a matter of fact, the signal given was no signal at all, but he drove on because he wanted the horse to know that he could control her. We insist that it was gross negligence in the plaintiff to drive rapidly down the hill knowing the actual danger, and this, too, when he did not know whether the defendant saw or heard the signal, and when there was nothing in the action of the horse to indicate to him that it was frightened."

This statement is a one-sided one of what the record shows. There is testimony to the effect that, while the horse was a spirited one, it could be controlled; that plaintiff did not see the automobile until he had started down the hill; that he could not well turn around; that there was room to pass; that plaintiff would have been successful in passing if defendant had turned to the right and given part of the highway; and that the defendant paid no attention to the plaintiff. Upon the record made, the question of the contributory negligence of plaintiff could not be decided as a legal one.

3. In disposing of the motion for a new trial, the judge held that the verdict was not contrary to the weight of the evidence. After reading the record, we are satisfied he was right about that phase of the case.

4. There is an abundance of evidence in the record that defendant did not stop when signaled to do so, and that he failed to give a share of the road. While the testi-

mony was contradictory, it was not so conclusive that it could be said as a matter of law that defendant was not negligent.

5 and 6. So far as the requests mentioned were good law they were fully covered by the general charge.

7. The record discloses in great detail what plaintiff was able to do before the accident, what he was able to do afterwards, and what he did do. It cannot be said, in the absence of any request or any intimation to the court, that what he said about damages for loss of time was likely to be misunderstood, or that it was misunderstood. The amount of the verdict would not indicate that the jury was misled.

8. Question No. 4 was not so framed as to meet the requirements of the statute.[1]

9. Mr. Strong was the defendant; Mr. Noble and Mr. Ryan were with him in the automobile. Each of them as a witness had given his version of the occurrence. The trial judge did not abuse the discretion possessed by him in allowing the cross-examination of these witnesses about which complaint is made.

It is not necessary to discuss the other assignments of error. The case was carefully tried.

Judgment is affirmed.

OSTRANDER, HOOKER, MCALVAY, and BROOKE, JJ., concurred.

[1] The special question, No. 4, was as follows: Did plaintiff know the horse was afraid of automobiles and voluntarily assume the risk.—REPORTER.

PLOZKE *v.* DETROIT UNITED RAILWAY.

1. NEGLIGENCE—EVIDENCE OF INJURIES—DAMAGES—INSTRUCTIONS TO JURY—STREET RAILWAYS.

In an action for injuries to a passenger while riding on defendant's street car, it was not error to submit to the jury her testimony concerning her nervous condition, insomnia and pain in her arm and ankle, following the injury, although her physician testified that she did not show any effects of nervousness, that she did complain to him of her right arm, that the insomnia might result from such an accident, and it would be impossible to tell how long the ill effects might continue.

2. SAME—DAMAGES.

Two thousand dollars is not so excessive an amount, under the testimony, as to warrant the setting aside of the verdict.

Error to Wayne; Hosmer, J. Submitted June 14, 1910. (Docket No. 9.) Decided September 27, 1910.

Case by Augusta Plozke against the Detroit United Railway for personal injuries. A judgment for plaintiff of $2,000 damages is reviewed by defendant on writ of error. Affirmed.

Brennan, Donnelly & Van De Mark, for appellant.

Sellers & Sellers (*Cassius Hollenbeck*, of counsel), for appellee.

MCALVAY, J. The injury to plaintiff for which this suit was brought occurred while she was riding as a passenger on a car of defendant in the city of Detroit, when a car was derailed. It is the same occurrence described briefly in the case of *Mueller* v. *Railway*, *ante.*, 313 (127 N. W. 325), to which reference is had. No further facts and details as to how the accident occurred are given, for the reason that there is no dispute upon these

facts. Upon the trial no evidence was presented on the part of defendant. Plaintiff recovered a verdict of $2,000. Defendant is before this court upon writ of error, claiming that the verdict was excessive, and not justified by the evidence, also that the court erred in permitting the jury by his charge to consider the testimony given by plaintiff relative to her physical condition at the time of the trial, claimed by her to have been the result of her injury.

As we understand defendant's contention, it is that, because of the testimony of plaintiff's attending physician as to her condition, her testimony which tended to show a condition up to the time of the trial claimed as resulting from the accident should have been stricken out and withdrawn from consideration. The trial occurred October 20, 1909. The physician first attended her March 27, 1908, two days after the injury. His testimony as to the external injuries visible and found by him is that they were not very severe, and from those, as far as he could say, she had recovered. He says:

"The subjective symptoms were the most severe—the limited motion when she went to turn. We can tell when a person is actually hurt or faking in a complaint of that sort, because they will show that it hurts them when they move. * * * Her motions were limited, showing that she had been strained and sore. There is no doubt in my mind that plaintiff had been injured."

As to whether she had received any nervous shock, he said:

"She suffered some, of course. She was not unconscious, and she was not paralyzed. I have treated her since. The attendance was pretty complete after the accident up to the latter part of April, and then I saw her off and on up to September 24th of this year. The treatment up to that time was for nervousness that she complains of. I did not know her before the accident."

He proceeded:

"Well, of course, symptoms are entirely subjective."

He explained that subjective symptoms were things which she complained of, for which he was obliged to take her word.

"I treated her for insomnia and nervousness, and that treatment extended to September of this year. There were no objective symptoms except what I have stated. As to other matters, I have got to determine them upon the history of the case as given by the patient. I ascertained from time to time as nearly as I could what her condition was."

He stated that the injury to the ankle was nothing severe; that the last time he examined her was on September 24th.

"From the condition which I saw then, I would say in regard to the character of the injuries that there is no evidence of permanency in the symptoms which she presents."

He treated her in September for lack of power to sleep, as she claimed, and had treated her from time to time since the accident for that complaint. She had been in the office quite often complaining of nervousness and inability to sleep. To a question stated hypothetically describing the accident, injury, etc., the doctor answered that it might produce insomnia. To a question by the court, he answered that such injuries as she gave evidence of when he saw her could be followed by such nervousness and insomnia; that it would be impossible for anybody to tell how long it would continue. On cross-examination he said:

"A person simply looking at her would say that she had healed up and recovered; that she did not have the appearance of a nervous person. All the patient's reflexes are perfect, which shows that all her powers as far as they are concerned are all right."

He said she might be suffering from the result of the injury, and no one would or could explain it but herself.

Plaintiff testified that, on being struck on the forehead at the time of the accident, she became unconscious, and

knew nothing until she came to in the undertaker's shop. She said she was injured upon her nose, arm, chest, mouth, and ankle; that she was in the hospital three days, and confined to her bed at home for eight weeks; that, before the accident, she always had perfect health, doing her own work and going out to work, earning $6 and $6.50 a week. Since the accident she is always sick, dizzy, and, when the weather changes, in pain; that she cannot do her own work now, but must keep her daughters at home for that purpose; that she cannot sleep on account of pains in her arm, chest, and ankle; that she cannot breathe through her nose. The doctor was recalled for further cross-examination, stating that plaintiff did complain to him of her right arm; that he had no opinion as to its cause; that it might be rheumatism or neuralgia; that there was no ocular evidence after the accident to warrant the supposition that this would follow, yet accidents were erratic, and "you cannot tell what will follow." We have given the substance of all the testimony bearing upon this question.

The charge excepted to is as follows:

"I am asked to charge you that there is no evidence in the case from which you can find that the trouble with the plaintiff's right arm, of which she now complains, has resulted from the derailment or the injury received thereby. I cannot say that, gentlemen of the jury. If you find that she was not suffering from the injury of which she now complains before, and she suffers now from the injury, I think it is a matter you may take into consideration, and I think it is a matter you may find. To what extent she suffers in that respect in the right arm at the present time is, of course, wholly a question for you. It is for you to say what credence any of the witnesses which have sworn shall have in your sight."

We do not agree with defendant's contention. For the court, under the circumstances, to have taken the course urged would have been palpable error. The testimony of the plaintiff was material and received without objection. The substance of the testimony of the physician who

had treated her up to within 30 days of the trial is that although she is, as far as can be seen, recovered, and nothing you could see would warrant one in supposing that the present condition as stated by her would follow this accident, yet it might follow. The question was for the jury. There was not the slightest intimation that the plaintiff falsified. The jury reconciled the testimony of both witnesses, and found for plaintiff. It is not a case where this court will reverse the action of the trial court in refusing to set aside this verdict because it is excessive. The record in our opinion contains nothing which would warrant such action on our part.

The judgment is affirmed.

OSTRANDER, HOOKER, MOORE, and BROOKE, JJ., concurred.

SCOTT *v.* DOW.

1. TRIAL—CROSS-EXAMINATION—WITNESSES.
   To ask a witness, on cross-examination, after he has testified that he did not remember making certain conflicting statements on another trial, if his testimony was untrue, is not proper cross-examination.

2. SAME—CONDUCT OF TRIAL COURT.
   A reprimand for persisting in improper cross-examination, notwithstanding the adverse ruling of the court, is not reversible error, when it was induced by counsel's conduct.

3. HIGHWAYS—LAW OF THE ROAD—MOTOR VEHICLES—PERSONAL INJURIES.
   In an action by the operator of a motorcycle against the driver of an automobile who collided with him, a request to

charge that plaintiff is governed by the motor vehicle law, is sufficiently covered by a charge that he was bound to observe the same rules of the road as defendant, and was *prima facie* guilty of contributory negligence if he was operating his motorcycle at a greater speed than the laws of the State or the ordinances of the city permit.

4. SAME—MOTOR VEHICLES.
The charge was more favorable to defendant than he was entitled to, and sufficiently stated the rule that plaintiff was governed by the city traffic ordinance.

5. SAME—NEGLIGENCE—VIOLATION OF ORDINANCE.
Breach of an ordinance is evidence of negligence, not negligence *per se*.

6. SAME—PRESUMPTIONS.
Failure to give a requested instruction that the presumption is against the person on the wrong side of the road, is not error where the court charged that if the plaintiff cut the corner, and the collision resulted, whether by carelessness of the motorman a little greater or more than that of the plaintiff, he could not recover.

Error to Wayne; Donovan, J. Submitted June 14, 1910. (Docket No. 56.) Decided September 27, 1910.

Case by Arthur Scott against Alex Dow for personal injuries. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Wilkinson, Post & Oxtoby, for appellant.

William P. Corbett (*Howard B. Bloomer*, of counsel), for appellee.

BROOKE, J. Plaintiff recovered a judgment against defendant for $300 in an action of tort for injuries sustained by him in a collision between a motorcycle, ridden by himself, and an automobile driven by defendant. The collision occurred at the corner of Woodward and Milwaukee avenues, in the city of Detroit.

Plaintiff entered Woodward avenue from the east and turned south. Defendant was proceeding north on Wood-

ward. Plaintiff claimed that he passed across the center of Woodward avenue before turning south, and that defendant ran his machine diagonally across the street, striking plaintiff's machine on the west side of Woodward, just south of Milwaukee. Defendant claimed that plaintiff turned south on Woodward upon the east side of the street, when he, defendant, was approaching the intersection of Milwaukee; that, supposing plaintiff intended to stop at the east side of the street, he, defendant, turned slightly to the west to avoid him; that plaintiff suddenly discovered defendant's approach, and swerved to the west side of Woodward, where the vehicles came together.

Defendant was prosecuted in police court for driving his machine at a rate of speed prohibited by ordinance. Upon that trial plaintiff gave testimony for the people. He there testified that, when he entered Woodward, he observed defendant approaching from the south at a distance of about from 50 to 70 feet. Later he brought this suit against defendant in the justice's court, where he testified that he first saw defendant when he was about in the center of the block, between Baltimore and Milwaukee avenues. Upon the trial at circuit, plaintiff testified that, when he first saw defendant, he was nearer Baltimore than Milwaukee avenue. Plaintiff was cross-examined at great length by counsel for defendant upon the discrepancies in his testimony upon the question of distance. Plaintiff testified repeatedly that he did not remember having testified in police and justice's courts as the record in those proceedings indicated. Counsel for defendant then asked the following question:

"*Q.* And, if you testified differently in police court, your testimony in police court was not true?

"*The Court:* You cannot ask any man to testify that way, not the adverse witness. That is for the jury, whether he is mistaken. It is unreasonable to ask anybody whether their testimony is untrue. That is for the jury.

"*Mr. Oxtoby:* The question is whether he intentionally testified.

"*The Court:* I will rule it out. It is impertinent to ask any man whether it was not true.

"*Q.* If you testified in justice court, Mr. Scott, that, when you first came on Woodward avenue Mr. Dow was 85 feet from you, your testimony in justice court was not true?

"*The Court:* You need not answer. It is impertinent and insulting to a witness, and a lawyer should not ask it, and I reprimand you now. It is wrong."

Error is assigned upon this ruling and the accompanying language. We think the question was properly excluded. It was not proper cross-examination, as the court had pointed out earlier in the trial. Counsel had clearly brought out the variations in the plaintiff's various estimates as to the distance. These discrepancies were proper subjects of comment to the jury. We cannot say that the language in which the ruling was couched constitutes reversible error as it was induced by counsel's disregard of the court's previous ruling.

Defendant requested the court to charge as follows:

"I charge you that the motorcycle on which the plaintiff was riding on October 19, 1907, was a motor vehicle within the meaning of the Michigan motor vehicle law."

Error is assigned upon the court's refusal to give this request, and it is argued that in so doing he allowed the jury to test the actions of the defendant by the standard prescribed by the statute, and the actions of the plaintiff, on the other hand, by the common law. A sufficient answer to this claim is found in the following excerpts from the charge:

"I charge you that the plaintiff in operating his motorcycle on the day in question was bound to observe the same rules of the road as was the defendant in charge of his automobile; that the plaintiff had the right to operate his motorcycle only in compliance with the law and the burden of proof is on him to show that he was lawfully operating his vehicle on Woodward avenue. * * *

"If you find that the plaintiff in going into Woodward avenue from Milwaukee on the day in question was operating his motorcycle at a greater speed than permit-

ted under the laws of Michigan, and the traffic ordinance of the city of Detroit, then he was *prima facie* guilty of contributory negligence, and could not recover."

Error is likewise assigned upon the refusal of the court to give the following request:

"I charge you that the motorcycle upon which the plaintiff was riding on October 19, 1907, was a motor vehicle within the traffic ordinance of the city of Detroit, approved April 30, 1907."

The last paragraph of the charge above quoted sufficiently covers this request, and is more favorable to defendant than was proper. There was much conflict in the testimony as to the rate of speed at which plaintiff entered Woodward avenue. That question, therefore, became a question of fact for the jury. Had the jury determined that plaintiff was at that moment operating his machine at a speed greater than four miles per hour (the ordinance limit), plaintiff's recovery would not necessarily have been barred. Breach of an ordinance is evidence of negligence, not negligence *per se*. *Blickley* v. *Luce's Estate*, 148 Mich. 233 (111 N. W. 752), and cases cited.

It is urged that the court erred in refusing to give defendant's 14th request, as follows:

"I charge you that, where a collision takes place, the presumption is against the person on the wrong side of the road."

Inasmuch as the collision actually occurred on the west side of Woodward avenue, which was the wrong side of the road for the defendant to be upon when traveling north, it would, at first blush, appear that this request, if given, would have operated against his interest. But it will be remembered that it was defendant's theory that he had been driven out of his proper course by an effort to avoid collision with plaintiff, who was earlier upon the east side of the street. Upon this point also the testimony of the various witnesses did not agree. The court charged:

"And last, if you find that the plaintiff cut the corner at the southeast corner of Milwaukee avenue and Woodward avenue, in entering upon Woodward avenue, and came into the way of the motorman [defendant], and a collision as a consequence occurred, whether by the carelessness of the motorman, a little greater or more than that of the plaintiff, the plaintiff cannot recover, for he must be without blame or fault in the matter."

We are of opinion that defendant's rights were fully protected by the foregoing and other portions of the charge.

The other errors assigned do not require discussion.

The judgment is affirmed.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

GOODSPEED v. SMITH.

1. BROKERS—TROVER AND CONVERSION—STOCK GAMBLING TRANSACTIONS—BUCKET SHOPS.

   The making of a contract by plaintiff with defendant for the purchase, as broker, of stock on margins, and its consequent breach, not being denied, the alleged intention of the parties to carry out a gambling transaction, prohibited by Act No. 336, Pub. Acts 1907, as claimed by defendant and as denied by plaintiff, was a question for the jury.

2. SAME—CONVERSION OF STOCK—TRANSACTIONS ON MARGIN.

   No conversion could take place where an actual purchase of stock was not contemplated or executed by the broker.

3. SAME—CONTRACTS—ILLEGALITY.

   The fact that the broker knowingly engaged in a business prohibited by law and made contracts in violation of the

statute, would not defeat the plaintiff's right to damages, if he acted in good faith, and the defendant failed to perform the agreement.

4. SAME.

The provisions of Act No. 336, Pub. Acts 1907, being merely penal, would not prevent plaintiff's recovery.

5. TROVER AND CONVERSION—DAMAGES—INCORRECT THEORY.

The submission to the jury of the question of a conversion of stock by a broker who never, in fact, bought the stock, was not prejudicial error, where the jury determined in plaintiff's favor by their verdict all the facts necessary to a recovery for breach of contract, and where the measure of damages was the same under either theory.

Error to the superior court of Grand Rapids; Stuart, J. Submitted June 14, 1910. (Docket No. 61.) Decided September 27, 1910.

Trover by Richard C. Goodspeed against Connor H. Smith. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Dunham & Phelps, for appellant.

Richard C. Goodspeed (*Fred P. Geib*, of counsel), *in pro. per.*

BROOKE, J. During the year 1907 and a part of 1908, defendant maintained a stockbroker's office in the city of Grand Rapids. He was not a member of any stock exchange, but wired all orders to Stapely & Co. of Cincinnati. That concern failed on May 9, 1908, and defendant ceased doing business on the same day. The plaintiff, a young lawyer, working for a salary of $75 per month and having practically no other resources, had certain dealings with defendant as follows: October 22, 1907, bought 10 shares of American Car & Foundry at 27⅞, upon a margin of 5 points per share, or $50. December 12, 1907, bought 10 shares American Locomotive at 35¼. March 24, 1908, sold same at 42¼, making a profit of $70. January 27, 1908, he ordered from defendant 10 shares Missouri Pa-

cific at 42¼, upon a margin of 10 points, paying thereon $100. February 17, 1908, this stock having receded in value, he paid $50 additional thereon. May 7, 1908, he ordered from defendant 10 shares Western Union Telegraph at 51¾, upon a margin of 10 points, paying nothing upon the purchase. As to each of the last two deals, plaintiff was notified in writing by defendant that the stocks so ordered had been purchased for plaintiff's account. On May 9, 1908, defendant's principal having failed, he closed his business; no settlement having been made with plaintiff on the last two purchases. On May 23, 1908, plaintiff wrote to defendant that he desired to pay the balance due upon the two lots of stock and receive the same. On August 29, 1908, another letter to the same effect was written. Defendant paid no attention to either letter. On January 21, 1909, plaintiff tendered to defendant the sum of $840, being the amount due thereon with interest at 5 per cent. from the date of the purchase, and demanded delivery of the stock. In the meantime, both issues had increased largely in value, so that upon the day the tender was made the market value of the 20 shares was about $563 in excess of the amount of the tender. Settlement having been refused by defendant, plaintiff brought suit and recovered a judgment for the above amount, with interest to the date of trial. The first count in the declaration is in trover for the unlawful conversion of the 20 shares of stock. The second and third counts set out the contracts, aver breach thereof, and consequent damage.

It is conceded by plaintiff that in the first and second transactions no stock was ever delivered to him, nor did he have it to deliver when he ordered it sold. Settlement was made upon the market quotations without actual delivery. He testifies, however, that as to all four transactions, it was his intention to actually buy, and, as he was able, to pay for the various stocks in which he dealt. So far as the defendant is concerned, it is clear that neither he nor his principal ever contemplated the actual execu-

tion of the orders in question. He was operating what is commonly known as a "bucket shop." He dealt in about 60,000 shares during the time he was in business, making actual deliveries of but 250 shares of stock within that period, and such deliveries were made only after the purchase price was paid in full.

Act No. 336, Pub. Acts 1907, absolutely prohibits the operation of such a business as defendant was engaged in and makes such operation a crime punishable by fine and imprisonment. By this act the offense is made complete where—

"Both parties *or such keeper or proprietor shall contemplate or intend* that such contracts, * * * shall be or may be deemed closed or terminated * * * when the market quotations reach a certain figure, * * * wherein the parties thereto do not contemplate the actual or bona fide receipt or delivery of such property, but do contemplate a settlement thereof based upon differences in the price at which said property is or is claimed to be bought and sold."

The making of the contracts in question, their breach by defendant, and consequent loss to plaintiff, is not denied by defendant. He contends, however, that the contracts were of a gambling character, plaintiff so understanding them, and therefore not enforceable. It is clear from his own testimony that he intended them to be such. Did plaintiff so regard them? Taking into consideration his limited means, his profession, and his knowledge of affairs, it is difficult to believe that he understood the transactions in any different light than did the defendant. This issue was, however, submitted to the jury under proper instructions, and it was determined in plaintiff's favor. Upon a full consideration of the matter, we have decided that that determination should not be disturbed.

The court submitted the case to the jury upon the theory that there had been an unlawful conversion, by the defendant, of 20 shares of stock belonging to plaintiff. We think the record clearly shows that there could have been no such conversion, for the reason that neither plaintiff

nor defendant ever had possession of the stock in question. Defendant, however, as before stated, notified plaintiff in writing that he had bought the stocks for plaintiff's account in both instances, and upon the notices so sent appeared the following language:

"The actual delivery of property is in all cases contemplated and understood."

These representations as to purchase were false; but, assuming the good faith of plaintiff, defendant cannot be heard to say that, because he misled plaintiff as to the facts, plaintiff must therefore go remediless. The statute above referred to is purely penal in character and has no bearing upon the question here involved. The fact that defendant knowingly engaged in a business prohibited by law, and made contracts in violation of the statute, cannot affect the right of the plaintiff, if he acted in good faith in the transaction, to demand damages growing out of defendant's failure to perform as he had agreed.

Upon the question of damages, the court charged the jury as follows:

"If you find that there was an unlawful conversion of any of these stocks by the defendant, then you should give the plaintiff as damages the value of the stock at the time of such conversion, less what the plaintiff owed defendant at that time, with interest from the time of the conversion to the present, at 5 per cent."

Had the case been submitted to the jury upon the proper theory, *i. e.*, a broken contract and consequent damage, the measure would have been the same as was given by the court upon the conversion theory. As, in order to reach the verdict they did, the jury determined all facts necessary to plaintiff's recovery in his favor, we conclude that the error pointed out in the charge was without prejudice.

The other assignments of error have been examined, but disclose no reversible error.

The judgment is affirmed.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

KILTS *v.* BOARD OF SUPERVISORS OF KENT COUNTY.

1. NEGLIGENCE—INDEPENDENT CONTRACTOR—BUILDING CONTRACT—NUISANCE.

   Contractors constructing a water tower at a county poor farm, under an agreement with the board of supervisors, are not liable for injuries to an employé of the contractors, caused by a collapse of the structure, from the negligence of subcontractors who furnished insufficient "I" beams to support it, under plans which the board of supervisors have approved, since the neglect was that of independent contractors.

2. MUNICIPAL CORPORATIONS—GOVERNMENTAL AGENCY—BOARDS OF SUPERVISORS—PUBLIC BUILDINGS AND WORKS—COUNTIES.

   A board of supervisors in constructing a water system for the poor farm of a county perform a governmental function, in the execution of which they are exempt from liability for negligent construction.

3. NUISANCE—NEGLIGENCE—CONTRACTORS—MUNICIPAL CORPORATIONS.

   A nuisance involves not only a defect but threatening or impending danger to the public, or, if a private nuisance, to the property rights or health of persons sustaining peculiar relations to the same.

4. SAME—DEFINITION—NEGLIGENCE.

   A nuisance is a use made by one of his own property, which works an irreparable injury to another's property, or which deprives his neighbor of the reasonable or comfortable enjoyment and use of his property, or which violates the unwritten but accepted law of decency, or which endangers or renders insecure the life and health of his neighbor.

5. SAME—MASTER AND SERVANT.

   Neither the board of supervisors nor the principal contractor are liable to the employé killed by a collapse of a water tower, as for a nuisance, which they owed him a duty not to construct.

Error to Kent; Perkins, J. Submitted June 15, 1910. (Docket No. 63.) Decided September 27, 1910.

Case by Lena M. Kilts, administratrix of the estate of James L. Kilts, deceased, against the board of supervisors of Kent county, Frank E. Stevens and Julius A. Ziesse, copartners as the Phœnix Sprinkling & Heating Company, and the Grand Rapids Bridge Company for the negligent killing of plaintiff's intestate. A judgment for plaintiff against the Grand Rapids Bridge Company alone is reviewed by her on writ of error. Affirmed.

Holmes & Holmes and *M. A. Nichols*, for appellant.

William B. Brown and *Hyde, Earle & Thornton*, for appellees.

HOOKER, J. The plaintiff, as administratrix of the estate of James L. Kilts, her husband, brought this action in the circuit court for the county of Kent to recover damages for the injury and subsequent death of her husband through the alleged negligence of the defendants. The accident occurred by reason of the giving way of a platform at the top of a water tower at the county farm of Kent county, due to insufficient support; it being conceded that the "I" beams used as joists under the platform were too light for the support of so heavy a load as was imposed upon them. Deceased and a fellow workman who were at work on the covering for the tank at the time of the collapse of the structure fell a distance of 80 feet, and both died from the fall.

The action is brought against the board of supervisors who authorized the erection of the tower and tank to furnish water for the poorhouse, boilers, closets, etc.; Stevens & Ziesse, copartners, who contracted with the board to erect the tower, etc., and the Grand Rapids Bridge Company, a corporation, being the subcontractor who furnished material and constructed the tower according to plans furnished by itself and acceptable to the board of supervisors. The bridge company did not appear, and its default was entered. Stevens & Ziesse defended upon the ground that the bridge company was an

independent contractor, and therefore they were not liable, while the board of supervisors joined to that ground of defense the further one that the erection of the tower was ordered by them in the capacity of a governmental agency. The learned trial judge directed a verdict for Stevens & Ziesse and the board upon the grounds stated, and allowed the jury to render a verdict against the bridge company, upon which judgment was rendered for $5,000 against the bridge company, and the plaintiff has appealed.

We understand that the appeal relates only to these defendants in whose favor a verdict was directed. That the bridge company was really the one at fault for the defect in the joists which caused the accident is indisputable on this record, and it was primarily liable, as it seems to have conceded by its default. Treating the case as one of negligence, it would seem that the contention of Stevens & Ziesse cannot be successfully resisted. The bridge company was clearly an independent contractor, and Stevens & Ziesse are not liable for its negligence.

The board of supervisors represented the county of Kent, and in making required or necessary provision for the poor performed a governmental function. See 4 Current Law, p. 721. The provision of necessary water for drinking, culinary, and sewer purposes, and as a protection against fire, is well within their implied power, if, indeed, they rest only in implication. Counsel for the county cite many cases from other, as well as our own, courts, sustaining this principle, and justifying its application to this case. We avail ourselves of the opportunity to collect from his brief, and insert in this opinion for convenient reference a list of our own cases upon this subject. *City of Detroit* v. *Blackeby*, 21 Mich. 84 (4 Am. Rep. 450); *Gale* v. *Village of Kalamazoo*, 23 Mich. 344 (9 Am. Rep. 80); *O'Leary* v. *Board of Fire & Water Com'rs of Marquette*, 79 Mich. 286 (44 N. W. 608, 7 L. R. A. 170, 19 Am. St. Rep. 169); *Gilboy* v. *City of Detroit*, 115 Mich. 121 (73 N. W. 128); *Shipman* v. *Live-*

Stock Com'n, 115 Mich. 488 (73 N. W. 817); *Murray* v. *Village of Grass Lake*, 125 Mich. 2 (83 N. W. 995); *Nicholson* v. *City of Detroit*, 129 Mich. 246 (88 N. W. 695, 56 L. R. A. 601); *Brink* v. *City of Grand Rapids*, 144 Mich. 472 (108 N. W. 430); *Ashley* v. *City of Port Huron*, 35 Mich. 296 (24 Am. Rep. 552); *Lenderink* v. *Village of Rockford*, 135 Mich. 531 (98 N. W. 4); *Rowland* v. *Kalamazoo Sup'ts of Poor*, 49 Mich. 553 (14 N. W. 494); *City of Pontiac* v. *Carter*, 32 Mich. 164; *Webster* v. *County of Hillsdale*, 99 Mich. 259 (58 N. W. 317); *Larkin* v. *County of Saginaw*, 11 Mich. 88 (82 Am. Dec. 63); *Miller* v. *City of Kalamazoo*, 140 Mich. 494 (103 N. W. 845); *Hines* v. *City of Charlotte*, 72 Mich. 278 (40 N. W. 333, 1 L. R. A. 844); *Sheldon* v. *Village of Kalamazoo*, 24 Mich. 383; *Buskirk* v. *Strickland*, 47 Mich. 389 (11 N. W. 210); *City of Detroit* v. *Beckman*, 34 Mich. 125 (22 Am. Rep. 507); *Barron* v. *City of Detroit*, 94 Mich. 601 (54 N. W. 273, 19 L. R. A. 452, 34 Am. St. Rep. 366). We are of the opinion, therefore, that neither of these two defendants is liable for the negligent injury of deceased.

Counsel for the plaintiff ask us to hold these defendants liable upon another ground, *i. e.*, that the tower was a nuisance, and therefore all the defendants are liable for the injury, upon the theory that all who have to do with creating or maintaining a nuisance are liable for injuries resulting therefrom.

Counsel make an ingenious and plausible argument that this tower and tank constituted a nuisance, for which all concerned in its erection are responsible, and each and every one of them liable for damages resulting therefrom, whether it was due to negligence or not, under an alleged general rule applicable to nuisances. We think this claim, if sustained, would be an extension of the law of nuisance. It is undeniable that when one causes to be erected a building upon his premises so near the street that snow may slide, or its defective walls fall, upon a passerby, upon the highway, it is a public nuisance, and whether

the defect was due to the negligence of the owner who may have had no part in the erection of the building or not is unimportant, for the reason that he was bound not to maintain or permit a public nuisance to exist on his premises. And if, instead of being contiguous to a highway, the defective structure was adjacent to an adjoining proprietor's land so that it was a menace to his property, or to his person in the use of his land, it would be a private nuisance and a breach of the owner's duty to maintain it. In either case he would be liable for injuries received from a fall of the snow or building, not necessarily because he was negligent in erecting or maintaining it, but because of his wrongful invasion of the rights of the public or his neighbor, liability for which does not depend upon motive. Neither need wait until serious damage has resulted, but the threatened danger may be averted by a proceeding to abate the existing nuisance.

But a private person may use his own premises as he will, so long as he does no injury to the public, or to the property and rights of a private person, and one may erect a weak structure upon his premises, so far from the street and other's property, that persons not entering upon his premises can be in no danger from it. It is true that trespassers or licensees or persons residing upon the farm may suffer injury, and they may be entitled to redress in many cases on the ground of negligence, but we know of no adjudicated cases that hold that such persons have a right to ask the abatement of such structures, which are in no way related to property rights of theirs. They are volunteers upon the premises, with certain rights of protection, to be sure, but not with the right to ask the owner to remove structures that they may think dangerous. The enunciation of the doctrine contended for would be attended by far-reaching results, and practically make every man the insurer of his help, his guests, and even strangers rightfully upon the premises. Practically it would have a

tendency to eliminate the whole doctrine of negligence in large classes of cases, for juries would be asked to find that buildings, machines, walks, roads, and all other articles or structures were nuisances if in any way defective or out of repair, because dangerous to those approaching them. The doctrine of contributory negligence would go with that of negligence if counsel's contention is correct.

We are of the opinion that a nuisance involves, not only a defect, but threatening or impending danger to the public, or, if a private nuisance, to the property rights or health of persons sustaining peculiar relations to the same, and that the doctrine should be confined to such cases. While adjudicated cases have been so variable that courts generally regard a technical and comprehensive definition difficult if not impracticable, the trend of opinion seems to be that the circumstances must be examined with a view to ascertaining *whether the alleged condition is one so serious as to interfere with the comfort of life and enjoyment of property, or so threatening as to constitute an impending danger to persons in the enjoyment of their legitimate rights.* The following quotations indicate this rule:

"Anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights." *Village of Cardington* v. *Fredericks*, 46 Ohio St. 442 (21 N. E. 766).

"Injury to property, with reference to its reasonable and ordinary use, by continuous hurtful acts, constituted a nuisance undoubtedly." *Sparhawk* v. *Railway Co.*, 54 Pa. 401, 421, per Thompson, J.

"A 'nuisance' is a term for all practices, avocations, erections, establishments, etc., against which courts will give relief, although they are not intrinsically criminal, because of their tendency to create annoyance, ill health, or inconvenience." *Gifford* v. *Hulett*, 62 Vt. 342, 346 (19 Atl. 231), per Taft, J. (A case of a barn.)

"The real question in all the cases is the question of fact, viz., whether the annoyance is such as materially to interfere with the ordinary comfort of human existence." *Crump* v. *Lambert*, L. R. 3 Eq. Cas. 409, 413, per Lord Romily, M. R.

"Anything not warranted by law which annoys and disturbs one in the use of his property, rendering its ordinary use and occupation uncomfortable to him, is a nuisance. If the annoyance is such as to materially interfere with the ordinary comfort of human existence, it is a nuisance." *Nolan* v. *City of New Britain*, 69 Conn. 668, 678 (38 Atl. 706), per Andrews, C. J.

"Nuisances to one's dwelling house are all acts done by another which render the enjoyment of life within the house uncomfortable, whether it be by infecting the air with noisome smells, or with gases injurious to health." *Cropsey* v. *Murphy*, 1 Hilt. (N. Y.) 126, 127, per Brady, J.

"It is not necessary that the smell should be unwholesome. It is enough if it renders the enjoyment of life and property uncomfortable." *Rex* v. *White*, 1 Burr. 333, 337, per Lord Mansfield.

Blackstone defines "private nuisance" to be:

"Anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." 3 Black. Commentaries, p. *216.

In *State* v. *Beardsley*, 108 Iowa, 396 (79 N. W. 138), it was said:

"A nuisance is the unlawful use of one's own property, working an injury to the right of another or of the public, and producing such inconvenience, discomfort, or hurt that the law will presume a consequent damage."

See, also, definition in Joyce on Nuisances, p. 18.

"A use made by one of his own property which works an irreparable injury to another's property, or which deprives his neighbor of the reasonable and comfortable enjoyment and use of his property, or which violates the unwritten but accepted law of decency, or which endangers or renders insecure the life and health of his neighbor, is a nuisance. So every enjoyment by one of his own property which conflicts with the rights of another in an essential degree is a nuisance. Another definition is: A private nuisance is 'where one so uses his property as to damage another's or disturb his quiet enjoyment of it.' A nuisance is also defined as 'a tort.' It is 'the use of one's own property which involves injury to the property, or

other right, or interest of the neighborhood.' So where anything is constructed on a person's premises, which of itself, or by its intended use, directly injures a neighbor in the proper use and enjoyment of his property, it is a nuisance."

Running through all of these is the element of a wrongful, continuing, impending danger to the lives, limbs, or health of the public, or to the legitimate property or personal rights of private persons peculiarly subject to the danger. The defendants in this case owed no duty to the deceased not to erect or maintain this structure. They committed no wrong against him in doing so, for they had no relations with him and he had no right upon the premises up to the time that he was employed to cover the tank. His rights under such employment, such as the right to a safe place to work, and to warning of danger, are to be measured by the ordinary rules of negligence cases, and grow out of his contract of employment, whether the tower was a private nuisance as to other persons or not. In this cause counsel's contention would subject every person who had anything to do with the authorizing, planning, or erecting of this tower and tank to liability for the injury to the intestate.

We fail to find adjudicated cases sustaining such a rule, and are therefore constrained to affirm the judgment.

OSTRANDER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

O'DONNELL *v.* LANGE.

1. NEGLIGENCE—EVIDENCE.
   Negligence cannot be established alone by proof of an injury.
2. SAME.
   But the manner of the accident and the circumstances surrounding it may warrant an inference or presumption of negligence.
3. SAME — HIGHWAYS AND STREETS — LAW OF THE ROAD — PERSONAL INJURIES.
   Evidence that defendant drove her horse against a street cleaner who was rightfully in the street, in the daylight, while there was plenty of room on either side of him, and no other vehicles in the way, and that the horse was within defendant's control, going slowly, presents a question of fact as to defendant's negligence.
4. SAME—CONTRIBUTORY NEGLIGENCE.
   Whether the plaintiff was using ordinary care in the performance of his work was a question for the jury, and he was not bound to neglect his work to escape collision with those who were not using reasonable care.

Error to Muskegon; Davis, J., presiding. Submitted June 20, 1910. (Docket No. 95.) Decided September 27, 1910.

Trespass *vi et armis* by John O'Donnell against Emma Lange. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

James E. Sullivan, for appellant.

William Carpenter, for appellee.

BIRD, C. J. This is a personal injury case brought by the plaintiff to recover damages for being run into and knocked down by defendant's horse, while she was driving it on Western avenue, in the city of Muskegon.

The plaintiff is an old man 70 years of age, and is employed as a street cleaner in the city of Muskegon. Western avenue is paved, and extends from east to west. A street car track occupies the center of the avenue. On either side of the track, between the outer rail and the curbing, is a traveled way of 22 feet. In the early afternoon of November 19, 1909, plaintiff was working about midway of the traveled way on the north side of the car track with his face towards the west. He was scraping dirt ahead of him. While so at work defendant drove up from the rear with a single horse and buggy, and drove her horse against the plaintiff, striking him in the back, and thereby throwing him to the pavement, after which the carriage passed over him, and he was injured. The plaintiff testified that he did not hear nor see the defendant drive toward him. His companion, who was working upon the other side of the street car track, with his face towards the west, testified that he did not hear nor see defendant. No other vehicles or teams were on the street at the time. The plaintiff charged defendant in his declaration with carelessly, negligently, and with force and arms driving her horse in and upon him and injuring him. At the conclusion of plaintiff's testimony, the defendant offered none, but requested the court to direct a verdict for the defendant, for the following reasons:

(1) Because no negligence was shown on the part of the defendant; and,
(2) If negligence were shown upon the part of the defendant, the plaintiff was guilty of contributory negligence, and cannot recover.

The trial court agreed with the position of defendant's counsel and directed a verdict for the defendant.

1. There is practically no disagreement between counsel as to what the law is. Their disagreement arises as to what the evidence shows. The contention of defendant's counsel is that the evidence establishes nothing but the fact of the injury, and that under the well-settled rule that negligence cannot be established alone by the proofs

of the injury, the plaintiff failed to make a case. *Quincy Mining Company* v. *Kitts*, 42 Mich. 34 (3 N. W. 240). On the other hand, plaintiff's counsel insists that something more is shown by the evidence than a mere injury, and he insists that the testimony brings it within another rule, viz., that, where the manner of the accident and the circumstances surrounding it are shown, they warrant an inference or presumption of negligence. *Lillibridge* v. *McCann*, 117 Mich. 84 (75 N. W. 288, 41 L. R. A. 381, 72 Am. St. Rep. 553). We are inclined to the view of the plaintiff that the testimony shows something besides the bare fact of an injury. It shows that defendant was employed by the city of Muskegon to clean the streets, that he was so employed at the time, and that he was rightfully in the street. It further shows that the street was wide enough so that she might have driven upon either side of him without driving upon the street car track; that there were no other vehicles on the street at the time; that it was daylight; and that her horse was within her control and going slowly. Considering in connection with these facts her duty to use reasonable care to avoid injuring those who might be at work in or using the highway, we think there was such a case made as entitled the plaintiff to go to the jury upon the question of her negligence. The defendant was driving in the direction of the plaintiff, and she could observe, if she had looked in the direction in which she was going, that plaintiff was at work, and had his back to her, and she might have assumed that the scraper with which he was working was making some noise, and, as she drew nearer, she could have observed that his inattention indicated that he did not know she was approaching, and had she exercised, in a slight degree, that care which she was bound to, under the law, the accident might have been avoided.

2. Was the plaintiff guilty of contributory negligence? It is well understood that streets must be repaired and must be kept clean, and necessarily men must be employed to do the work. Plaintiff was engaged in the lawful dis-

charge of his duties, and while he was bound to use ordinary care to avoid injury from passing vehicles, and could not recover if he failed in that duty, we do not think he was obliged to neglect his work to escape collision with those who were not using reasonable care in that regard. 18 Am. & Eng. Enc. Law (2d Ed.), p. 586; *Smith* v. *Bailey*, 14 App. Div. (N. Y.) 285 (43 N. Y. Supp. 856). Whether the plaintiff did give such attention on this occasion as he should have given, having due regard for his work, was a question for the jury.

The case is reversed, and a new trial ordered.

OSTRANDER, HOOKER, BLAIR, and STONE, JJ., concurred.

CRAIG *v.* INSURANCE CO. OF THE STATE OF PENNSYLVANIA.

VENDOR AND PURCHASER—INSURANCE—EQUITY—FRAUD.

Where, in pursuance of a written contract for the sale of land, the vendee procured insurance payable as the interest of the vendor might appear, but after the expiration of the policy procured another in his own name which, after the loss, he assigned to a third party, equity will enforce the agreement by declaring the proceeds of the insurance a trust fund and applying the same upon the land contract in payment of the balance due the vendor.

Appeal from Wayne; Rohnert, J. Submitted June 20, 1910. (Docket No. 113.) Decided September 27, 1910.

Bill by John Craig against the Insurance Company of the State of Pennsylvania, impleaded with Rose C. Delisle

and Henry Lezotte to reform a policy of insurance, and to establish a trust. From a decree for complainant, defendants Delisle and Lezotte appeal. Affirmed.

Lucking, Emmons & Helfman, for complainant.

May & Dingeman, for defendants.

The trial court, in its decree, made the following findings:

The court finds that, under the contract for the sale of real estate, by the complainant to the defendant, Henry Lezotte, the said Lezotte agreed to insure the buildings against loss by fire, in an amount approved by complainant, and to assign the policies to complainant; that said Lezotte did not so insure the premises; but that he did on August 3, 1908, take out insurance thereon, but made the same payable to himself, without any provision, as required by said contract, for the protection of complainant; that complainant trusted Lezotte to procure the insurance in accordance with the contract, and had no notice or knowledge that he had not done so until after the loss; that on September 14, 1908, said property was damaged by fire; that the loss thereon was subsequently adjusted as a total loss; that after such loss defendant Lezotte attempted to assign the proceeds of said insurance and other insurance to his sister, the defendant Rose C. Delisle, who had full notice and knowledge of complainant's rights; that said assignment is void and of no effect as against the complainant; that said Rose Delisle brought suit on the law side of this court against the defendant the Insurance Company of the State of Pennsylvania on November 18, 1908, and on February 8, 1909, took judgment thereon without contest or trial; that thereafter, upon order of this court, the proceeds of said policy, to wit, $1,150, were paid into the registry of this court to be held pending the determination of this case; that, by reason of the failure of said Lezotte to have the proper clause, rider, or provisions attached to the said policy to protect

said complainant, the said Lezotte committed a fraud upon complainant and became a trustee as to any funds derived from said insurance; that the insurance moneys so paid into this court constitute a trust fund which should be devoted to the payment of the amount due to the complainant under the said contract upon the deposit by complainant with the said register of a conveyance of said land.

HOOKER, J. Complainant sold certain premises to Lezotte upon land contract; his claim being secured by an insurance policy to Lezotte with a provision that the loss, if any, should be paid to him as his interest might appear. When the time for it to expire arrived, Lezotte took a policy in another company; the provision for complainant's indemnity being omitted. Soon after this, the building upon the premises burned, and Delisle, to whom the policy had been assigned, sued the company which issued the policy and obtained a judgment for the amount of the policy. Thereupon the bill was filed in this case praying a reformation of the policy, and the application of the amount due on the policy to the payment of complainant's claim and the bill as amended asks that it be treated as a trust fund. The defendants Delisle and Lezotte have appealed from a decree in favor of the complainant.

We see no occasion for a lengthy review of the testimony in this case. As to the question of fact, we are convinced of the truth and justice of the complainant's claim. The decree rendered upon such conclusion by the learned circuit judge is fully justified by the cases of *Miller* v. *Aldrich*, 31 Mich. 408; *Balen* v. *Insurance Co.*, 67 Mich. 179 (34 N. W. 654); *American Ice Co.* v. *Trust Co.*, 188 U. S. 626 (23 Sup. Ct. 432), cited by counsel.

The decree is affirmed, with costs against appellants, and a charge against the fund.

BIRD, C. J., and OSTRANDER, BLAIR, and STONE, JJ., concurred.

DELORIA *v.* VAN WINKLE.

1. CORPORATIONS—LIABILITY OF DIRECTORS FOR FAILURE TO FILE REPORT—STATUTES.

   The contention that a corporate director is not shown to be liable for the debts of the company during the failure to file an annual report, as required by Act No. 194, Pub. Acts 1905, amending Act No. 232, Pub. Acts 1903, because, under the testimony, he might have joined in making a report, which the corporation failed to file, is not sustainable where the evidence tended to show that the secretary did not verify a report because the directors failed to prepare it.

2. EVIDENCE—DIRECTORS—PAROL PROOF—BEST EVIDENCE.

   Parol proof that defendant was a director of the corporation was admissible after the foundation was laid for its admission by a showing that the secretary was unable to find the corporate records.

3. APPEAL AND ERROR—SAVING QUESTIONS FOR REVIEW—TRIAL.

   Where a case was tried on the theory that the corporation which failed to file its annual report was a Michigan corporation and the declaration alleged that it was a corporation organized under the laws of Michigan, and where the defendant failed to make the point on the trial that there was a failure of proof in that respect, the point will not be considered on error.

Error to Delta; Cooper, J., presiding. Submitted June 20, 1910. (Docket No. 1.) Decided September 27, 1910.

Assumpsit by Fred Deloria and Joseph Gibbs, copartners as Deloria & Gibbs, against Louis Van Winkle for goods sold and delivered. A judgment for plaintiffs on a verdict directed by the court is reviewed by defendant on writ of error. Affirmed.

A. H. Ryall, for appellant.

Henry R. Dotsch and *Cummiskey & Spencer*, for appellees.

BIRD, C. J. The plaintiffs recovered a judgment against the defendant on account of hay sold by the plaintiffs to the Escanaba Transportation Company. The defendant was director and president of the company, and his liability arose under the statute for his neglect and failure to join in the making of the annual report of the company for the year 1905. After the plaintiffs rested their case, the court directed a verdict for the plaintiffs, and the defendant has removed the case to this court for review, claiming the evidence was insufficient upon which to base the judgment. To prove their case the plaintiffs introduced in evidence the certificate of the secretary of State that the Escanaba Transportation Company did not file a report of its affairs for the year 1905, and they produced the secretary of the Escanaba Transportation Company, who testified that he signed no report of the company for that year. The books were not available at the time of the trial, and parol proof was made that the defendant was a director of the company during the defaulting period. Defendant contends that this testimony did not make out a *prima facie* case of liability, because the defendant might have joined in the making of the report and the report never have been filed; that the duty of the filing of the report is not upon the defendant director, but upon the corporation; and that the statute is penal in its nature and must be strictly construed.

The statute involved is Act No. 232, § 12, of the Public Acts of 1903, as amended by Act No. 194 of the Public Acts of 1905. The material portion of this section reads as follows:

"If any corporation neglect or refuse to make and file the reports required by this section, within the time herein specified, and shall continue in default for ten days after the 1st day of February, its corporate powers shall be suspended thereafter until it shall file such report, and it shall not maintain an action in any court of this State upon any contract entered into during the time of such default. And any director of such corporation so in default, who has neglected or refused to join in the making of

such report, shall be liable for all the debts of such corporation, contracted since the filing of the last report of such corporation, and shall also be liable to such corporation for any damages sustained by it, by reason of such refusal or neglect."

By referring to section 12 of Act No. 232, it will be observed that it was there made the duty of the directors to file the report in question. The amendment of 1905 changed this, and placed that duty upon the corporation. If the only evidence offered of defendant's default had been the certificate of the secretary of State that no report for that year had been filed, there would be much force to defendant's contention, because the defendant might have joined in the making of the report, and the failure to file it might have been the fault or neglect of the corporation. The testimony of the secretary of the company, however, made it reasonably clear that it was not the default of the corporation's failure to file, but was due to the neglect and failure of the directors to join in the making. The law requires the report to be verified by the secretary of the company, but this he could not well do until after it was made, and the fact that he did not verify it, together with the further fact that none was filed, where the law requires it to be filed, we think raised a *prima facie* case as to defendant's default. *Hall* v. *Kellogg*, 16 Mich. 135.

Defendant also complains that there was no competent testimony offered that defendant was a director of the company. The court permitted this fact to be shown by parol evidence, and the foundation laid for its admission was undoubtedly sufficient.

It is also said by defendant that no proof was offered to show that the Escanaba Transportation Company was a corporation coming within this act, and that, if there were evidence of this fact, there was nothing to show whether it was a Michigan or Wisconsin corporation. We do not find any direct proof in the record that this was a Michigan corporation, subject to the provisions of Act No. 232, but the case was tried throughout by both

counsel on this theory, presumably because the status of defendant as a Michigan corporation subject to Act No. 232 was fixed by this court in *Deloria* v. *Atkins*, 158 Mich. 232 (122 N. W. 559). The declaration alleged that the company was organized under the laws of Michigan, and further alleged that it was the duty of defendant, as director and president of the company, under section 12 of Act No. 232 of the Public Acts of 1903, as amended, to join in making a report of its affairs for the year 1905. Defendant's counsel, upon cross-examination of plaintiff's witness, developed the number and names of the stockholders, and the number of shares each owned, and the number and names of the directors. At the close of the case, defendant's counsel stated to the court, in his application for a directed verdict, "that he principally relied upon the fact that there was no evidence of the statutory negligence of the directors." After trying the case upon the theory that it was a Michigan corporation, subject to the provisions of Act No. 232, and developing upon cross-examination who the stockholders and the directors were, and making no point in the trial court of plaintiffs' failure in this regard, we think the defendant is in no position to raise this question on appeal. *Hamilton* v. *Ames*, 74 Mich. 298 (41 N. W. 930).

The judgment of the trial court is affirmed.

OSTRANDER, HOOKER, BLAIR, and STONE, JJ., concurred.

GILKEY *v.* GILKEY.

1. TRUSTS—LIEN FOR ALIMONY—DIVORCE.
   A decree awarding alimony to the wife in divorce proceedings cannot be made a lien upon a trust estate which was created by the father of defendant, providing after the payment of his debts, that the proceeds should be used for the support of himself and family, including defendant, his son, that the trustee might distribute the estate when he should deem it advisable and the trust should terminate in twenty years; notwithstanding that the claims of the other beneficiaries had been satisfied by the trustee with the consent of complainant and defendant, since the payment of alimony is not within the uses to which the trustee was authorized to apply the trust estate.

2. SAME—DEBTOR AND CREDITOR.
   Money received by the trustee belonging to defendant, to whose use it has been applied, is, however, applicable to the payment of alimony and may not be held in trust as against defendant's creditors.

Appeal from Kalamazoo; Knappen, J. Submitted June 22, 1910. (Docket No. 119.) Decided September 27, 1910.

Bill by Elizabeth R. Gilkey against Clarence F. Gilkey and William H. Bennett, trustee, for a divorce. From a decree for complainant, and making the award of alimony a lien upon the trust, defendant Bennett appeals. Reversed and remanded.

A. M. & C. H. Stearns, for complainant.

Harry C. Howard, for appellant.

HOOKER, J. On January 21, 1910, complainant was granted a decree of divorce with alimony, $4,000 in amount. The decree provided that this sum should be a lien upon certain land held by William H. Bennett as trus-

tee for defendant Clarence Gilkey, said Bennett as trustee having been made a party defendant by leave of court. An appeal was taken by Bennett. The question in the case is whether the court should have made the decree for alimony a lien upon the property in the hands of the trustee.

The history of the trust is as follows: On November 14, 1906, Edgar W. Gilkey, a man in failing health and the owner of considerable property, his wife joining, made a deed of his property to George L. Gilkey, a relative, in trust for the following purposes:

(1) To pay the debts and adjust his grantor's business affairs.

(2) To pay out of the profits, proceeds, and rents of said property to Edgar W. Gilkey or his family during his lifetime such sums as the trustee should deem reasonable and necessary for the proper care and support of himself and family, including his wife, son Clarence and daughter Grace, and to reinvest the remainder.

(3) After Edgar W. Gilkey's death, to pay his widow, Anna, should she survive him, such sums as the trustee should deem necessary for her maintenance and support, and to do the same in relation to the son and daughter, Clarence and Grace.

(4) The trustee or his successor or successors was authorized to distribute the property, as directed in the will, whenever he should deem it advisable.

(5) The trust should terminate within 20 years.

The trust was accepted, and has so far been carried out, in a way. The evidence in this proceeding shows that the trustee has in effect made distribution of a portion of the trust fund to the extent of satisfying the widow and daughter of Edgar Gilkey, with the sanction of the chancery court, on a petition filed by him. He did this with the consent of Clarence Gilkey, the only other *cestui que trust*, and his wife, the complainant. He made no distribution as to him, but, on the contrary, every step in the proceeding from the petition to the decree shows that there was no intention to turn over to Clarence Gilkey the title to said trust property, but, on the contrary, all ex-

pressly provided that the property remaining shall continue in trust under the terms of Edgar's deed. We need not concern ourselves with questions regarding the action of the court in the premises further than to say that the effect was not to create a new and different trust from that created by Edgar's deeds, so far as the property conveyed by said deed is concerned. Until the trustee shall convey (*i. e.*, distribute) to Clarence Gilkey said property, it is not subject to seizure by the court to pay alimony allowed to the wife, for that is not within the uses to which the trustee was authorized to apply it. We cannot, therefore, sustain the decree in respect to the provision creating a lien.

There is evidence in the case that indicates that certain money received from another source by Bennett as guardian *ad litem* for his ward Clarence Gilkey has been used in removing incumbrances from the land received by him from Edgar Gilkey in trust. This is not sufficiently definite to enable us to determine the amount, and possibly it may be that the fact was not established. But such a claim is made. If such moneys have been so used, we think the proceeds of it cannot be held as a trust fund against creditors, for one cannot cut off his creditors by deeding all of his property to one in trust for his own uses, to the exclusion of creditors. See *Hackley* v. *Littell*, 150 Mich. 106 (113 N. W. 787), and cases cited. To the extent, therefore, that such fund has been applied to the payment of mortgages on trust property deeded by Edgar Gilkey and still in the name and hands of the trustee, such a lien might have been decreed, and presently enforced by proper proceedings. The decree will be reversed, and one entered in this court in accordance with this opinion and remanding the cause with leave to take further proof, with a view to determining the facts, and the making of such decree as they shall warrant, as indicated herein.

BIRD, C. J., and OSTRANDER, BLAIR, and STONE, JJ., concurred.

FIFTH AVENUE LIBRARY SOCIETY *v.* GATES.

1. SALES—DELIVERY—EVIDENCE—TAKING CASE FROM JURY—CARRIERS.
   No error was committed in refusing to direct a verdict for the seller of books, under a contract providing for delivery to the purchaser, where there was a dispute as to the actual delivery of the books to defendant by an express company which carried the merchandise.
2. SAME—DELIVERY TO CARRIER.
   The receipt of the books by the carrier, or by the local agent of the company, did not constitute a sufficient delivery.

Error to Washtenaw; Kinne, J. Submitted June 23, 1910. (Docket No. 130.) Decided September 27, 1910.

Assumpsit by the Fifth Avenue Library Society against Neil A. Gates upon an account stated. A judgment for defendant is reviewed by plaintiff on writ of error. Affirmed.

Edward B. Benscoe (*Carl Storm*, of counsel), for appellant.

George J. Burke (*M. J. Cavanaugh*, of counsel), for appellee.

HOOKER, J. Defendant is a resident of Dexter, Mich. Plaintiff is a New York concern. It sued defendant in justice's court upon the following contract, filing an affidavit of amount due and statement of account. Issue was joined, plaintiff had judgment, and defendant appealed.

The cause was tried by jury in the circuit. The affidavit was offered in evidence. Upon objection the court remarked, "I think you would better offer your proofs." Exception was taken. The affidavit follows:

"Statement.

"NEW YORK, March 2, 1909.

"Dr. NEIL A. GATES, Dexter, Mich.,
"In Account with
"FIFTH AVENUE LIBRARY SOCIETY.

"Total amount of contract	$79 20
"Total amount paid to date	00 00
"Balance	$79 20

"STATE OF NEW YORK, } ss.:
"County of New York. }

"(Affidavit of Emory A. Elrod, Treasurer.)

"Emory A. Elrod, being duly sworn, deposes and says that he is treasurer of the Fifth Avenue Library Society of New York. That Neil A. Gates, M. D., of Dexter, Michigan, owes said Fifth Avenue Library Society $79.20, being balance due on the purchase price of a set of Ridpath Library of Universal Literature, consisting of twenty-five volumes. That said Neil A. Gates signed a contract agreeing to pay $79.20 for said set of books. That no part of said sum has been paid. That there are no counterclaims or offsets against the same. That the books were shipped to said Gates in accordance with said contract, and that the agreement has been performed in every respect by said Fifth Avenue Library Society, and that the copy of account herewith annexed is a true statement of the account as it appears on the books of the said Fifth Avenue Library Society.

"EMORY A. ELROD, Treas."

"Contract.

"Carefully fill in all blanks. Subscriber should retain duplicate of this order.

"FIFTH AVENUE LIBRARY SOCIETY,
"114 Fifth Avenue, New York City.
"DEXTER, MICH., April 23, 1907.

"Express prepaid.

"*Gentlemen:* Please deliver to me one set Renaissance Edition de Luxe of 'The Ridpath Library of Universal Literature' in twenty-five volumes, bound in full leather, gilt top, for which I agree to pay you $79.20 payable as follows: $15.00 on receipt of books and $5.00 each month thereafter until the full amount is paid, default of which renders the whole amount due. The title to said books

does not pass to me until they are paid for in full. I understand this order is not subject to countermand or cancellation. No agreement is valid other than embodied in this contract.

"Paid to salesman on account———. (15.00 will remit on receipt of books.)

"Deliver books as soon as convenient after above date.

"Salesman, Alf. A. Simmonds.

"Subscriber's signature, Neil A. Gates.

"Subscriber's occupation, Physician and Surgeon.

"Subscriber's business address, Dexter, Mich.

"Subscriber's residence, Dexter, Mich.

"Deliver books at Dexter."

On the back of which contract the following indorsements appear:

"JOHN A. TAYLOR CO.

"*Gentlemen:* In accordance with our indorsement advertising contract with you, we authorize you to allow a credit equal to the value of 14 volumes in the purchase price of the Ridpath Library to those persons you may select.

"FIFTH AVENUE LIBRARY SOCIETY,
"E. A. ELROD, Treas.

"Special Reduction Authorized.

25 volumes, complete set	$200 00
14 volumes credit	112 00
	$88 00

"Cash discount 10 per cent.

"JOHN A. TAYLOR CO.

"*Gentlemen:* I agree to furnish a written opinion on the Ridpath Library within thirty days from receipt of complete edition and give you and the publishers the privilege of using same in advertising the library. I understand this matter is to be treated strictly confidential.

[Signed] "NEIL A. GATES."

As it was subsequently admitted and held to make a *prima facie* case, there is no occasion to discuss this question further. The court held that under this contract it was necessary that the books be delivered to the defendant in Dexter, and that delivering the same to an express

company directed to defendant at Dexter did not constitute a delivery to defendant at Dexter. There was no error in this. The intention, as shown by the contract, was that the defendant was to have the books delivered to him at Dexter, before becoming liable for their price. The order should receive no other construction. Hence the receipt of the books by the local agent of the express company was not sufficient. As there was conflicting testimony regarding an alleged delivery by the express agent at Dexter to defendant, the court did not err in refusing to direct a verdict for plaintiff.

It is unnecessary to discuss other questions further than to say that our examination of them has convinced us that there was no error.

The judgment is affirmed.

BIRD, C. J., and OSTRANDER, BLAIR, and STONE, JJ., concurred.

UNION TRUST CO. *v.* DETROIT RIVER TRANSIT CO.

1. CONTRACTS—SALES—WARRANTIES—PAROL EVIDENCE TO VARY WRITTEN INSTRUMENT—INTERPRETATION.

No evidence of a warranty made orally by the agent of the seller of a steam hoist is competent to vary the terms of the contract of sale, where it appeared that the seller wrote the buyer, after oral negotiations terminated, that the agent had reported to him the making of the sale on terms stated in the letter, to which the vendee replied that his understanding was correct.[1]

[1] As to right to show parol warranty in connection with contract of sale of personalty, see note to *Electric Storage Battery Co.* v. *Waterloo, C. F. & N. R. Co.* (Iowa), 19 L. R. A. (N. S.) 1183.

2. SAME—EVIDENCE.

A subsequent letter of the vendor to the vendee stating in response to complaints made by the purchaser, that he had referred the matter to the agent who would see the purchaser about it, was not an admission of the warranty.

Error to Wayne; Murfin, J. Submitted June 23, 1910. (Docket No. 135.) Decided September 27, 1910.

Assumpsit by the Union Trust Company, administrator of Joseph H. Berry, deceased, against the Detroit River Transit Company for goods sold and delivered. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

George W. Radford, for appellant.

Angell, Boynton, McMillan & Bodman, for appellee.

Joseph H. Berry sold and delivered to the Detroit River Transit Company a steam clam shell hoist. The vendee February 27, 1907, filed its declaration in the Wayne circuit court, the substance of the allegations therein, in addition to the common counts in assumpsit, being that plaintiff had a contract to transport and deliver sand in Canada and purchased the hoist in question to be used in carrying out said contract in unloading sand from its vessel; that it was represented and warranted to said plaintiff, vendee, by said Berry, through his agent, French, that the hoist and appurtenant machinery were in good condition, in working order, of first-class material, suitable for the purpose aforesaid. Breaches of the alleged warranties are set out with particularity, and the resulting damages are stated. Plaintiff's bill of particulars includes items for loss of profits, wages paid to men, the expense of making repairs, etc., the total of them with the down payment being $5,513.53. To this declaration defendant Berry pleaded the general issue, and on March 14, 1907, he filed a declaration in said court containing the common counts in assumpsit to recover of the Detroit River Transit Company the balance of the pur-

chase price of the hoist. The plea was the general issue with notice of the special matters of defense contained in the declaration in the first mentioned cause. Mr. Berry died, and the Union Trust Company, as administrator of his estate, was thus brought upon the record. There was an order consolidating the causes, and, upon the trial of the consolidated cause, a verdict was directed in favor of the administrator for the balance of the purchase price of the hoist and interest, and upon this verdict the Union Trust Company had judgment.

It appeared that, having concluded negotiations for the sale of the hoist for Mr. Berry, and having received from the Detroit River Transit Company its check for $500, Mr. French, the agent of Mr. Berry, composed a letter which, with the check, was delivered to Mr. Berry, who signed and sent the letter to the treasurer of the Detroit River Transit Company, and received a reply thereto. It appeared that the check was not actually paid, through the clearing house, until October 29th; but no one testified concerning the actual date of its deposit or the date when it was indorsed by Mr. Berry. It bears his indorsement, that of Berry Bros., Limited, and that of their indorsee, the Commercial National Bank. It was drawn upon American Exchange National Bank. Both banks are in Detroit. The letters referred to read as follows:

"DETROIT, October 26th, 1906.

"Mr. H. E. BEECHER, Treasurer,
"Detroit River Transit Company,
"Detroit, Mich.

"*Dear Sir:* Referring to our conversation regarding the steam clam-shell hoist, Mr. French reports that he has arranged to sell you this hoist as it now stands on the river front on Private Claim 10 for the sum of $2,250.00. He has today handed me your check for $500.00 which is hereby acknowledged, and it is understood that the balance of $1,750.00 is to be paid on December 15th, 1906. If this arrangement is as you understand it, will you kindly acknowledge, and oblige,

"Yours very truly,
"J. H. BERRY."

"October 29, 1906.

"Mr. J. H. BERRY,
"c/o Berry Bros.,
"City.

"*Dear Sir:* Answering yours of the 26th regarding the Steam Clam-Shell Hoist, would say that your understanding of the matter is correct.

"Yours truly,
"H. E. BEECHER."

Later, in November, 1906, two other letters passed. They are here set out:

"Nov. 23, 1906.

"Mr. JOS. BERRY,
"Berry Bros. Co.
"City.

"*Dear Sir:* Referring to the unloading derrick which we bought from you recently would say that your Mr. French represented and sold this to us as being in perfect working condition with the possible exceptions of one or two parts which were missing and which he said had been stolen while laying on the shore. Had we known the conditions of this machine was in we would not have taken it as a gift, because by the time we pay the expense of putting this in working order it will have cost us as much as a new machine.

"We have spent more than two solid weeks with a crowd of boiler makers and machinists trying to get this in working order and at the present writing it is not yet in shape. Among a few of the serious items which were badly in need of repairs were the boiler tubes and the piston rod to the bucket. We were obliged to have a brand new set of boiler tubes installed and also have the piston rod of the clam shell straightened. This was sprung so much that it was impossible to pry open the jaws of the clam shell.

"As soon as we find out definitely what our repair bill on this machine will be we are going to make a claim on you for it and we are notifying you to this effect now, so that should you desire, you can have your Mr. French make an examination of it and investigate our claims. The most serious loss which we have had due to this clam shell is that we have our boat waiting with a load for one

week to be unloaded. This, of course, at this time of the year means a very serious loss to us.

"Yours truly,
"H. E. BEECHER."

"DETROIT, November 24th, 1906.
"Mr. H. E. BEECHER, Treasurer,
"Detroit River Transit Company, Detroit.
"*Dear Sir:* Answering your favor of the 23rd inst., beg to say I have referred same to Mr. French, with request that he see you in reference to the complaint you make.

"Yours very truly,
"J. H. BERRY."

It appeared that the hoist had been used by Mr. Berry, who purchased it as a second-hand hoist, and stood on his land in Detroit. It was there examined by a representative of the vendee, and was there received by it. The case for plaintiff was made by the first two letters which have been referred to and by proof of the amount of the unpaid purchase price and interest. In substance and effect the court excluded all testimony offered by the vendee claimed to have a tendency to vary or contradict or explain the terms of the said letters. In excluding the last two letters of the correspondence, the court said:

"I may say that the basis of the exclusion is twofold. In the first place, it has a tendency, at least in parts, directly to contradict the contract that these parties entered into, and, further, as I construe this contract, giving it the most favorable construction for the defendant's side of this case, the best that could be said is that there might be an implied warranty of fitness and, under those circumstances, that letter, I do not think, would be proper. In the absence of the expression in Ex. 1, 'Sell you this hoist as it now stands,' I should hold there was an implied warranty of fitness, because counsel has shown that these parties knew the uses to which the machine was to have been put. I would hold there was an implied warranty of fitness, and they could complain of latent defects, so that they could have returned the machine. I would hold that it is their duty to make an examination within a reasonable time and discover such defects as were discov-

erable, and then either affirm or reject. Failing to do that, they cannot now be heard to complain."

The errors assigned upon exceptions to these rulings present the meritorious questions.

OSTRANDER, J. (*after stating the facts*). The question in this as in all similar cases is whether the writing produced as evidence of the agreement purports to contain all of the terms of the contract. In a particular case, as, for example, *Electrical Appliance Co.* v. *Standard Electric Co.*, 151 Mich. 662 (115 N. W. 982), it may appear upon the face of the writing that some term has been omitted. In *Beld* v. *Darst*, 146 Mich. 143 (109 N. W. 275), a majority of the court, in view of peculiar circumstances recited in the opinion, sustained the ruling of the trial court admitting testimony of a parol contemporaneous agreement of the parties, although the writing relied upon as evidence of the principal agreement appeared to be complete. In the case now presented it is apparent that Mr. French, representing Mr. Berry, and the representative of the Detroit River Transit Company, had orally agreed about the sale of the hoist—had made a bargain—before any letter was written. It seems to be quite as apparent that the only purpose which the immediate correspondence served, or could have intended to serve, was to state, in writing, the terms of the bargain as between the principals thereto. Mr. Berry advises the vendee that he is stating the terms of the agreement as they had been reported to him by his agent. There is no apparent ambiguity in the language employed. No warranty or representation is referred to. On the contrary, the language aptly affirms the absence of conditions or warranties, express or implied, and the understanding that the vendee took the property as it stood; that is, in the condition in which it was found, and that delivery was made on the river front on his land. The understanding of the terms of the sale, as thus expressed, is declared by the vendee to be his understanding also. In-

terpretation of the agreement, thus evidenced, is not affected by the fact, if it was a fact, that the vendee had taken possession of the hoist or by the fact, if it was a fact, that Mr. Berry had transferred the check before the correspondence was concluded. The last letter appearing in the correspondence of the parties cannot be treated as an admission of the facts stated in the one to which it is a reply or as the vendor's interpretation of the meaning of the words used in his first letter. And it was followed by action on the part of the vendor which negatives any such idea.

The court below made a proper disposition of the matter, and the judgment is affirmed.

BIRD, C. J., and HOOKER, BLAIR, and STONE, JJ., concurred.

HARDY *v.* STOPPEL.

1. DAMAGES—SALES—BREACH OF WARRANTY.

   In an action for breach of warranty for selling plaintiff a horse which was blind, it was a correct rule to charge the jury that the damages would equal the difference between the actual value at the time of the sale and the value of the horse, if it had been as it was warranted.

2. SALES—WARRANTY.

   A request to charge that the plaintiff must show that he relied upon the warranty is sufficiently covered by a charge that the jury must find that the warranty was made and relied on, and that there must be a warranty and a reliance on it to justify a recovery.

3. SAME—PATENT DEFECTS—WARRANTY.

To charge the jury that plaintiff could not recover for breach of warranty of soundness if the defect was patent, and that if it was such as to require the exercise of more than ordinary care to discover it, plaintiff might rely on the warranty, sufficiently covered a requested instruction that if plaintiff could have discovered the defective eyesight by a reasonable examination he was estopped to claim damages therefor.

Error to Ingham; Collingwood, J. Submitted June 23, 1910. (Docket No. 133.) Decided September 27, 1910.

Assumpsit by James Hardy against Theodore H. Stoppel and Fred Szepanak, copartners as the South Lansing Coal Company, for breach of warranty on the sale of a horse. A judgment for plaintiff is reviewed by defendants on writ of error. Affirmed.

John J. Zimmer, for appellants.

Jason E. Nichols, for appellee.

BIRD, C. J. Plaintiff purchased a horse of the defendants under a claimed warranty that it was sound. Soon after taking the horse into his possession, plaintiff discovered that the horse was blind in one eye, and that the sight of the other was impaired. The horse was affected with amaurosis of the eyes, a disease which affects the optic nerve, and one which is not easily discoverable by the ordinary observer. Plaintiff brought suit on his warranty. The defendants admitted that the horse was blind in one eye, but denied the warranty. The plaintiff recovered a judgment and the defendants assign error.

Upon the question of damages, the court charged the jury, in substance, that, if they found that plaintiff was entitled to recover, they should award him the difference between the value of the horse at the time of the sale, if the horse had been as warranted, and its actual value at that time. Defendants' counsel takes exception to this

instruction, and insists that this was not the proper rule to be applied in this case. We think the court stated the rule correctly, and is in accord with the rule laid down in *Barker* v. *Cleveland*, 19 Mich. 230, and *Jackson Sleigh Co.* v. *Holmes*, 129 Mich. 370 (88 N. W. 895).

Defendants' counsel requested the court to charge "that the plaintiff must show by a preponderance of the evidence that he relied upon the warranty," and assigns error upon the failure of the court to so instruct the jury. At one place in his charge, the court instructs the jury that:

"You have heard all the evidence in the case, and you are to decide whether, under all the circumstances in the case, Mr. Szepanak warranted that horse to be sound, and you must further, from the evidence in the case, decide whether Mr. Hardy relied on that statement."

Later in the charge, he instructed them "that there must be a warranty, and a reliance on that warranty, before you can find for the plaintiff." We think this fairly covered the request of defendants, and gave the jury to understand that, before they could find for the plaintiff, they must not only find a warranty, but that the plaintiff relied on the warranty.

Defendants' counsel also complains because of the refusal of the court to give the following request:

"If the plaintiff could have discovered, by a reasonable examination, the defective eyesight of the horse, then he is estopped from claiming damages for such defective eyesight."

The court did not give this in the language of the request, but instructed the jury upon this question as follows:

"In regard to the question of warranty, you must take into consideration a latent defect and a patent defect. If the horse had been warranted sound, and had in reality lost an ear, it would be such a defect as any one could see, and he could not claim for such a defect as that. But, if the defect was such that it was necessary to use more than

ordinary care in examining it, that could be taken into consideration."

While the court might have made this part of the charge more clear and explicit, what he did say to them on this subject was, in substance, what was requested by counsel. In view of this, we do not think it can be said that the court refused to give the request.

The other errors assigned have been examined and considered, but we are not of the opinion that they demand a reversal of the case.

The judgment of the trial court is affirmed.

OSTRANDER, HOOKER, BLAIR, and STONE, JJ., concurred.

CAIRBRE v. McQUILLEN.[1]

1. TRIAL—CROSS-EXAMINATION—EVIDENCE.
   It is within the discretion of a trial judge to permit leading questions to be asked of a party, by his counsel.

2. SAME—LEADING QUESTIONS.
   It is not an abuse of discretion for the trial court to permit plaintiff's counsel to ask plaintiff questions from the bill of particulars, and ask leading questions to refresh his recollection as to items and dates; the witness being unable to see distinctly or to recall certain dates and amounts.

3. PLEADING—BILL OF PARTICULARS—PAYMENTS—CREDIT ITEMS.
   The plaintiff's bill of particulars need not show credit items of payments made by defendant.

4. SAME—STATUTE OF LIMITATIONS.
   The plaintiff in an action of assumpsit for money loaned may testify to payments not credited on his bill of particulars.

[1] Rehearing applied for December 22, 1910.

5. STATUTE OF LIMITATIONS—DEFENSE—SURPRISE.
Where credits are shown by a plaintiff in order to rescue a claim from the operation of the statute of limitations and the defendant is surprised and unable to go forward for want of preparation, his remedy is an application to the trial court for further time.

6. TRIAL—CROSS-EXAMINATION—PARTIES—WITNESSES.
Where a party is made a witness by the opposing counsel, he may be cross-examined as to material facts not brought out on direct examination. *Blackwood* v. *Brown*, 32 Mich. 104, overruled.

7. SAME—WAIVER OF ERROR.
Error committed in refusing to permit such cross-examination is waived by the party who subsequently takes the stand in his own behalf and gives testimony upon the principal issues.

Error to Marquette; Cooper, J., presiding. Submitted June 23, 1910. (Docket No. 139.) Decided September 27, 1910.

Assumpsit by Bernard Cairbre against James McQuillen for money had and received. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

T. J. Dundon (*Samuel H. Davis*, of counsel), for appellant.

J. L. Heffernan, for appellee.

BIRD, C. J. Plaintiff sued defendant in assumpsit to recover on an account which he claims was incurred by defendant between the years 1870 and 1886. In compliance with a demand, plaintiff filed a bill of particulars showing 25 separate items, aggregating $3,065.85. It was claimed by plaintiff that defendant made various payments upon the account from 1870 to 1886. Since 1883 defendant has resided outside of the State.

Defendant denied that he had ever received any money from plaintiff. He admitted that, while attending medical college in Montreal, he had received money from

home, but claimed it was advanced to him by his mother, who was then the wife of plaintiff. This money he claimed to have repaid. In addition to his general denial and notice of set-off, he relied upon the statute of limitations. Plaintiff recovered a judgment, and defendant assigns error. (This case was before this court on a former occasion, and the opinion will be found reported in 151 Mich. 590 [115 N. W. 737]).

It is assigned as error that plaintiff's counsel was permitted to read to plaintiff while on the witness stand certain items in the bill of particulars, and to ask leading questions thereon to refresh his recollection. It appears from the record that the bill of particulars had been prepared from memoranda furnished by the plaintiff to his counsel, and some of them were in the handwriting of plaintiff. Plaintiff's eyesight was so poor that he could not read, but could identify, his memoranda. The plaintiff while testifying could not recall the items nor the dates of them without prompting. Under these circumstances, the court permitted counsel to read to plaintiff certain items from the bill of particulars, and to ask some leading questions to refresh his recollection. It is within the discretion of the trial judge to permit leading questions to be asked of a witness (*Webb* v. *Feathers' Estate*, 119 Mich. 475 [78 N. W. 550]), and, under the circumstances as they existed here, we see nothing which would justify us in saying that the trial judge abused that discretion.

Defendant insists that the trial court was in error when he permitted the plaintiff to testify to certain payments which he claims were made by defendant, because they were not shown by plaintiff's bill of particulars. This raises the question as to whether the plaintiff's bill of particulars must show credit as well as debit items. It is not our understanding that the rule requires plaintiff's bill of particulars to show credit items. *Ryckman* v. *Haight*, 15 Johns. (N. Y.) 222. In the case before us defendant demanded a bill of particulars of plaintiff's claim for

which he sought a recovery. He did not demand a bill of particulars of his own set-off or payment, and we can see no reason why more should be required or furnished than was demanded. The defendant is supposed to be informed of the state of his own account and of the payments which he has made. In cases like the present one, where credits are sought to be shown, in order to rescue the claim from the operation of the statute of limitations, instances may arise where the defendant is surprised and unable to go forward for want of preparation, but in such cases application can be made to the trial court for time in which to prepare to meet the unexpected claim.

Another error relied upon by defendant's counsel is that his right of cross-examination was unduly abridged by the trial court. Plaintiff's counsel called the defendant as a witness to show that he had resided outside of the State since the year 1883. He examined him upon no other subject. Defendant's counsel then claimed the right to cross-examine the witness upon that and other subjects. Plaintiff's counsel objected to this, and insisted that the rule of cross-examination would not permit him to cross-examine on any other subject than the one on which the witness was examined in chief. The court held this to be the rule. We think the court was in error in this ruling. The plaintiff made the defendant his witness, and he was sworn and testified in his behalf. This gave defendant's counsel the right, under the well-settled rule in Michigan, to cross-examine him upon any material question in the case. *People* v. *Barker*, 60 Mich. 277 (27 N. W. 539, 1 Am. St. Rep. 501); *Ireland* v. *Railroad Co.*, 79 Mich. 163 (44 N. W. 426); *Hemminger* v. *Assurance Co.*, 95 Mich. 355 (54 N. W. 949). And the fact that the witness was one of the parties to the case rather than a third party would not create an exception to the rule. *New York Iron Mine* v. *Negaunee Bank*, 39 Mich. 644. After the ruling of the court, defendant took the witness stand and testified in his own behalf, and went into the issues fully, and, for

aught the record shows, he testified to everything that he would have testified to if he had been cross-examined. Under these circumstances, we think the error was waived. *Hemminger* v. *Assurance Co.*, *supra*. The case of *Blackwood* v. *Brown*, 32 Mich. 104, is cited by appellee to sustain the ruling. A like question was raised in that case, but some language is made use of in the opinion which indicates that the ruling of the trial court was sustained for other reasons, namely, the stage of the trial at which the cross-examination was attempted and the lack of relevancy of the direct questions to the matters in issue. But, if that case can be said to be at variance with the rule laid down in the *Barker Case*, it must give way before the more liberal rule declared in that case.

The judgment of the trial court is affirmed.

OSTRANDER, MCALVAY, and BLAIR, JJ., concurred.

HOOKER, J. I concur in the result upon the ground of waiver, but doubt the propriety of holding that a defendant may make his defense on cross-examination by his own counsel whenever he shall have been called upon a single point by his adversary.

In re WOODWORTH'S ESTATE.

1. WILLS—PROBATE—EVIDENCE—CONVEYANCES BY DECEASED.
   In a contest over a will, which contained no provision for the husband of testatrix, evidence was admissible to show that she had executed to him in the stead of a testamentary provision a quitclaim deed of her interest in the homestead held in common by the husband and wife.

2. SAME—COMPETENCY—EXPERT AND OPINION EVIDENCE.
It was not error to reject the opinion of a witness as to the mental incompetency of deceased, supported only by evidence that deceased failed to recognize the witness about the time the will was made, that she might have been asleep or in a stupor, but recognized the witness later when she opened her eyes.

3. SAME—DIRECTING VERDICT—INCOMPETENCY.
The question of mental incompetency should not be submitted to the jury, where witnesses give testimony which tends to show the mental capacity of testatrix, and no opinion or facts tending to show incompetency are produced.

4. SAME—UNDUE INFLUENCE—EVIDENCE.
Undue influence cannot be predicated upon opportunity alone.

5. SAME—QUESTION OF FACT.
It is proper to refuse to submit to the jury the question of undue influence in the absence of evidence tending to show that some person made an attempt to influence the testatrix; and the suggestion of her sister that she should execute a will and provide for her husband did not amount to undue influence.

Error to Jackson; Parkinson, J. Submitted June 21, 1910. (Docket No. 118.) Decided September 27, 1910.

John S. McConnell and others presented for probate the last will and testament of Agnes P. Woodworth, deceased. The will was allowed in the probate court, and George O. Woodworth, contestant, appealed to the circuit court. A judgment for proponents on a verdict directed by the court is reviewed by contestant on writ of error. Affirmed.

Grove H. Wolcott and *R. S. Woodliff*, for appellant.

Thomas E. Barkworth, for appellees.

BIRD, C. J. This proceeding had its beginning in the probate court of Jackson county, to probate the last will and testament of Agnes P. Woodworth, deceased. The probate of the will was resisted by George O. Woodworth,

the husband of the testatrix, upon the grounds of undue influence and mental incompetency. The will was admitted to probate, and an appeal was taken to the circuit court, where a trial resulted in a directed verdict in favor of the will. After the trial in the circuit court, the contestant died, and the suit is now being prosecuted in this court by a special administrator, representing the estate of the contestant.

The testatrix was 74 years old when she executed the will. It was executed during her last illness, which lasted about two weeks. She inherited from relatives the estate which she left, and it was of the value of $5,300. The homestead was valued at $2,500, and they owned it as tenants in common. The testatrix and the contestant had lived together about 42 years, and most of the time in the city of Jackson. They had no children. The husband had no property save his interest in the homestead. He had not been very successful in accumulating property, and had managed his wife's financial affairs so badly that she placed them in the hands of her brother, J. Scott McConnell. The will was prepared from memoranda which she dictated to Judge Hammond, an old and reputable practitioner of the city of Jackson. It was a simple will, in which she gave her husband "sufficient furniture, bed, and bedding to comfortably furnish a room." She divided her household furniture and personal belongings among her relatives, and to her sister, Cordelia E. Markham, she gave her bonds, amounting in value to $3,500, and to her brother, J. Scott McConnell, she gave the balance of her estate, amounting to about $1,800, and nominated him as executor of the will.

It was insisted by the contestant that she was not in a mental condition to dispose of her property; that, by reason of her illness and the effect of a certain medicine which had been given her, she was incapacitated to make a will; and that, if she had any testamentary capacity at the time the will was made, it had been overcome by the

influence of her sister, Cordelia Markham, the principal legatee.

The assignments of error raise three questions, to which attention will be given:

(1) Was the trial court in error in admitting the evidence relative to the quitclaim deed and the circumstances attending it?

(2) Did the trial court err in directing a verdict upon the question of mental incompetency?

(3) Was it error to direct a verdict on the question of undue influence?

1. The court admitted in evidence a quitclaim deed of the homestead, executed by testatrix the day following the making of the will, conveying her interest in the homestead to her husband, and also permitted the circumstances under which it was made to be shown. It appears that, when testatrix detailed to Judge Hammond the disposition which she desired to make of her property, she informed him that it was her wish that her husband should have her interest in the homestead. The deed transferring the property to them was shown to Judge Hammond, and he, observing that it ran to husband and wife, assumed, without further inspection, that they owned it by the entirety, and he advised that nothing further would be necessary to vest the title in the husband after the death of testatrix. Subsequently this was questioned by the contestant, and Mrs. Markham took the deed to Judge Hammond, whereupon, after an examination, he found that the homestead was conveyed to testatrix and her husband, as tenants in common, and that they were not the owners of it by the entirety. Judge Hammond then suggested that, inasmuch as the will had been made, it would be better to transfer her interest in the homestead by a quitclaim deed, which was at once prepared, the matter explained to testatrix, and she executed it.

Counsel for contestant are very strenuous in their contention that this testimony was not competent. We are

unable to agree with them. We think it was competent to show to what extent the testatrix had aided the contestant, whether before or after the making of the will. *Beaubien* v. *Cicotte*, 12 Mich. 459; *Bush* v. *Delano*, 113 Mich. 321 (71 N. W. 628). It was admissible for another reason. It tended to rebut the inference which was sought to be drawn from the provisions of the will that the contestant had not been dealt fairly with by the testatrix in the disposition of her property. A conveyance of one-half of the homestead to her husband was a part of her plan in disposing of her property, and the one-half interest, according to the testimony, was worth $1,250, and without doubt she would have devised it to him in the will but for the erroneous impression of Judge Hammond. The fact that her interest in the homestead passed to contestant by deed rather than by devise made him no less a recipient of her bounty.

2. It is claimed by the contestant that the question of the mental incompetency of the testatrix should have been submitted to the jury. The proponent called several witnesses to establish the mental competency of the testatrix, and among them were Judge Hammond, who prepared the will; Emma Cole, an old acquaintance and neighbor; Emma Smith, the nurse who cared for her in her last illness; and Dr. Walter Snow, the attending physician. All these witnesses testified that the testatrix was physically weak, but that her mind seemed clear. The testimony showed that no drug was administered to testatrix which would affect her mind until several days after the will was executed. The nurse testified that "Mrs. Woodworth's mind seemed clear until after we gave her morphine," and Dr. Snow testified that morphine was not given to her until the last four days of her life.

The contestant was a witness in his own behalf, but he gave no testimony tending to show that testatrix was mentally incapable of making the will. Only one other witness was sworn and testified for contestant, and she was not interrogated upon that subject at all. It is very

clear to us that the trial court committed no error in refusing to submit this question to the jury unless the opinion of Janet Cassidy should have been received. Mrs. Cassidy was a neighbor and was invited in to witness the will. She testified on behalf of the proponent. At the conclusion of the cross-examination she was asked by the contestant for her opinion as to the mental competency of the testatrix to make the will. The court refused to allow her to answer, on the ground that she had stated no facts which tended to impeach the will. Contestant claims this was error. The substance of Mrs. Cassidy's testimony was that she called to see the testatrix the day the will was made and the day previous, and the testatrix did not recognize her at first nor greet her as she was accustomed to do. She had her eyes closed, and witness was not sure she was not asleep. Afterwards testatrix opened her eyes and recognized her. She also testified that on the day the will was made she heard her sister, Mrs. Markham, talking to the testatrix, and the testatrix lay, apparently, in a stupor. On this occasion she also had her eyes closed, and the witness was not sure whether testatrix was sleeping. The witness related no irrational conversation or extraordinary conduct on the part of the testatrix, which was inconsistent with competency. What she did relate was entirely consistent with the theory that testatrix was sleeping at these times. The testatrix was ill and physically weak, and it would not be expected that she would recognize and greet a neighbor as quickly and cordially as she would when she was well. If she awoke suddenly and saw a neighbor standing at her bedside, and for the moment was unable to tell who she was, but later recognized her, it would furnish no grounds for saying that she was incompetent.

Under the rule established by this court, we think the trial court was right in excluding the opinion of the witness. *Prentis* v. *Bates*, 93 Mich. 234 (53 N. W. 153, 17 L. R. A. 494); *O'Connor* v. *Madison*, 98 Mich. 183 (57

N. W. 105); *Lamb* v. *Lippincott*, 115 Mich. 611 (73 N. W. 887).

3. Should the question of undue influence have been submitted to the jury? The testatrix decided during the first week of her illness that she would make a will. Judge Hammond, an old acquaintance, was sent for, and, when he came, she dictated to him the disposition she desired to make of her property. The will was prepared and read over to her, and she stated it was as she desired it. Her sister, Mrs. Markham, was present, helping to care for her, and her brother, J. Scott McConnell, was also present. Both were present at the request of testatrix. The witness Janet Cassidy testified that she heard Mrs. Markham, on the morning that the will was made, say to testatrix that she had better make a will and provide well for George (Woodworth). Mrs. Markham admitted saying this in substance, but gives as a reason that her sister had given her so many instructions as to the distribution of her silverware, wearing apparel, and furniture that she told her that she was afraid she could not remember all the instructions, and that she (testatrix) had better make a will and then there would be no trouble about it. This was a proper suggestion upon the part of Mrs. Markham, and we see no attempt in the suggestion to influence testatrix in favor of any one, unless it was on behalf of contestant himself. Testatrix's brother and sister may have been in a position to influence her; but there is no proof in the record that they did so or attempted to do so, or that any one else attempted to influence her in the slightest degree as to a disposition of her property. Something more than this must be shown to carry the question of undue influence to the jury. Undue influence cannot be predicated upon opportunity alone. *Severance* v. *Severance*, 90 Mich. 417 (52 N. W. 292). We think the court was right in refusing to submit the question of undue influence to the jury.

The appellee has discussed in his brief the question as

to whether the administrator of contestant is a proper party to this appeal. We think the view this court has taken of the case renders that question unimportant.

The judgment of the trial court sustaining the will is affirmed.

OSTRANDER, HOOKER, BLAIR, and STONE, JJ., concurred.

LONG *v.* SCHROEDER.

1. WATERS AND WATERCOURSES — FLOWAGE RIGHTS — DAMS — EQUITY.

A bill of complaint showing that defendants have maintained for forty years a dam in a stream that flows through the lands of complainants; that the defendants are planning to raise the height of the dam and cause the complainants' land to be overflowed; the defendants admitting in their answer that their right to maintain the dam is based on prescription; that it has settled and that they purpose to reconstruct the dam at its original height, presents a case for a court of equity.

2. SAME—PRESCRIPTIVE RIGHTS.

Under the averments of the answer, defendants have no right to maintain the dam at a greater height than the old dam was at the commencement of suit.

3. SAME—PLEADING—SUPPLEMENTAL BILL.

It is unnecessary to file a supplemental bill to show that complainants after the commencement of suit completed the new dam at a greater height than the old one; the facts entitling the complainants to a decree requiring the reduction of the height of the new dam.

4. SAME—RELIEF—CONTEMPT—INJUNCTION.
Nor is the sole relief of the complainants by contempt proceedings for disobedience of a preliminary injunction issued by the trial court.

5. SAME—EVIDENCE.
That some of the complainants abandoned the suit was immaterial.

Appeal from Lenawee; O'Mealey, J. Submitted June 29, 1910. (Docket No. 82.) Decided September 27, 1910.

Bill by John Long and others against William Schroeder and another to restrain defendants from increasing the height of a dam. From a decree dismissing the bill, complainants appeal. Reversed and remanded.

Bird & Sampson, for complainants.

Westerman & Westerman and *Smith, Baldwin & Alexander*, for defendants.

Nineteen owners of land joined in filing the bill of complaint in this cause. The bill was filed October 23, 1906, and it is charged therein that for more than 40 years a dam had been maintained across the River Raisin outside of and near to the corporate limits of the village of Deerfield, the water being used to operate a mill or mills; that defendants, the owners of the mill property, on October 19, 1906, began to construct a new dam across the river just above the old dam and had so driven piling for the new dam, driven spikes into trees on opposite sides of the river, and had made such statements as to indicate the purpose and intention to build the new dam 20 inches higher than the old dam; that, if they should construct the new dam 20 inches higher than the old dam, complainants would be injured by the overflow of their lands, or of some of them, and, in any event, the drainage of the lands would be interfered with and proper and usual cultivation and use thereof prevented. It was prayed that defendants be perpetually enjoined "from building the new

dam any higher than the old dam," and there was, also, a prayer for a temporary injunction and a prayer for general relief. An order to show cause why a temporary injunction should not issue was made October 24, 1906, and incorporated therein was a further restraining order that defendants, until cause should be shown, refrain from constructing the new dam "higher than the old dam." Later, on November 7th, an answer was filed, and on the same day an order was made; the pertinent portion thereof reading:

"And after hearing the argument of counsel, and the admission of defendants' counsel that the defendants did not intend to construct the new dam any higher than the old dam now is, it is hereby ordered that said defendants * * * are hereby restrained from constructing said new dam any higher than the old dam now is. * * *"

The bill contains no statement of the right of defendants in the premises or of the height of the old dam other than the one that the old dam had for 40 years held back the water to a certain height, known and recognized by all persons owning land above the dam. As to this, the answer, which was sworn to, denies that the old dam held the water to a certain height which had been maintained during said period of time, and alleges, upon information and belief, that the old dam had settled and was considerably lower than it had been in former years. It is denied that the spikes driven into trees and the piling already in place indicated an intention to construct a dam 20 inches higher than the old dam was when it was constructed, "or 20 inches higher than the old dam;" denied that any statements of such an intention had been made. But it is averred:

"That said dam was settled somewhat from the height to which it was when originally constructed; that their intention is to construct said dam as near as possible the same height that it originally was, but no higher than they have a lawful right to do, and deny that they intend to construct it 20 inches higher than the old dam, or any higher."

It is averred that, if the new dam is no higher than the old dam was when constructed, no injury to complainants would result. The cause stood on bill and answer until September 28, 1908, when a replication was filed, and meantime defendants constructed the new dam.

According to the printed record, the cause was brought on for hearing September 8, 1908, and testimony was taken, we assume, in open court. It is the contention of complainants that this testimony requires the finding that the new dam is considerably higher than the old dam, while defendants assert the contrary. After the testimony had been taken, and in March, 1909, complainants were given leave to file a supplemental bill, and they did file one which purports to set out the facts and circumstances, or some of them, occurring after the filing of the original bill, concerning the construction and height of the new dam and the effect thereof on complainants' lands. In the supplemental bill it is prayed that defendants be required to abate, or take down, the new dam to the height of the old dam. To this supplemental bill defendants demurred March 24, 1909, and filed an amendment to the demurrer on June 7, 1909. The demurrer was sustained and the supplemental bill dismissed. Later, on motion of defendants, all testimony was stricken out and the original bill was dismissed.

Further facts, relied upon by defendants, are that before the supplemental bill was filed, by stipulation filed in court January 23, 1909, 10 of the complainants withdrew from the case, only 2 of the 10 gave testimony, and that in behalf of defendants. The complainants and appellants contend:

First. That they were entitled to relief under the original bill.

Second. That the facts occurring after the filing of the original bill, and while the injunction was in force, were properly brought upon the record by the supplemental bill.

Third. That a decree should be entered requiring defendants to lower the dam so as to make it correspond in height with the old dam.

OSTRANDER, J. (*after stating the facts*). If complainants have, in fact, no grievance, other questions are unimportant. It is apparent from the facts which have been stated that the complainants admit, and the defendants assert, a prescriptive right. They do not assert that their predecessors in ownership of the mill or that they themselves ever acquired the right to flow the lands of upper proprietors in any different manner or to any greater extent than they were or would be overflowed by the dam in the condition it was when the bill was filed. The only difference between them, on this point, is that complainants charge a constant and long-maintained interruption to the flow of water caused by the old dam, while the defendants say that the old dam has settled, from which it is inferred, necessarily, that the interruption to the flow has not been constant and the overflow of lands caused thereby has been variable. It may be said that defendants concede, in the answer, that, if the new dam should be built higher than the old dam was as it was originally constructed, complainants would have a grievance which, if properly presented, a court of equity ought to relieve. We are of opinion, also, that the matter set up in the answer concludes defendants from claiming the right to maintain a dam any higher than the old dam was at the time the bill was filed. We are convinced that the new dam is higher than the old dam was at the time the bill was filed. In other words, we measure the rights of defendants as against those of complainants by the interruption to the flow of water caused by the old dam as it was when the suit was begun. We come therefore to the questions of pleading.

The court below was of the opinion that the remedy open to complainants was by proceedings for contempt; that the relief asked for by the supplemental bill was not consistent with the relief asked for in the original bill; that the complainants could not, by supplement, introduce the facts occurring since the filing of the original bill for the purpose of securing a mandatory decree for the

abatement of the new dam. It is said in the opinion of the court:

"The facts stated and the relief asked thereon in the supplemental bill is practically an abandonment of the original bill and of complainants' rights and remedies under it, and sets up a new substantive cause of action upon which a decree might be made without connecting it with the original bill."

Defendants did not seek a dissolution of the temporary injunction, and did not, and do not now, question the power of the court to allow it. After it was issued, there remained the question of the right of complainants to a decree making the injunction permanent and, perhaps, as affecting the matter of costs, the question of defendants' purpose and of complainants' justification for filing the bill. We do not perceive how defendants' conduct pending the hearing of the cause upon its merits did or could change the issues. Complainants are not asking for damages, but only for a decree requiring defendants to maintain the new dam at a height corresponding with that of the old dam—for relief by injunction. If entitled to such relief when the original bill was filed, they are entitled to it now. The fact that such relief can be afforded now only by a decree requiring defendants to lower the new dam is a fact for which defendants are alone responsible. It is no other or different relief than was asked for in the original bill, and it must be granted or denied upon the facts which remain unaffected by defendants' conduct pending the suit. In this view of the matter, it is immaterial that some of the complainants abandoned the suit, or that some of them are willing the dam shall remain as now constructed. It was not necessary to bring upon the record, in the form of a supplemental bill, the facts which were made to appear at the hearing respecting the violation by defendants of the preliminary injunction and the necessity for a decree mandatory in its form. We are, however, in some doubt concerning the precise terms which ought to be incorporated in a manda-

tory injunction. Unless counsel can agree about the precise dimensions to which the new dam should be reduced or the precise dimensions of the reduction which should be made in its height to make it correspond, substantially, to the height of the old dam, the record must be remanded, for this purpose, to the court below.

Complainants may, in any event, have the decree of this court for reversal of the decree below, for costs of both courts, and for a mandatory injunction in accordance with this opinion.

MOORE, BROOKE, BLAIR, and STONE, JJ., concurred.

STREPANSKI *v.* GRAND RAPIDS PLASTER CO.

MASTER AND SERVANT—SAFE PLACE—INSUFFICIENT LIGHTS.

The duty of the master to provide a safe place does not apply to work in a mine where conditions constantly change by reason of blasting and removing rock, so as to require the master to maintain sufficient lights for temporary contingencies.

Error to Kent; Perkins, J. Submitted June 28, 1910. (Docket No. 125.) Decided September 27, 1910.

Case by Andrew Strepanski against the Grand Rapids Plaster Company for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Thomas P. Bradfield (*Francis A. Stace*, of counsel), for appellant.

Kleinhans & Knappen, for appellee.

MOORE, J. The defendant is engaged in the business of mining gypsum and preparing and placing its various products upon the market. The plaintiff has been at work in the mine more than 25 years. At the time he was injured he had been a breaker for more than six months. While breaking and loading gypsum into a car, a piece broke off from a large rock and fell upon his leg and ankle, injuring them very severely. It is his claim that the defendant was negligent in not having the place where plaintiff was at work properly lighted so he could have seen the crack in the rock, and thus have avoided the accident. At the conclusion of the evidence on the part of the plaintiff, the circuit judge directed a verdict for the defendant. The case is brought here by writ of error.

It is insisted upon the part of the plaintiff that the doctrine of a safe place to work applies to this case, and that the case should have been submitted to the jury. We quote from the brief of counsel:

"The case of *Fox* v. *Iron Co.*, 89 Mich. 387 (50 N. W. 872), is important in this case in two ways. The court says:

" 'The practice of requesting the court to direct a verdict at the close of the plaintiff's case is not one to be commended, as the circuit court would rarely, and never, except in a very plain case which was free from all doubt, grant such motion. * * * The motion should not be granted where there are any inferences of fact to be drawn by a jury from the testimony, and the motion was properly overruled in this case.'

"This case is also important, because it lays down the principle upon which we also rely that an employer cannot delegate a duty, so as to escape responsibility, which properly belongs to the employer, and on page 393 of this case this duty is discussed in the following language:

" ' "The true rule, I apprehend, is to hold the corporation liable, for negligence or want of proper care, in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent, intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter * * * is liable for the

manner in which they are performed." ' *Flike* v. *Railroad Co.*, 53 N. Y. 549.

" 'And hence a true test is—

" ' "Whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master." McKinney on Fellow Servants, p. 54.

" 'Applying this test to the facts of this case, there can be no doubt that Marshall was charged with the duty of keeping the hoisting apparatus in repair, and that such duty properly belonged to the corporation to perform. He was not, therefore, merely a fellow-servant with plaintiff.' "

Many other cases are cited, and particularly the case of *Kaukola* v. *Mining Co.*, 159 Mich. 689 (124 N. W. 591), which counsel says is conclusive of this case.

As bearing upon the question of whether the case should have been submitted to the jury, counsel regard the following testimony as important. We again quote from the brief:

"And the witness Veecncki testifies that from his knowledge of the thickness of this rock that fell and the strength of gypsum rock and the location of the rock on the ground and piled near the big rock that he would say that it must have been cracked at the point it finally broke off before it fell. The testimony shows that plaintiff examined the rock as well as he could in the light furnished, and that it appeared solid before he started to clean up close to it, and that no crack was visible where it afterwards broke.

"The testimony of the plaintiff is that all the cracks in dry gypsum rock like the rock in question which are made by dynamite blasting are visible in a good light, because the force of the gas and the explosion separates the portions of the rock and forces small particles into the cracks in such a manner that the rock does not settle together again so closely but what the cracks can be seen in a good light. Plaintiff further says:

" ' When the lights were near we could see the cracks in the stone, but one could not see them that night, because the lights were far away.' "

It is the contention of defendant that the doctrine of a safe place to work does not apply at all, for the reason

that the work which plaintiff was doing was that of mining, and that the work itself made the place, which was continually changing.

The case made by the plaintiff is, in substance, as follows: There is a main passageway in the mine upon which there is a tram railway for the cars, and in which the main electric wires are placed. From each side of the main passageway rooms or benches are at right angles to the main passageway. The ceiling is supported by leaving pillars of the original gypsum rock. As the lateral benches, or passageways at right angles to the main passageway progress away from the main track, branch car tracks are laid in the side benches or passageways, connecting with the main track. The lateral benches, or passageways, are lighted by electric lights attached to cables. The cables are attached to the feed wires in the main passageway by plugs, and are extended along the ceiling of the lateral passageways, or benches, as the work progresses. These cables are about 50 feet long, and are attached to the ceiling of the side passageways by drilling a hole in the ceiling and driving a wooden plug into this hole. Hooks are screwed into these wooden plugs, and the cables are supported by these hooks. The most advanced portion of the work is lighted by two or three incandescent lamps fastended to a small board, on the back of which is a hook or ring which loops over the hook in the ceiling. The board containing the incandescent bulbs is so arranged that it can be unhooked and carried back and placed behind a pillar during a blast and later hung back upon the hook. At the time plaintiff was injured the side passage on which he was working had been extended about 60 feet from the main passageway. It is the duty of the drillers to bore the holes for the powder or dynamite. After the drillers, come the blasters, who load the holes and fire the blasts during the intermission between shifts, either in the morning or evening. After the blasters come the breakers, who with the aid of a point (which they use as a wedge), and a

hammer, break up the larger pieces into small pieces suitable for the crushers, and load them on the tram cars.

Plaintiff testified, in part, as follows:

"*Q.* Will you tell what the usual practice was in the mine about the blasters working on a bench one night and the loaders coming the next night to clean up after them?

"*A.* When we came to work the blasting had already been done, some drilling was done, and sometimes the loaders and drillers were working on the same bench at the same time. The blasting was always done after one shift had gone away and before the other came. This loading and blasting was done by a loader man. This loader man fired the blasts. * * * The Friday night on which I was hurt was the first night that we had been at work on this bench after the last blast had been fired off, and no rock from the last blast had been taken out before our crew went to work to break rock the night I was hurt. It was smoky in the room when we went to work that night. They had electric lights, but they were dusty and gave poor light, and with respect to the rock part on which we were going to work the light was quite a bit behind it. I don't know how many feet; I could not see well to do my work with the lights where they were. That night I complained about the poor lights. In the first place, I spoke to the foreman, and the foreman told me to speak to Fronczak. This was when we were about to start to work. The foreman's name is Hoffman. He walked around the benches. * * * I told Hoffman right away after I went to work about the lights, the night on which I was hurt, and I told him the light was too far away and that it was not right. Hoffman said he would send Fronczak down. After that I went to work. I saw Fronczak after that about 7 o'clock, and told him to fix the lights, and he said he didn't have time; he had to fix the track. Fronczak said he would fix the lights when he finished the other work.

Two cars had been loaded and been sent away and one more loaded that night before I was hurt. The loaded car was in the middle of the bench at the time. It was about eight feet away from the pile of rock. The top of the pile of rock on the loaded car was about two feet higher than my head, and the light was behind this loaded car. The lights in the mine were put up in the center of the bench, hanging from the ceiling, and there were three globes, not very

large globes, about the size of the one on the table. * * * After a car was loaded, and before breaking more stone, we were instructed to see whether the rocks were solid, and then we had to throw back the dirt, or finer stuff, so that we would have the floor of the bench clear and clean. We had to throw it against the wall on the right-hand side. Every time we would load up a car there would be a lot of dirt left, and we had to throw that away first before loading another car. At the time I was hurt I was throwing dirt away with a short-handled shovel. Before I started to shovel away this dirt from in front of this rock, we looked to see whether the stone or the rock was solid. I could not see any cracks in the rock where it afterwards broke. The light was dirty and it was far away. I couldn't see. * * * The loader, Wiktorowski, blasted out this short hole in this large rock. After he had fired the hole, he said it was all ready. The shape of the large rock, part of which afterwards fell upon me, was in the shape of the clay model. I was in front of the rock on the right-hand side. I can't remember very well what happened. When I was hurt I was taken away. I imagine that the piece fell off the top here and slipped onto me when I was throwing dirt. The top of this rock which fell as I stood was about four feet above my head and was about five feet above the level of the place where I was standing. The middle plane of the rock was about four feet from the ground upon which I was standing. * * * When we looked at the rock to see if it was safe before we shoveled up the dirt, we did not see any crack in the rock where it afterwards broke; we thought it was solid all over. When the rock struck me it scratched me and scraped me and cut two of my veins or blood vessels. The doctor says I had a broken rib, the flesh was scraped off of my injured leg clear to the bone, and the rock cut off the ankle bone."

We have already quoted the rest of his testimony which is important, and also the important part of the testimony of Mr. Veecncki. This testimony makes it very clear that plaintiff was engaged in the work of actual mining, following up the work of the drillers and blasters by removing the result of their work, namely, the dirt and the rock which was broken down by the blast.

In the case of *Kaukola* v. *Mining Co.*, 159 Mich. 689

(124 N. W. 591), which counsel for appellant regard as conclusive, Justice STONE said, among other things, the following:

"The lighting of this passageway or thoroughfare of the mine far distant from the working places of most of those who passed through them—it being always dark in the mine—was just as necessary for the safety of the men as it was to have the walls and floors in a proper condition. * * * It was a thing which it was necessary to keep permanently in condition."

Mr. Justice STONE then expressly recognizes the distinction between conditions that are permanent and those that are constantly shifting, in the following language:

"Unlike the case of *Livingstone* v. *Plate Glass Co.*, 146 Mich. 236 (109 N. W. 431), here the place furnished was a permanent place of work, and not one where the conditions were constantly changing."

So far as this case is applicable to the one we are considering, it sustains the contention of defendant.

There are numerous decisions of this court upon the proposition that under similar circumstances to the case before us, the doctrine of safe place to work does not apply. See *Beesley* v. *F. W. Wheeler & Co.*, 103 Mich. 196 (61 N. W. 658, 27 L. R. A. 266); *Petaja* v. *Mining Co.*, 106 Mich. 463 (64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505); *Landowski* v. *Chapoton*, 137 Mich. 429 (100 N. W. 564); *Livingstone* v. *Plate Glass Co.*, *supra*; *Karppinen* v. *Mining Co.*, 154 Mich. 528 (118 N. W. 1118).

It is not necessary to discuss the other contentions of counsel. We think a verdict was properly directed.

Judgment is affirmed.

BIRD, C. J., and OSTRANDER, BROOKE, and BLAIR, JJ., concurred.

BALDWIN v. ESCANABA LIQUOR DEALERS' ASSOCIATION.

1. APPEAL AND ERROR — TIME TO APPEAL — EQUITY PRACTICE — CLAIM OF APPEAL.

The failure of appellants to file a claim of appeal after the settlement of the record in chancery is not fatal where the claim was actually filed prior to the settlement of the case.

2. SAME—REGISTER'S FEE—PAYMENT.

Actual payment of the fee to the register in chancery is unnecessary if the register treats it as paid within the 40 days after settling the testimony by giving the solicitors credit for the amount, makes no demand, and it is subsequently paid. Act No. 299, Pub. Acts 1909.

Bill by Francis L. Baldwin against the Escanaba Liquor Dealers' Association for an injunction. From a decree for complainant, defendant appeals: On motion to dismiss the appeal. Submitted June 28, 1910. (Calendar No. 24,102.) Motion denied September 27, 1910.

A. H. Ryall, for the motion.

Cummiskey & Spencer, contra.

PER CURIAM. A motion is made to dismiss the appeal upon two grounds:

(1) The failure of the appellants to file a claim of appeal with the register in chancery of the circuit court for the county of Delta within 40 days after the settlement of the case.

(2) The failure of the appellants to pay to the register of the court the sum of $5 within 40 days after the settlement and filing of the case in the lower court.

The record shows the entry of the decree December 23, 1909, the filing of the bond on appeal January 29, 1910, the filing of the claim of appeal February 10, 1910, the filing of the case settled April 19, 1910, and the payment of the fee June 13, 1910. Section 2 of Act No. 299 of the

Public Acts of 1909 provides for filing claim of appeal and payment of $5 to the register within 40 days after the settlement of the case on appeal. The first ground for dismissal was passed upon adversely to the contention of the mover in *Patterson* v. *Hynes*, 148 Mich. 581 (112 N. W. 129).

Touching the second ground urged, we find from the affidavit of the register that, while the $5 fee was not in fact paid within the time limited by statute, the register considered it as paid, gave solicitors for defendants personal credit for the same, and made no demand therefor. The money was actually paid on June 13, 1910. These facts constitute a sufficient compliance with the statute.

The motion is denied.

KETCHUM *v.* FILLINGHAM.

1. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — AUTOMOBILES — HIGHWAYS.

   The question of the plaintiff's contributory negligence was for the jury, where she testified that she drove to a street car track, paused before crossing it, to avoid an approaching car, and defendant's automobile collided with her.

2. SAME—INSTRUCTIONS TO JURY.

   A charge to the jury that the operation of an automobile required the use of ordinary care, that it included the duty of having the car under control when approaching street intersections, and that defendant must use such care as an ordinarily prudent man would have used, with further instructions concerning the duty of exercising due care on the part of both plaintiff and defendant, sufficiently defined the issues of negligence.

3. DAMAGES—PLEADING—SPECIAL DAMAGES—PERSONAL INJURIES.
It is improper to refuse an instruction to the jury that an injury to plaintiff's knee, not counted on in her declaration, should not be considered in awarding damages.

4. TRIAL—CREDIBILITY OF WITNESSES.
It is error to refuse a properly framed request to instruct the jury that if any witness wilfully testified falsely, as to a material fact, no credit should be given to other uncorroborated testimony of that witness.

Error to Ingham; Collingwood, J. Submitted June 28, 1910. (Docket No. 153.) Decided September 27, 1910.

Case by Catherine J. Ketchum against Joseph P. Fillingham for personal injuries. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed.

Thomas, Cummins & Nichols, for appellant.

Jason E. Nichols and *Frank L. Dodge*, for appellee.

Plaintiff was injured in a collision between an automobile owned and operated by defendant and a carriage in which she was riding. Just prior to the accident plaintiff was driving slowly in a westerly direction along Hillsdale street, in the city of Lansing. When she reached Washington avenue, she observed a street car approaching from the north. She drove out upon Washington avenue, but claims to have stopped her horse a few feet east of the street car track to allow the street car to pass in front of her. Defendant approaching the intersection from the south collided with the carriage, smashing the left front wheel and left thill. The carriage remained upright, and plaintiff was not thrown from it. Plaintiff recovered a verdict, and defendant has removed the case to this court by writ of error.

BROOKE, J. (*after stating the facts*). We cannot agree with the claim of defendant that plaintiff was, un-

der her own testimony, guilty of contributory negligence as a matter of law. If her testimony is to be believed, she acted with ordinary prudence. Under all the testimony, it was, at most, a question of fact for the determination of the jury under proper instructions, which were given.

With reference to defendant's negligence, the court charged the jury as follows:

"It [the automobile] entails on the man or woman who runs it the duty of keeping it under control, especially at the street intersections, and not to run it at a rate of speed which would be dangerous or which would contribute to its getting from under his control. * * * He [defendant] was bound to use just such ordinary care, prudence, and caution as the ordinarily prudent man would have used under such circumstances. This duty includes the duty of having his automobile under control when approaching and passing street intersections, and of operating it at such a speed as is reasonable and proper, having regard to the traffic conditions of the street and the safety of the people."

It is most strenuously urged by defendant that the charge as a whole does not define the issues of negligence, nor limit the jury to the consideration of the specific negligence charged in the declaration. We think the portion of the charge quoted above, taken together with the definition of negligence in another portion thereof, and the repeated admonition of the court that the plaintiff could recover only if she convinced the jury by a preponderance of the evidence that she was free from negligence and that her injury resulted from the negligent act of the defendant, fairly instructed the jury upon the law involved in this phase of the case. In her declaration plaintiff set out that she was injured—

"By having her general nervous system severely shocked, her head and shoulders and back severely strained and wrenched, and thereby causing curvature of the spine, and her right arm and hand severely injured, and also inflicting other painful and severe injury to the body and abdomen, and thereby so bruising plaintiff in

her left side as to cause a swelling or abscess, of a tumorous nature to form, which has caused plaintiff to suffer," etc.

It will be noted that no claim is made in the declaration that plaintiff had suffered an injury to her legs. Upon her direct examination she testified as follows:

"Then I had nervous chills, hundreds of them. I shook just like a leaf day after day and formed a large lump under my right knee. It remains there yet, and my feet are numb. They are just like no feet, just as if they were coming to from being asleep."

Plaintiff's husband, on direct examination, testified:

"When I was giving her a bath, I discovered those lumps under her knee. They were under one knee. They were about as large as the bottom of that tumbler and oval, and on the other one was about the size of a guinea egg, a walnut, or something of that kind."

Dr. Reynolds, plaintiff's physician, also upon direct examination testified:

"*Q.* Now, with reference to the leg, let me call your attention. Did you discover anything under her knee?

"*A.* There is a bunch there I think. I was thinking there might be two, but I guess there isn't but one.

"*Q.* What was that caused from, Doctor, if you know?

"*A.* Well, it is an enlargement of a gland, but I don't know what caused it in this case. It might have been an injury and might not."

All the foregoing testimony seems to have been admitted without objection on the part of the defense.

When the proofs were closed, however, defendant preferred the following request:

"(14) No claim is made in the declaration of damages for injuries to plaintiff's knees; hence no damages can be awarded for such injuries."

This request was refused, and the court charged:

"The damages claimed by the plaintiff in her declaration are for the pain and suffering from the time of the injury up to the present time, whatever she may have

suffered physically and mentally, by reason of her injuries or the nervous condition from the time of the accident up to the present time she is entitled to recover for if you find for the plaintiff."

We think this instruction erroneous. It has been repeatedly held that recovery may not be had for injuries not pleaded. *Fuller* v. *Mayor, etc., of Jackson*, 92 Mich. 201 (52 N. W. 1075); *Hall* v. *City of Cadillac*, 114 Mich. 99 (72 N. W. 33). It cannot be said, as claimed by plaintiff, that in making up their verdict the jury were not influenced by this testimony. At the time of the trial the swellings beneath the knees afforded practically the only external evidence of plaintiff's injury.

Defendant's 15th request, as to the credibility of witnesses, was in proper form, and should have been given.[1] *Knowles* v. *People*, 15 Mich. 408; *Hamilton* v. *People*, 29 Mich. 173; *O'Rourke* v. *O'Rourke*, 43 Mich. 58 (4 N. W. 531); *Gerardo* v. *Brush*, 120 Mich. 405 (79 N. W. 646).

The judgment is reversed, and a new trial granted.

BIRD, C. J., and OSTRANDER, MOORE, and BLAIR, JJ., concurred.

[1] The request to charge the jury referred to is as follows: "I charge you that if you are satisfied that any witness knowingly and willingly testified to that which was false, and was a material matter, that the whole testimony of such a witness would be seriously affected by that fact, and that no credit should be given to the naked statement of such a witness when unsupported or not corroborated by any other proof in the case, but where corroborated by other proofs or circumstances, the testimony of such witness may receive such credit as it may appear to you to deserve."—REPORTER.

STRELOW v. AMERICAN COLOR CO.

1. CORPORATIONS — STOCKHOLDERS' LIABILITY — JUDGMENT CREDITORS—EXHAUSTION OF LEGAL REMEDIES.
   Before filing a bill in equity to enforce the liability of stockholders for partly paid stock, the creditor must reduce his claim to judgment and exhaust his legal remedies. 3 Comp. Laws, §§ 9755-9780.

2. EQUITY—JUDGMENT—ARBITRATION—CREDITORS' BILL.
   Equity will not take jurisdiction of a bill of complaint to enforce stockholders' liability, filed by a creditor who has secured an award of arbitrators against the corporation, but not a judgment, and who does not show an execution issued and returned unsatisfied.

Appeal from Wayne; Murphy, J. Submitted June 30, 1910. (Docket No. 39.) Decided September 27, 1910.

Bill by Albert Strelow against the American Color Company and others for an accounting, and to enforce the payment of unpaid stock subscriptions. From an order sustaining demurrers to the bill, complainant appeals. Affirmed.

Charles Engelhard, for complainant.

W. L. Jenks, *F. L. Wilson*, and *Bowen, Douglas & Eaman*, for defendants.

BROOKE, J. Complainant, who was a creditor of defendant American Color Company, on December 14, 1906, caused an attachment to issue against the property and effects of said defendant. On December 19, 1906, an agreement was entered into between the parties to that suit to liquidate the damages by arbitration. On May 1, 1907, the arbitration committee signed a finding, fixing the amount of complainant's claim at the sum of $2,275.84. The said defendant was a tenant of complain-

ant, and there appears to have been past due on account of rent the further sum of $1,250. Complainant had another claim against said defendant for repairs amounting to $87.20. None of these claims were placed in judgment, and, of course, no execution therefor was returned unsatisfied, in whole or in part. On May 17, 1907, complainant filed his bill in this cause, setting out gross mismanagement on the part of the officers of said defendant, and averring that many of the stockholders (also made defendants) had not paid in full for the stock standing in their several names. He prayed that the Security Trust Company (already acting as trustee for the defendant American Color Company under a mortgage) be appointed trustee to collect the assets of said defendant, and distribute the same among the bona fide creditors thereof;

"That an account be taken to show the true condition of the company, and the amounts so due from the various said stockholders and all the members of the company, and that the necessary orders and decrees may be entered requiring their proportional contributions for the amounts so unpaid on their said stocks, to the extent necessary to make up the deficit or shortage required to pay in full all legitimate claims and expenses of administration and of this proceeding, and for the enforcement and collection of such orders and decrees according to law."

To this bill of complaint defendants Ramage, Hopkins, Charles W. Thompson, W. Thompson, Jr., Jenks, and Pepper demurred. The principal ground of demurrer is—

"That it appears affirmatively from said bill of complaint that said complainant is not a judgment creditor of said defendant American Color Company in any manner or form whatsoever, and it further appears that the main purpose of said bill of complaint is to enforce a liability on this defendant for unpaid subscriptions to the capital stock of said defendant American Color Company."

From a decree sustaining the demurrer complainant appeals.

Complainant's position, as we gather it from a very voluminous brief, is:

(1) That it is not necessary for him to have reduced his claims to judgment in order to maintain his bill to compel payment of unpaid stock subscriptions; and

(2) That, if a judgment is necessary, the arbitration award is equivalent in law to a judgment.

His first contention has been directly passed upon in *McKee* v. *Garbage Co.*, 140 Mich. 497 (103 N. W. 906). It was urged there, as it is in the case at bar, that independent of the statute (chapter 269, §§ 9755–9780, 3 Comp. Laws), equity courts exercised jurisdiction over directors, managers, trustees, and other officers of corporations for many of the purposes specified in the statute, and exercised that jurisdiction at the instance of any creditor, whether he had proceeded to judgment or not, or whether his claim was due or not. This court in disposing of complainants' contention there said:

"We cannot recognize that principle in this State, because we have already deliberately repudiated it. See *Bank of Montreal* v. *Lumber Co.*, 90 Mich. 345 (51 N. W. 512). Complainants cannot therefore maintain their suit on any general principle of equity."

In *C. H. Little Co.* v. *Cemetery Ass'n*, 135 Mich. 248 (97 N. W. 682), it was held that, aside from the remedies and proceedings provided by chapter 269, §§ 9755–9780, 3 Comp. Laws, courts of equity have jurisdiction in many cases, but it was further held that—

"It is the common-law duty of a creditor in such cases to proceed first against the property of the corporation, to ascertain if any can be found to satisfy his debt, before proceeding against the stockholders. The proceeding against the stockholders would be entirely unnecessary if there were tangible assets subject to the payment of creditors."

In effect, complainant asks us to overrule our holding in *McKee* v. *Garbage Co.*, *supra*, together with the decisions upon which it is based. No good reason is perceived for such a course. It seems to us that it is imposing no hardship upon a creditor to ask him to first exhaust

his legal remedy by judgment and execution against the assets of the corporation itself before permitting him to inquire into the relations existing between the corporation and its stockholders. He has no interest in the subject, unless the corporation itself is unable to pay its debt.

Is the arbitration award the equivalent of a judgment? Many decisions as to the effect of an award are cited in complainant's brief, but none of them answer this question in the affirmative. It is, we think, clear that it is rather the basis for a judgment than its equivalent. An execution could in no event issue upon the award itself without a precedent judgment. But, if complainant's contention as to this question is correct, it does not meet the situation. The object of the statute and of the common-law rule is to insure the exhaustion of the assets of the corporation itself before recourse can be had to unpaid stock subscriptions, and this can be done only by issuing an execution against such assets. Its return unsatisfied, in whole or in part, clothes the court with jurisdiction to proceed against the delinquent stockholders.

The decree is affirmed, with costs.

BIRD, C. J., and OSTRANDER, MOORE, and BLAIR, JJ., concurred.

VILLAGE OF WOLVERINE *v.* CHEBOYGAN CIRCUIT JUDGE.

1. MANDAMUS—INJUNCTION—PARTIES TO SUIT — PROSECUTING ATTORNEY.

   In an application for mandamus to compel the dissolution of a temporary injunction issued in a suit by the prosecuting attorney on the relation of residents of a village, to prevent the approval of liquor dealers' bonds, the objection that the prosecuting attorney is an improper party is not meritorious where the attorney general has intervened and approved of his action.

2. INTOXICATING LIQUORS — PROSECUTING ATTORNEY — EQUITY — PARTIES — APPROVAL OF BONDS — RESTRAINING UNLAWFUL ACTION—PUBLIC OFFICERS.

   Under 1 Comp. Laws, § 2556, the prosecuting attorney may file a bill to enjoin the unlawful approval of liquor dealers' bonds by a village council.

3. SAME—PUBLIC OFFICERS—MUNICIPAL CORPORATIONS — INJUNCTION.

   Injunction is the proper remedy to restrain the council of a village from approving a liquor dealer's bond which has been protested by a majority of the voters. Act No. 321, Pub. Acts 1907.

4. SAME—ACTION OF COUNCIL—APPROVAL OF BOND—CONCLUSIVENESS.

   The action of a village council in holding that a protest of the majority of the voters against the approval of a liquor dealer's bond did not comply with the statute is not final.

5. SAME—TEMPORARY INJUNCTION — BOND OF LIQUOR DEALERS — APPROVAL.

   It is a proper exercise of discretion to restrain, by a preliminary injunction, the approval of liquor dealers' bonds and the issuance of licenses to sell intoxicating liquors at retail where the court finds that a majority of the resident voters for governor at the last election protest against the bonds which are executed by a surety company. Act No. 321, Pub. Acts 1907.

Mandamus by the village of Wolverine and others to

compel Frank Shepard, circuit judge of Cheboygan county, to dissolve a temporary injunction. Submitted July 1, 1910. (Calendar No. 24,025.) Denied September 27, 1910.

Charles D. Barghoorn and *C. S. Reilley*, for relators.

Franz C. Kuhn, Attorney General, *David H. Crowley*, Prosecuting Attorney, and *Frost & Sprague*, for respondent.

MOORE, J. This is an application for a writ of mandamus to compel the respondent to dissolve a temporary injunction issued by him. Mr. Daley and Mr. Sellick are saloon men. The other relators are members of the village council of the village of Wolverine.

In April, 1910, a bill of complaint was filed by David H. Crowley, prosecuting attorney, on the relation of Fred D. Clark and Casson B. Stonehouse, in which it was represented that said Crowley had been and was prosecuting attorney, and that said Clark and Stonehouse were residents with their families of the village of Wolverine in said county, and the owners of valuable property therein; that the village of Wolverine consisted of six trustees, with its president, Henry Kuehl, and its clerk, Arthur Bonnett, all duly elected, qualified, and acting for said village; that on April 5, 1910, a majority of the qualified electors of the village of Wolverine, equal to a majority of the votes cast for governor at the last general election, filed a petition with said village protesting against the acceptance of bonds offered by any individual, firm, or corporation proposing to engage in the sale of intoxicating liquors, protesting against the acceptance of such bonds on which said bonds any surety or bonding company was given as the surety thereon; that it was the duty of the common council to refuse to accept bonds of any individual, firm, or corporation upon which a bonding company was given as surety; that James Daley and William Sellick, relators, had each secured bonds and proposed to

engage in the sale of intoxicating liquors at the village of Wolverine upon which said bonds the Michigan Bonding Company was surety, and that said Daley and Sellick offered and sought to have the village of Wolverine accept said bonds and duly certify to same, and to thereafter present the same to the county treasurer, and that said county treasurer was to be requested to issue a license thereon, and that, notwithstanding the filing of a petition protesting against the acceptance of such bonds, complainants were informed that the common council had no right to accept same and to issue a certificate, and that the common council's officers and trustees threatened to issue and deliver said bonds and deliver the certificates aforesaid; that the proposed action of the common council was without authority of law and beyond the powers of said council; and that its proposed action in issuing and delivering certificates of approval, and the proposed action of the county treasurer in issuing licenses, is a violation of public duty in that the proposed action was illegal and unlawful, and that licenses obtained upon said bonds would be illegal, and that the place where the sales of liquor would be made would be a nuisance and would work irremediable injury. The bill prayed for a writ of injunction. A demurrer and an answer were interposed to the bill of complaint. A temporary injunction was issued. A motion was made to dissolve this injunction. After a full hearing the motion was denied. This mandamus proceeding was then instituted.

The attorneys for the relators urge (we quote from the brief):

"There are four questions for discussion in this case, viz.:

"*First.* Had the prosecuting attorney for and in behalf of the people of the State of Michigan the right to commence this action?

"*Second.* Was injunction the proper remedy?

"*Third.* The effect of the action of the common council of the village of Wolverine on said petition of protest.

"*Fourth.* The construction to be placed on Act No. 321

of the Public Acts of 1907, what is meant by the expression therein, 'A majority of the qualified electors of any town, village or city, equal to a majority of the votes cast for governor at the last general election.'"

We will consider these questions in the order presented.

1. It ought to be stated in this connection that the attorney general of the State has intervened and approves of the action of the prosecuting attorney, so that, if the objection made by counsel is technically correct, it ought not to have much weight in an application for a writ of mandamus, which is a discretionary writ. We think, however, section 2556, 1 Comp. Laws, gives the prosecuting attorney full authority to appear in such a proceeding as this.

2. Is injunction the proper remedy? It has been repeatedly held by this court that, when officers are about to do unlawful and unauthorized acts, an injunction may be issued. See *McMullen* v. *Ingham Circuit Judge*, 102 Mich. 608 (61 N. W. 260), and the cases therein cited.

3. It is claimed under this head that the decision of the village council that the petition of protest does not comply with the law is final and controlling. Counsel cite many cases in support of this contention. An examination of these cases will show that they arose under statutes which expressly provided that the action should be final. The statute under consideration has no such provision.

4. It is the contention under this head (we quote from the brief):

"The intention of the legislature evidently was that a majority of the qualified electors, who were such qualified electors at the time of the presentation of the petition, should have the right to protest against the acceptance of surety bonds. It is only the persons who are qualified electors at that time who are interested in the acceptance of such bonds, and the protestants must be a majority of such qualified electors. To further define this majority the legislature adds that this majority must be equal to a majority of the votes cast for governor at the last general election."

The act under consideration is Act No. 321, Pub. Acts 1907. The language which is important here is as follows:

"SECTION 1. Whenever any bond * * * is by the law of the State * * * required * * * such bond * * * may be executed by a surety company qualified to act as surety or guarantor as hereinafter provided. * * * *Provided, further*, That where any bond is required for the sale of liquors under the laws of this State, such bonds shall not be executed by any surety company as herein provided, except by and with the consent and approval of the township board, or of the board of trustees or of the common council of any village or city as the case may be, within which said bond is required to be filed: And *Provided, further*, that the bond of such surety company shall not be accepted by said township board, common council or a board of trustees unless such surety company shall be a corporation of the State of Michigan, organized and existing under the laws of the State of Michigan, and with a capital stock of not less than five hundred thousand dollars: *Provided*, That whenever a majority of the qualified electors of any township, village or city equal to a majority of the votes cast for governor at the last general election shall file a petition with the township board of any township, board of trustees, council or common council of any village or city, protesting against the acceptance of the bonds offered by any individual, firm or corporation proposing to engage in the sale of intoxicating liquors at retail, it shall be unlawful for such township board of such township, board of trustees, council or common council of any village or city to accept such bonds."

This language is clear and unambiguous. The circuit judge found that 165 qualified electors residing in the village of Wolverine voted for governor at the last general election. He also found that 101 qualified electors residing in the village of Wolverine signed the petition of protest. We find no occasion to interfere with the action of the circuit judge.

The application of the relators is denied, with costs.

MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

MACOMBER *v.* COTTRELL.

1. EQUITY—PLEADING AND PRACTICE—DECREE ON DEMURRER.
   Although Chancery Rule 9, subd. *e*, requires that after a demurrer to the bill of complaint has been sustained, the complainant be given an opportunity to amend, the bill may be dismissed unless it can be effectively amended.

2. SAME—APPEAL AND ERROR—STATUTES.
   Act No. 299, Pub. Acts 1909, amending 1 Comp. Laws, § 549, is declaratory of the pre-existing practice in circuit courts as to the right to amend, and is not intended to confer an absolute right to amend in all cases, where the demurrer is sustained on appeal.

3. SAME—AMENDMENT—DECREE.
   An opportunity to amend complainant's bill of complaint in the case of *Macomber* v. *Cottrell, ante,* 91, is permitted on a showing of additional facts tending to prove fraud and collusion, and the decree is amended by substituting for the order of dismissal an order remanding the cause with leave to file an amended bill of complaint.

Bill by Allen E. Macomber against George Cottrell and others to set aside a compromise agreement and an assignment of a claim and for an accounting: On motion of complainant to amend the decree in the cause reported at page 91, *ante.* Motion granted December 7, 1910. (Docket No. 64.)

William S. Jenney, for the motion.

Stevenson, Carpenter & Butzel and *James G. Tucker, contra.*

HOOKER, J. The cause was heard on appeal from an order overruling demurrer to the bill. The order was reversed and the bill dismissed. The cause is reported *ante,* 91.

Counsel now ask us to amend the decree; fix a time

within which complainant may amend his bill, and remand the cause for further proceedings. This application is upon two grounds. *First*, the statute, Act 299, Pub. Acts 1909. *Second*, the proposed statement of further facts set forth in the application now before us.

1. **Statute.** The practice in chancery requires an opportunity to amend bill or answer after demurrer sustained. Chancery Rule 9, subd. *e*, former Rule 23. In *Creasey* v. *St. George's Society*, 34 Mich. 51, a decree for complainant without permitting defendant to answer, held premature; "defendant should have had *leave* to answer." It seems then that *leave* is necessary.

In *Lamb* v. *Jeffrey*, 41 Mich. 719 (3 N. W. 204), it was held that the bill should not be dismissed on demurrer unless the defects are not amendable, while in *Smith* v. *Blake*, 96 Mich. 542 (55 N. W. 978), the same exception was made.

In *Bigelow* v. *Sanford*, 98 Mich. 662 (57 N. W. 1037), we said that on sustaining a demurrer which goes to the merits of the whole bill, the bill may be dismissed, etc.

In *Aldine Manfg. Co.* v. *Phillips*, 118 Mich. 171 (76 N. W. 371), we held that the opportunity should have been given below had it been asked, which we would not presume. See, also, *Bank of Michigan* v. *Niles*, Walk. Ch. (Mich.) 396; *Church* v. *Holcomb*, 45 Mich. 29 (7 N. W. 167).

The rule announced in *Bigelow* v. *Sanford* seems to show that the circuit court has power to dismiss a bill where a general demurrer is sustained, and that it is proper where the bill cannot be effectively amended. That it is a proper rule seems plain for it would be unfortunate if it should be necessary to go to a hearing of the merits on an amended bill or upon demurrers to the same to ascertain that the amended bill or answer could not be amended. Such a rule would, in the latter case, put it in the power of a complainant to protract the litigation for as long a time as he should be able to file new pleadings. *Bigelow* v. *Sanford* is in line with the prac-

tice generally. 1 Enc. Pl. & Prac. p. 481; Fed. Eq. Rule 35; *Riddle* v. *Whitehill*, 135 U. S. 627; 1 Enc. Pl. & Prac. p. 488; *Hardin* v. *Boyd*, 113 U. S. 761; *Shackleford* v. *Bankhead*, 72 Ala. 476.

It is contended that the statute, 1 Comp. Laws, § 549, as amended by Act No. 299, Pub. Acts 1909, requires an opportunity to amend in all cases of hearing on demurrer on appeal to this court. This statute was passed in 1883, prior to which no appeal could be taken from an order overruling a demurrer. We are of the opinion that it should be construed to be declaratory of the pre-existing practice in circuit courts and its application to cases in this court upon appeal, the question being heard *de novo*, and that it was not the intention to make the giving an opportunity to amend mandatory in all cases. The rule has never been so construed although the language seems to be equally broad. We see no reason for giving the statute a different construction from that given the rule. We must, therefore, overrule the first ground relied on.

2. **Amendment.** The dismissal of the bill was based on an affirmative showing of a compromise therein contained, and while we recognize the fact that settlements or compromises of pending litigation may be set aside for fraud, we were of the opinion that the bill did not contain allegations warranting such relief, but affirmatively showed the contrary.

The new application is based on new and other allegations of fraud and collusion. We do not wish to pass upon their sufficiency at this time. We recognize, however, and approve the practice which gives complainants an opportunity to amend in all cases where the defects in the bill are not such as to be necessarily fatal, beyond the power of amendment, and think it should be followed in this as well as the lower court, and that ordinarily doubts of the ability to amend and the propriety of an amendment should be resolved in favor of giving an opportunity. In view of the facts now alleged, we think it advisable to amend the decree, substituting for the order of dismissal

an order that the cause be remanded with leave to the complainant to file an amended bill within 30 days after notice of the filing of the record in the circuit court.

Costs will be allowed on this motion.

MOORE, MCALVAY, and BROOKE, JJ., concurred. BLAIR, J., concurred in the result.

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ABANDONMENT—See DIVORCE (10).

ABATEMENT OF LEGACY—See WILLS (4).

ACCEPTANCE OF WORK—See CONTRACTS (3).

ACCOUNTING—See APPEAL AND ERROR (7); EQUITY (6).

ACCOUNT STATED.

Where it appeared that plaintiff at different times presented statements of account in writing to the defendant, who signed them, but upon the trial testified that it had been previously agreed to compromise his claim against the plaintiff for damaged goods, by allowing him a credit of a stated amount upon which future purchases should apply, evidence was admissible to prove the compromise, notwithstanding the signed statements, which presented a question for the jury, whether they were intended as mere memoranda of goods furnished or as final statements of account. *Buckeye Brewing Co.* v. *Eymer*, 294.

See SALES (1).

ACTION—See BROKERS (6); CONTRACTS (5); PLEADING (3).

ACTION ON THE CASE—See TROVER AND CONVERSION.

ADEMPTION OF LEGACY—See WILLS (7).

ADEQUATE REMEDY AT LAW—See EQUITY (3); QUIETING TITLE; TRUSTS (1).

ADJOURNMENT—See JUSTICES OF THE PEACE (1, 2).

ADMISSIONS—See CONTRACTS (8); EVIDENCE (17, 30); SEDUCTION (4).

ADVERSE INTEREST OF AGENT—See PRINCIPAL AND AGENT (9, 10).

ADVERSE POSSESSION.

1. Adverse possession may devest an equitable title unsupported by a tax deed or certificate of sale issued, where the city of Detroit purchases property for unpaid taxes under its charter. *Klatt* v. *City of Detroit*, 187.

ADVERSE POSSESSION—Continued.

2. Color of title is not necessary in the claimant of land whose property is held adversely, in order to support the adverse possession. *Id.*

See CONSTITUTIONAL LAW (3); PARTIES (2).

AFFIRMATIVE DEFENSE—See INSURANCE (3).

AFFIRMATIVE RELIEF—See EQUITY (1).

AGENCY—See PRINCIPAL AND AGENT.

ALIMONY—See DIVORCE (4, 9–11, 13); TRUSTS (3, 4).

AMENDMENT—See CONSTITUTIONAL LAW (1); COSTS (3); DISMISSAL AND NONSUIT (2); EQUITY (9–11); TRIAL (5).

AMENDMENT OF RECORD—See HABEAS CORPUS (7).

APPARENT AUTHORITY OF AGENT — See PRINCIPAL AND AGENT (2–4).

APPEAL AND ERROR.

1. The record of an appeal to circuit from probate court, uncertified by the circuit judge, showing no entry of judgment, is not in condition for hearing in the Supreme Court. *In re Vetter's Estate*, 109.

2. The point that such by-law had been amended so as to prevent the waiver cannot be raised for the first time in the Supreme Court. *Ruterbusch* v. *Supreme Court I. O. F.*, 213.

3. On appeal from a decree which gave to appellant more than it was entitled to, no complaint may be made of the error. *A. M. Campau Realty Co.* v. *City of Detroit*, 243.

4. Neither 3 Comp. Laws, § 10504, nor the court nor any order of the court made pursuant thereto, may operate to extend the time limited by statute in which to take out a writ of error. *Kaiser* v. *Wayne Circuit Judge*, 248.

5. Although counsel for plaintiff omitted to except at the time to the court's ruling that he must elect between a count under the death act and a count under the survival act, a subsequent exception to the ruling that the plaintiff could not recover under the survival act should be held to apply where the election was made because of the ruling. *Ely* v. *Detroit United Ry.*, 287.

6. Under 3 Comp. Laws, §§ 11966, 11967, the record in a criminal case should be certified to the Supreme Court before judgment, in order to test the validity of a law; after sentence the sole remedy is a writ of error. *People* v. *Dickerson*, 400.

7. The denial of a motion to dismiss, for want of jurisdiction, a bill of complaint in chancery against an executor, for an accounting, to which he had filed an answer, subsequently presenting in probate court his final account covering the same matter, may not be reviewed on appeal, since the order is not a final adjudication of rights. *Brooks* v. *Hargrave*, 599.

8. On appeal from a decree in chancery no modification will be made in favor of a party who does not appeal. *Herpel* v. *Herpel*, 606.

APPEAL AND ERROR—Continued.

9. In cases where a verdict has been instructed, the case made by the party ruled against must be taken as true in determining, on error, whether there was anything to be submitted to the jury; and the strength or weakness of the evidence presented by the opposite party need not be considered. *Goda* v. *Maurer*, 621.

10. Where a case was tried on the theory that the corporation which failed to file its annual report was a Michigan corporation and the declaration alleged that it was a corporation organized under the laws of Michigan, and where the defendant failed to make the point on the trial that there was a failure of proof in that respect, the point will not be considered on error. *Deloria* v. *Van Winkle*, 660.

11. The failure of appellants to file a claim of appeal after the settlement of the record in chancery is not fatal where the claim was actually filed prior to the settlement of the case. *Baldwin* v. *Escanaba Liquor Dealers' Ass'n*, 703.

12. Actual payment of the fee to the register in chancery is unnecessary if the register treats it as paid within the 40 days after settling the testimony by giving the solicitors credit for the amount, makes no demand, and it is subsequently paid. Act No. 299, Pub. Acts 1909. *Id.*

See COSTS (4); DIVORCE (2); EQUITY (7, 10); EXCEPTIONS, BILL OF; HABEAS CORPUS (2); JUSTICES OF THE PEACE (3–7); TRIAL (1–3, 5, 6, 15); WILLS (8).

APPROVAL OF BONDS—See INTOXICATING LIQUORS (8–11).

ARBITRATION AND AWARD—See EQUITY (8).

ARCHITECTS—See CONTRACTS (3).

ARGUMENT OF COUNSEL—See TRIAL (4).

ASSAULT AND BATTERY.

Where respondent was charged with assault with intent to do great bodily harm, less than murder, upon the person of his infant son, and the injuries and attendant circumstances, taken with admissions of the boy at the time, tended to prove the crime, the case was one for the jury, even though the son testified that he might have been kicked by a horse. *People* v. *Hennard*, 225.

See EVIDENCE (13, 14); PRINCIPAL AND AGENT (6); TRESPASS VI ET ARMIS.

ASSESSMENTS—See INSURANCE (7, 8, 10, 11).

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ATTEMPT TO PURCHASE—See EMINENT DOMAIN (4).

ATTORNEY AND CLIENT—See BROKERS (3); TAXATION (9).

AUTHORITY OF AGENT—See PRINCIPAL AND AGENT (2–4).

AUTOMOBILES — See CORPORATIONS (7); HIGHWAYS AND STREETS (2, 4, 5, 8); NEGLIGENCE (12, 13).

BANKS AND BANKING.

The fact that a bank, which holds a note of the vendor of a stock of merchandise in bulk without compliance with the statute, failed to set off a deposit of the vendor against it, but permitted him to check it out, does not discharge the vendee from his liability under the statute. Act No. 223, Pub. Acts 1905. *Marquette County Sav. Bank* v. *Koivisto*, 554.

See EXECUTORS AND ADMINISTRATORS (1–3); PRINCIPAL AND AGENT (7, 8); TRADE-NAMES; TRUSTS (1).

BAR TO ACTION—See JUDGMENT (4); MECHANICS' LIENS (3).

BENEFICIAL ASSOCIATIONS—See INSURANCE (2–5).

BEST EVIDENCE—See EVIDENCE (31).

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BILL OF EXCEPTIONS—See EXCEPTIONS, BILL OF.

BILL OF PARTICULARS—See COMPROMISE AND SETTLEMENT (3); PLEADING (2, 6).

BILLS AND NOTES — See CORPORATIONS (12, 13); EXECUTORS AND ADMINISTRATORS (2, 3); PRINCIPAL AND AGENT (7, 8).

BOARDING CAR—See CARRIERS (2).

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BOARDS OF SUPERVISORS—See MUNICIPAL CORPORATIONS (6); NUISANCE (3).

BONA FIDE PURCHASER—See TAXATION (8).

BONDS — See DEBTOR AND CREDITOR; FRAUDULENT CONVEYANCES (6); INTOXICATING LIQUORS (2–4, 9–11); MANDAMUS; MUNICIPAL CORPORATIONS (4, 5).

BOUNDARIES.

The boundary line between two adjoining riparian owners, as to the land covered by water, is not in any way dependent upon the direction of the lines on land, but the lines from the shore should run, as near as may be, perpendicular to the course of the stream. *A. M. Campau Realty Co.* v. *City of Detroit*, 243.

BREACH OF CONTRACT—See CORPORATIONS (4); DAMAGES (4); EVIDENCE (12); MECHANICS' LIENS (3); REPLEVIN; SALES (2); SPECIFIC PERFORMANCE (2); TROVER AND CONVERSION; VENDOR AND PURCHASER (2).

BREACH OF WARRANTY—See CONTRACTS (7, 8); DAMAGES (6).

BRIDGES.

The question of contributory negligence in failing to take another road, or to lead his team, is one of fact, where, in crossing a bridge which plaintiff knew had no sufficient railing, one of his companions, who was driving, guided the horses off the edge, in the darkness. *Priebe* v. *Township of Moorland*, 110.

See MUNICIPAL CORPORATIONS (1).

BROKERS.

1. Disputed testimony that the plaintiff, a real estate man, interviewed defendant as to the price of his house, and obtained the refusal of it, at two per cent. commission, no price being fixed, that he arranged for an inspection of the house by a prospective purchaser, who subsequently purchased the property directly from the vendor, presents a question of fact for the jury as to the procuring cause of the sale and the broker's right to a commission. *Wood* v. *Smith*, 334.

2. In order to recover commissions the broker must show that he was the procuring cause of the sale, that the purchaser learned of the property through him, and bought the property because of his efforts, which must be shown to have been more than a mere introduction of the vendor and vendee. *Id.*

3. Evidence considered and *held* to support the findings of fact made by the trial court in rendering judgment against an attorney at law who claimed commissions for an attempted sale of real property under an agreement with his client. *Skeels* v. *Snow*, 561.

4. The making of a contract by plaintiff with defendant for the purchase, as broker, of stock on margins, and its consequent breach, not being denied, the alleged intention of the parties to carry out a gambling transaction, prohibited by Act No. 336, Pub. Acts 1907, as claimed by defendant and as denied by plaintiff, was a question for the jury. *Goodspeed* v. *Smith*, 641.

5. No conversion could take place where an actual purchase of stock was not contemplated or executed by the broker. *Id.*

6. The fact that the broker knowingly engaged in a business prohibited by law and made contracts in violation of the statute, would not defeat the plaintiff's right to damages, if he acted in good faith, and the defendant failed to perform the agreement. *Id.*

7. The provisions of Act No. 336, Pub. Acts 1907, being merely penal, would not prevent plaintiff's recovery. *Id.* 642.

See TROVER AND CONVERSION.

BUCKET SHOPS—See BROKERS (4, 6).

BUILDING CONTRACTS — See CONTRACTS (1, 3); MECHANICS' LIENS (2, 3); NEGLIGENCE (7).

BULK-SALES LAW — See BANKS AND BANKING; DEBTOR AND CREDITOR; FRAUDULENT CONVEYANCES.

BURDEN OF PROOF — See INSURANCE (3); LIBEL AND SLANDER (1); NEGLIGENCE (1); WILLS (8).

CANCELLATION OF INSTRUMENTS.

1. The validity of deeds given by a mother to her sons, whom the bill of complaint charged with fraud, is *held*, as a matter of fact, to be sustained by the testimony. *Anderson* v. *Anderson*, 343.

2. A conveyance of land made by a husband to his wife without consideration, no fraud being shown, will not be rescinded because the wife subsequently deserted him and refused to return on the ground that he had contracted and communicated to her a venereal disease. *Purcell* v. *Purcell*, 404.

CARRIERS.

1. Evidence that the derailment was caused by the spreading of rails, that the ties were rotten and the spikes loose, justifies the submission of the carrier's negligence to the jury. *Schulte* v. *Michigan Cent. R. Co.*, 76.

2. A conductor who knows that a passenger is in the act of boarding a car should neither direct the starting of a standing car nor direct the acceleration of speed of a car in motion. *Orth* v. *Saginaw Valley Traction Co.*, 353.

3. Testimony that the conductor signaled the motorman to proceed while plaintiff was boarding a car, after it had stopped, before crossing a railroad track, and that the resulting increase in speed threw plaintiff to the ground, presents a case for the jury, notwithstanding that it was not a customary place for the taking on of passengers. *Id.*

4. It cannot be said as a matter of law that plaintiff was guilty of contributory negligence in boarding the car while it was in motion; the evidence failing to show conclusively that the rate of speed was six miles an hour, and testimony being introduced to prove that the conductor gave the signal knowing the danger to plaintiff. *Id.*

5. An instruction to the jury that plaintiff did not assume the risk of the accelerated speed was correct. *Id.*

6. Testimony as to the experience of witnesses relative to the jerking of defendant's cars when the power was increased, was competent in connection with defendant's claim and testimony in support thereof that a device in use on its cars prevented jerking. *Id.*

7. A shipper who delivers to a carrier goods worth more than $50, and fills out a receipt in which is a clause providing that the rate of charge shall be fixed by the valuation stated, which is agreed to be $50 unless a larger sum shall be declared, may recover only $50 for the loss of the goods where he neglects to declare the value. *D'Arcy* v. *Adams Express Co.*, 363.

CARRIERS—Continued.

8. In an action for injuries to a passenger while riding on defendant's street car, it was not error to submit to the jury her testimony concerning her nervous condition, insomnia and pain in her arm and ankle, following the injury, although her physician testified that she did not show any effects of nervousness; that she did complain to him of her right arm; that the insomnia might result from such an accident, and it would be impossible to tell how long the ill effects might continue. *Plozke* v. *Detroit United Ry.*, 632.

9. Two thousand dollars is not so excessive an amount, under the testimony, as to warrant the setting aside of the verdict. *Id.*

See PLEADING (4); SALES (4, 5).

CASH PREMIUM POLICIES—See INSURANCE (6).

CERTIORARI—See COSTS (3); JUSTICES OF THE PEACE (5).

CHANCERY APPEALS—See APPEAL AND ERROR (8).

CHANGING CONDITIONS—See MASTER AND SERVANT (21).

CHARITIES—See TRUSTS (2).

CHARTER COMMISSION—See ELECTIONS.

CHASTITY—See SEDUCTION (1).

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COMMINGLING FUNDS — See EXECUTORS AND ADMINISTRATORS (1).

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COMMON COUNTS — See ACCOUNT STATED; TROVER AND CONVERSION.

COMMON-LAW MARRIAGE — See MARRIAGE; SEDUCTION (1, 3).

COMPETENCY — See DEEDS (3); EVIDENCE (18); MASTER AND SERVANT (1, 3); WILLS (8, 11, 12).

COMPROMISE AND SETTLEMENT.

1. Complainant filed a bill in equity to vacate a compromise agreement made with the executor of his deceased sister's husband, by which complainant released all claim to his sister's estate as her heir at law, for the payment of a certain sum of money. The bill averred that the executor suppressed a certain account book, having entries showing the amount of money in the hands of deceased belonging to the sister. By

COMPROMISE AND SETTLEMENT—Continued.

the terms of the compromise it appeared that during the life of testator, complainant had made claim to his share of the sister's estate, that the testator claimed the same by gift from his deceased wife, and finally conveyed certain real estate and canceled a certain note in settlement of the claim. The bill contained no averment that complainant was misled by misrepresentations of the facts. *Held*, that no case was made for the interposition of equity. *Macomber* v. *Cottrell*, 91, 718.

2. In an action for goods sold, for which defendants claimed they had made payment by a compromise, oral testimony that certain items were not entered in the plaintiff's books until after the alleged compromise, is not incompetent under the best evidence rule. *Rock Island Plow Co.* v. *Smith*, 180.

3. Although no bill of particulars was filed, the claimed defense made it admissible to prove what was included in the settlement. *Id.*

4. It is *held* that the evidence warranted the submission to the jury of the question whether or not a plow had been included in the settlement. *Id.*

See ACCOUNT STATED.

CONCLUSIVENESS—See INTOXICATING LIQUORS (10).

CONDITIONS PRECEDENT—See INTOXICATING LIQUORS (3).

CONDONATION—See DIVORCE (6).

CONDUCT OF COUNSEL—See TRIAL (11).

CONDUCT OF TRIAL COURT—See TRIAL (11).

CONFIRMATION OF SALE—See GUARDIAN AND WARD (2).

CONFLICTING TESTIMONY—See EVIDENCE (25).

CONSIDERATION—See HUSBAND AND WIFE (4).

CONSOLIDATION OF CAUSES—See COSTS (1),

CONSPIRACY—See LIBEL AND SLANDER (4).

CONSTITUTIONAL LAW.

1. Act No. 194, Pub. Acts 1905, amending Act No. 232, Pub. Acts 1903, by including foreign corporations within the provisions imposing a liability on directors for failure to make reports, is unconstitutional for the reason that the amendment is not fairly within the title of the amended statute, which refers to domestic corporations only. *Young* v. *Moore*, 60.

2. A drain commissioner, who holds over until the election of his successor under Act No. 118, Pub. Acts 1909, and whose salary is fixed by the board of supervisors before the date named in the act, from which the then acting commissioner shall hold over, is entitled to the compensation as changed, and the action of the board of supervisors does not contravene the constitutional inhibition against the increase or decrease of

CONSTITUTIONAL LAW—Continued.

salary of any officer after election or appointment; since the right to the office was not determined until the date named in the statute. *Chase* v. *Hart*, 74.

3. The legislature may extend or repeal a statute of limitations or abolish the rule of adverse possession so as to affect cases where the period has not already run, or title been previously acquired. *Klatt* v. *City of Detroit*, 186.

4. The statute prohibiting solicitation by an agent of a foreign corporation of orders for the purchase of intoxicating liquors at wholesale without a license is not unconstitutional as a discrimination against nonresidents. *People* v. *Swenson*, 397.

See CORPORATIONS (15, 17); MUNICIPAL CORPORATIONS (1, 3); TAXATION (2).

CONSTRUCTION OF CONTRACTS—See CONTRACTS (3).

CONSTRUCTION OF DEEDS—See DEEDS (2).

CONSTRUCTION OF FRANCHISE—See MUNICIPAL CORPORATIONS (3).

CONSTRUCTION OF STATUTES—See INTOXICATING LIQUORS (7); RAILROADS (5); STATUTES (1, 2).

CONSTRUCTION OF WILLS—See WILLS (2, 5, 6).

CONTEMPT—See DIVORCE (11); HABEAS CORPUS (7, 8); WATERS AND WATERCOURSES (7).

CONTRACT, MODIFICATION OF—See FRAUDS, STATUTE OF (1).

CONTRACTORS—See NUISANCE (1).

CONTRACTS.

1. After it was found that the plans for constructing a building were impracticable, the architects provided a new method of constructing the foundation by which for caissons of cement resting on bedrock were substituted piers with bells, which, the engineer informed the contractor, contained approximately an equal amount of concrete. In fact they contained 1,049 feet more of concrete. *Held*, that the contractor who proceeded to carry on the work under similar terms was entitled to extra compensation for the increased cost. *Vaughan* v. *Ford*, 37.

2. Pumping water which an independent contractor caused to flood the basement is properly allowed as an extra expense in a suit to enforce a mechanic's lien. *Id.*

3. In construing a building contract, it is competent evidence that steel beams were not to be encased in concrete, where it appeared that the architects accepted the work without objection. *Id.*

4. The existence of an express contract executed upon both sides precludes recovery upon an implied contract relating to the same matters. *Hathaway* v. *Vaughan*, 269.

CONTRACTS—Continued.

5. The commencement of an action of assumpsit affirms a contract where one exists and has not been disaffirmed. *Id.*

6. Services rendered at the expense of the vendor of wood in fighting fire to protect it, without the knowledge or direction of the vendee, are not recoverable of the latter, even though after receiving notice of the expense a written statement was rendered to the vendor showing credit for this item, but showing an erroneous balance due for money advanced to the vendor. *Kelley* v. *East Jordan Chemical Co.*, 525.

7. No evidence of a warranty made orally by the agent of the seller of a steam hoist is competent to vary the terms of the contract of sale, where it appeared that the seller wrote the buyer, after oral negotiations terminated, that the agent had reported to him the making of the sale on terms stated in the letter, to which the vendee replied that his understanding was correct. *Union Trust Co.* v. *Detroit River Transit Co.*, 670.

8. A subsequent letter of the vendor to the vendee stating in response to complaints made by the purchaser, that he had referred the matter to the agent who would see the purchaser about it, was not an admission of the warranty. *Id.* 671.

See BROKERS (1, 3, 4, 6); CARRIERS (7); CORPORATIONS (3, 4, 7, 8); DAMAGES (4); DIVORCE (13); EQUITY (3); ESTOPPEL (4); EVIDENCE (12, 16); FRAUDS, STATUTE OF (2); HUSBAND AND WIFE (1); INSURANCE (9); LIFE ESTATES; MECHANICS' LIENS (2, 3); SALES (2); SPECIFIC PERFORMANCE; STREET RAILWAYS (4); TROVER AND CONVERSION; VENDOR AND PURCHASER (2); WITNESSES (2).

Agreement to apply dividends in payment of products, see CORPORATIONS (7).

Parol agreement to execute lease, see LANDLORD AND TENANT (1).

CONTRIBUTORY NEGLIGENCE — See BRIDGES; CARRIERS (4); HIGHWAYS AND STREETS (2, 5); MASTER AND SERVANT (4, 17); NEGLIGENCE (4, 11, 12); RAILROADS (1–3); STREET RAILWAYS (1).

CONVERSION—See BROKERS (5); TROVER AND CONVERSION.

CONVEYANCES—See CANCELLATION OF INSTRUMENTS (2); DEEDS (1); ESTOPPEL (2); HOMESTEAD; WILLS (1, 10).

CORPORATIONS.

1. Act No. 310, Pub. Acts 1907, does not impose a liability on directors of a foreign corporation for failure to make annual reports. *Young* v. *Moore*, 60.

2. Subscriptions to capital stock must be for a definite number of shares. *Wheeler* v. *Ocker & Ford Manfg. Co.*, 204.

3. A contract to employ a corporate manager to be paid a salary up to a specified sum in cash, the balance in corporate stock, is not a stock subscription or a sale of the stock. *Id.*

CORPORATIONS—Continued.

4. Under such contract, the corporation has the option to pay in stock or in cash up to the time payment is due; thereafter the obligation becomes one to pay in cash. *Id.*

5. Trust mortgages, conveying all the property of a corporation in trust for the benefit of creditors, amount to an assignment for that purpose. *Id.*

6. Where trust mortgages given by a corporation of its business and property do not authorize the trustees to continue the business or hire a manager, they are not authorized to employ the services of a manager for that purpose. *Id.* 205.

7. A corporation may sell its capital stock at par and at the same time, in good faith, sell its personal property for a sum payable partly in cash, partly, if at all, from dividends thereafter to be declared upon the stock issued to the vendee of the personalty, and may not, without disaffirming the agreement and retendering the consideration, recover the value of the personal property. *Hathaway* v. *Vaughan*, 269.

8. A guaranty of the rent of a dwelling house and business building, to be occupied by a saloon keeper, who makes no agreement to buy liquors exclusively of, or to do any other act for the benefit of the guarantor, and who offers no other inducement, is not within the authority of the secretary of the brewing company who executes the guaranty, and who is not its manager, when it was not expressly authorized by the board of directors, and the time of the lease extended far beyond his term of office. *McBroom* v. *Cheboygan Brewing & Malting Co.*, 323.

9. Matters occurring subsequently to the execution of the guaranty are not evidence tending to show that the plaintiff was thereby induced to rely on the authority of the agent. *Id.*

10. Stockholders of a corporation may informally agree to distribute a certain sum as dividends without going through the form of corporate action, or without action of the board of directors. *Barnes* v. *Spencer & Barnes Co.*, 509.

11. A division of profits is a dividend, even though not called or considered such by directors or stockholders. *Id.*

12. Failing to deny the execution of a corporate note, made by the president of the association without express authority, permits the introduction of the note in evidence; whereupon it makes a *prima facie* case. *Id.*

13. A promissory note executed in the corporate name by its president, to himself, for the price of timber sold by him to the corporation, is valid in the absence of evidence that the price was unfair, and especially upon proof that the directors knew of the transaction, never repudiated the note, and the corporation credited the amount of the purchase price on its books, in his name. *Id.* 510.

14. A corporate officer may deal with the corporation if his acts are open and fair and known to the directors and stockholders. *Id.*

CORPORATIONS—Continued.

15. A mining corporation, organized in 1853, ceased to exist as a corporation *de jure* at the expiration of 30 years, at which time there was no constitutional method of extending the term of its franchise. *Attorney General, ex rel. Linnell*, v. *Gay*, 612.

16. No right to exercise the corporate franchise could be gained by estoppel or laches on the part of the State officials, since there was no authority under statute or otherwise to revive the corporation. *Id.*

17. An invalid attempt to extend the life of the corporation, made in 1882, was not validated by the constitutional amendment of 1889, and the enactment of Acts Nos. 129 and 142, Pub. Acts 1889, which require specific action to renew corporate life. Const. of 1850, Art. 15, § 10. *Id.*

18. The contention that a corporate director is not shown to be liable for the debts of the company during the failure to file an annual report, as required by Act No. 194, Pub. Acts 1905, amending Act No. 232, Pub. Acts 1903, because, under the testimony, he might have joined in making a report, which the corporation failed to file, is not sustainable where the evidence tended to show that the secretary did not verify a report because the directors failed to prepare it. *Deloria* v. *Van Winkle*, 660.

19. Before filing a bill in equity to enforce the liability of stockholders for partly paid stock, the creditor must reduce his claim to judgment and exhaust his legal remedies. 3 Comp. Laws, §§ 9755-9780. *Strelow* v. *American Color Co.*, 709.

See CONSTITUTIONAL LAW (1); EQUITY (6, 8); EVIDENCE (31); PARTIES (3); TRADE-NAMES (1, 3).

COSTS.

1. But one trial fee is allowable in two actions of ejectment tried together, under stipulation. *Weber* v. *Wayne Circuit Judge*, 32.

2. The practice authorized and adopted in Wayne county under Act No. 31, Pub. Acts 1903, is inconsistent with 3 Comp. Laws, § 11254, so that term fees are not taxable. *Id.*

3. After two years from the date of a judgment awarding costs, the Supreme Court will not exercise its discretion, if it has the authority, to grant an amendment in proceedings by certiorari to review drain proceedings and award the costs against the petitioners for the drain, who are not parties to the record. *Harrington* v. *Calhoun Probate Judge*, 35.

4. Costs, on appeal from justice's court, are discretionary with the circuit judge. *Rock Island Plow Co.* v. *Smith*, 180.

5. An estate in process of probate is entitled to costs against the people on an appeal by the auditor general from an order of the probate court refusing to require the payment of an inheritance tax in an excessive amount asked by the State. 3 Comp. Laws, § 11277. *In re Fox's Estate*, 531.

See INSURANCE (12).

COUNTIES—See MUNICIPAL CORPORATIONS (6); NUISANCE (3).

COURTS—See HABEAS CORPUS (6).

COVENANTS—See LANDLORD AND TENANT (4).

CREDIBILITY OF WITNESSES—See TRIAL (16).

CREDIT ITEMS—See PLEADING (6).

CREDITORS' BILL—See EQUITY (8); FRAUDULENT CONVEYANCES (2).

CRIMINAL LAW.

1. A child of twelve years cannot be prosecuted for a felony in any court. *In re Mould*, 1.

2. The commission of a felony renders the infant a delinquent child. *Id.* 2.

3. The inquiry as to whether such infant is a delinquent child under Act No. 6, Pub. Acts Extra Sessions 1907, should take place in the county of her residence. *Id.*

4. The order recommitting a respondent who has served a portion of his sentence and has secured an order admitting him to bail will require him to serve the remaining portion of the sentence. *People* v. *Adams*, 372.

See APPEAL AND ERROR (6); ASSAULT AND BATTERY; EVIDENCE (2, 13–15); HABEAS CORPUS (6); INTOXICATING LIQUORS (1, 5); SEDUCTION (1); TRIAL (4).

CROSS-EXAMINATION — See EVIDENCE (8, 10, 23); TRIAL (9, 10, 13–15).

CROSSINGS—See RAILROADS (1, 2).

CUSTODY OF CHILDREN — See DIVORCE (7); HABEAS CORPUS (1, 3, 10–16).

DAMAGES.

1. The damages for physicians' services and for the value of groceries lost in driving off the bridge were properly left to the jury, under evidence showing approximately the respective amounts. *Priebe* v. *Township of Moorland*, 110.

2. Good faith in the publication of a libelous charge in no way affects the defendant's liability to compensate the plaintiff for his actual damages to reputation or feelings. *Schattler* v. *Daily Herald Co.*, 116.

3. Actual damages may be increased by reason of malice of the defendant, on the theory that the injury to the feelings is greater from a wrong wantonly inflicted than from a wrong done in good faith. *Id.*

4. It was error to hold that, as a matter of law, the plaintiff could recover the cost of the finished gears and profits less the value of the property as mere junk, where the defendant offered evidence tending to show a higher value. *Barcus* v. *Wayne Automobile Co.*, 177.

DAMAGES—Continued.

5. It was not error for the court to instruct the jury that if the plaintiff, by a preponderance of the evidence, had convinced them of the truth of his claim that he had loaned defendant at one time $2,000 and at another $8,500, and that he had subsequently agreed to accept a room in defendant's house during his life and $7,000 in full satisfaction, then he was entitled to recover the $7,000 and interest, and such instruction did not amount to the direction of a verdict. *Bennett* v. *Maurice*, 254.

6. In an action for breach of warranty for selling plaintiff a horse which was blind, it was a correct rule to charge the jury that the damages would equal the difference between the actual value at the time of the sale and the value of the horse, if it had been as it was warranted. *Hardy* v. *Stoppel*, 676.

7. It is improper to refuse an instruction to the jury that an injury to plaintiff's knee, not counted on in her declaration, should not be considered in awarding damages. *Ketchum* v. *Fillingham*, 705.

See CARRIERS (9); EVIDENCE (4, 29); LANDLORD AND TENANT (5, 6); LIBEL AND SLANDER (3); MECHANICS' LIENS (3); PARTITION (3); PLEADING (4); TROVER AND CONVERSION.

DAMS—See WATERS AND WATERCOURSES (4).

DEATH.

The direct cause of death not operating continuously during the period in which the decedent survived, it was a question for the jury whether his administratrix was entitled to recover under the survival act. *Ely* v. *Detroit United Ry.*, 288.

See MASTER AND SERVANT (14); NEGLIGENCE (6).

DEATH ACT—See APPEAL AND ERROR (5); PLEADING (3).

DEBTOR AND CREDITOR.

A bond to pay a judgment and costs on appeal from justice's court creates the relation of debtor and creditor between the surety and obligee, before the breach of its condition, within the meaning of the provisions of Act No. 223, Pub. Acts 1905. *Hanna* v. *Hurley*, 601.

See CORPORATIONS (4, 5); EQUITY (3); FRAUDULENT CONVEYANCES; PARTIES (3); RECEIVERS; TRUSTS (4).

DECLARATIONS—See EVIDENCE (26).

DECREE—See EQUITY (11).

DECREE ON DEMURRER—See EQUITY (9).

DEEDS.

1. A conveyance reserving to grantor's wife the timber "now on" a portion of land, "with privilege to remove the same at

DEEDS—Continued.

any time," did not reserve to her underbrush which grew upon the property after she had removed all the timber. *Moore* v. *Young*, 237.

2. Any doubt existing as to what construction should be given the language used in the deed should be construed most strongly against the grantor. *Id.*

3. Preference of a part of decedent's children by the execution of a deed and its delivery in escrow, although the act was unwise and unnatural, is *held* not to establish his incompetency where he expressed a reason for it, sufficient in his opinion, and did not act under a delusion. *Cooper* v. *Cooper*, 304.

See CANCELLATION OF INSTRUMENTS (1); ESCROWS; ESTOPPEL (4); HOMESTEAD; TAXATION (7).

DE FACTO CORPORATIONS—See CORPORATIONS (17).

DEFAULT—See PRINCIPAL AND SURETY (1).

DEFENSES—See INSURANCE (10); JUSTICES OF THE PEACE (7); LIMITATION OF ACTIONS (2); QUO WARRANTO; SEDUCTION (3).

DEFINITION OF NUISANCE—See NUISANCE (2).

DELIVERY—See ESCROWS; SALES (3–5).

DEMURRER—See EQUITY (4, 10).

DEPOSIT—See BANKS AND BANKING; EXECUTORS AND ADMINISTRATORS (1).

DEPOSITIONS—See EVIDENCE (22).

DESERTION—See CANCELLATION OF INSTRUMENTS (2).

DESTRUCTION OF SUBJECT-MATTER OF CONTRACT—See SALES (3).

DETROIT CHARTER—See ADVERSE POSSESSION (1); LIMITATION OF ACTIONS (1); PARTIES (2).

DEVISES—See WILLS (7).

DIRECTED VERDICT—See APPEAL AND ERROR (9); DAMAGES (5); HIGHWAYS AND STREETS (4); LIBEL AND SLANDER (5); SALES (2, 4); TRIAL (1); WILLS (12).

DIRECTORS OF CORPORATIONS—See EVIDENCE (31).

DISCRETION—See JUSTICES OF THE PEACE (6).

DISCRIMINATION—See CONSTITUTIONAL LAW (4).

DISMISSAL AND NONSUIT.

1. A plaintiff is entitled to submit to a voluntary nonsuit at any time before the jury retires from the box to deliberate upon their verdict. *Davis* v. *Detroit United Railway*, 240.

2. After a refusal to permit the plaintiff to submit to nonsuit,

DISMISSAL AND NONSUIT—Continued.

and on motion for a new trial, the amendment, at plaintiff's request, of a conditional order granting the right to nonsuit, on payment of costs within a specified time, waives the objection that the plaintiff was technically entitled to a new trial. *Id.*

See APPEAL AND ERROR (7); DIVORCE (10, 11).

DISQUALIFICATION OF HUSBAND—See MARRIAGE.

DISTRIBUTION OF PROFITS—See CORPORATIONS (10, 11).

DIVIDENDS—See CORPORATIONS (10, 11).

DIVORCE.

1. A bill of complaint in the form of a bill for divorce, not referring to any other statute, with a prayer for separate maintenance and general relief merely, is not a proceeding to provide the wife with property and maintenance under 3 Comp. Laws, § 8686. *Horning* v. *Horning*, 130.
2. Act No. 324, Pub. Acts 1907, permitting the entry of a decree for divorce in a suit for separate maintenance, by the court hearing the evidence, authorizes the Supreme Court, on appeal, to enter the decree of divorce, since such appeals are heard *de novo*. *Id.*
3. On grounds of public policy, a divorce absolute is granted to the complainant, on appeal by defendant, from a decree providing for separate maintenance. *Id.*
4. Out of real property in which defendant has an equity of about $1,000, an award of alimony of $700, payable $50 per month, is *held* to be sufficient. *Id.*
5. After an examination of the evidence, it is *held* that the complainant is entitled to a divorce from his wife on the ground of extreme cruelty. *Hazelton* v. *Hazelton*, 192.
6. Continuance of the marriage relation after the wife has been guilty of extreme cruelty, does not furnish a defense on the ground of condonation, unless the offense is not repeated and unless proper subsequent treatment is shown. *Id.*
7. The custody of a child under fourteen years of age will be awarded to the mother, in divorce proceedings, in the absence of a showing of her unfitness to have the child. *Id.*
8. A decree for divorce in favor of the wife for extreme cruelty is *held* to be sustained by the evidence. *Jarstfer* v. *Jarstfer*, 196.
9. An award of $1,500 as alimony in a suit for divorce in which the wife was given a decree of divorce is insufficient and should be increased to $2,000 as against the defendant who has property worth $6,000, both parties being in poor health. *Zastrow* v. *Zastrow*, 292.
10. The dismissal of a bill for divorce for want of prosecution is warranted, where the complainant, after obtaining an order for temporary alimony and a solicitor's fee, and after receiv-

DIVORCE—Continued.

ing the alimony for about four months, made no further progress in the case; and defendant, after several years, obtained a divorce in another State on the ground of desertion, and remarried, but continued to contribute to the support of complainant's daughter, who was permitted to visit him, and the complainant knowing of the remarriage, made no demand for the unpaid solicitor's fee and alimony for thirteen years, when she threatened to proceed to enforce collection. *Stone* v. *Stone*, 319.

11. An allowance of temporary alimony is not intended to extend over a period of thirteen years, and in the absence of a demand for its payment during that period, the defendant is not in contempt so as to affect his right to have the bill dismissed for want of prosecution. *Id.*

12. For a wife to call her husband a "dirty dog," "street angel," "house devil," and like names, to associate with other men, drink intoxicants in a public house, remain out all night without satisfactory reasons, and neglect her household duties, constitutes extreme cruelty. *Begrow* v. *Begrow*, 349.

13. An agreement between husband and wife for a separation, with a settlement of property matters, is abrogated by their resumption of marital relations, second separation and second resumption thereof, and the contract is no bar to alimony in a suit by the wife for divorce. *Wright* v. *Wright*, 445.

See HABEAS CORPUS (12); TRUSTS (3).

DRAIN COMMISSIONER, SALARY OF — See CONSTITUTIONAL LAW (2).

DRAINS—See COSTS (3); WATERS AND WATERCOURSES (1, 3).

DURESS—See EVIDENCE (30).

DUTY DEVOLVING ON SERVANT — See MASTER AND SERVANT (9).

EARNINGS OF WIFE—See HUSBAND AND WIFE (2).

EASEMENTS—See WATERS AND WATERCOURSES (1, 3, 4).

ELECTION OF COUNTS—See PLEADING (3).

ELECTION OF REMEDIES—See PLEADING (3).

ELECTIONS.

In proceding to nominate members of a charter commission of the city of Grand Rapids, under Act No. 279, Pub. Acts 1909, the candidate must file a petition signed by not less than two per cent. of the voters for secretary of State at the preceding election, as in the case of the nomination of city and ward officers, notwithstanding a resolution of the common council providing a different method. Act No. 281, Pub. Acts 1909. *Meves* v. *Schriver*, 358.

EMANCIPATION OF WIFE—See HUSBAND AND WIFE (3).

EMINENT DOMAIN.

1. Objections to the sufficiency of a petition to take land by proceedings in eminent domain for railroad purposes are not sustainable, when it is alleged that the petitioner requires the premises for constructing and operating its road, that they are adjacent to its main line, that there is a public necessity for such taking, and that the corporation has duly attempted to acquire title by purchase. *Michigan Cent. R. Co.* v. *Ferguson*, 220.

2. No presumption prevails, in such proceeding, that the petitioner has determined to erect a passenger station on premises to be taken. *Id.*

3. It is an indispensable prerequisite to acquiring land in condemnation proceedings, that the corporation shall determine by proper action that the land is required for corporate purposes, and that the purposes shall be such that the private right must yield to the larger public necessity. *Id.*

4. An attempt to purchase the premises to be acquired is not properly evidenced by a showing that a representative of the petitioner had no authority except to agree upon a price and secure an option thereon in favor of a trust company. 2 Comp. Laws, § 6242. *Id.*

EMPLOYMENT—See CORPORATIONS (3).

EQUITABLE TITLE—See ADVERSE POSSESSION (1); TAXATION (4).

EQUITY.

1. Without a prayer in defendant's answer for affirmative relief, the court of equity cannot enjoin complainant from discharging upon his real property waters artificially collected. *Village of Trenton* v. *Rucker*, 19.

2. The jurisdiction of equity to enforce trusts of real or personal property is well established. *Wheeler* v. *Ocker & Ford Manfg. Co.*, 204.

3. The remedy at law is not adequate as between the creditor under a contract to pay for part of his services and trustees for creditors, since the court of law could not compel the trustees to recognize complainant's claim. *Id.* 205.

4. A demurrer in equity admits the truth of the averments of the bill of complaint. *Traders' Bank of Canada* v. *Fraser*, 315.

5. Evidence *held* not to show laches of the complainants in a suit to set aside a guardian's sale and conveyance of land. *Houlihan* v. *Fogarty*, 493.

6. Under a plea of the general issue and notice that the defendant purposes to file a bill for an accounting of plaintiff's acts as corporate president, asking that the amount, when so determined, may be set off against any amount due upon notes involved in the action at law, the defendant's remedy is in equity. *Barnes* v. *Spencer & Barnes Co.*, 510.

EQUITY—Continued.

7. Under a stipulation that testimony taken in one cause may apply to another so far as may be competent, it is proper to refer on appeal to the record in the related cause. *Backus* v. *Killmaster*, 594.

8. Equity will not take jurisdiction of a bill of complaint to enforce stockholders' liability, filed by a creditor who has secured an award of arbitrators against the corporation, but not a judgment, and who does not show an execution issued and returned unsatisfied. *Strelow* v. *American Color Co.*, 709.

9. Although Chancery Rule 9, subd. *e*, requires that after a demurrer to the bill of complaint has been sustained, the complainant be given an opportunity to amend, the bill may be dismissed unless it can be effectively amended. *Macomber* v. *Cottrell*, 718, 91.

10. Act No. 299, Pub. Acts 1909, amending 1 Comp. Laws, § 549, is declaratory of the pre-existing practice in circuit courts as to the right to amend, and is not intended to confer an absolute right to amend in all cases, where the demurrer is sustained on appeal. *Id.*

11. An opportunity to amend complainant's bill of complaint in the case of *Macomber* v. *Cottrell*, 162 Mich. 91, is permitted on a showing of additional facts tending to prove fraud and collusion, and the decree is amended by substituting for the order of dismissal an order remanding the cause with leave to file an amended bill of complaint. *Id.*

See COMPROMISE AND SETTLEMENT (1); CORPORATIONS (19); ESTOPPEL (1); EVIDENCE (27); INTOXICATING LIQUORS (8); PARTIES (3); PLEADING (1); SPECIFIC PERFORMANCE (1); TRADE-NAMES (1); TRUSTS (1); VENDOR AND PURCHASER (1, 3, 4); WATERS AND WATERCOURSES (4).

EQUITY JURISDICTION—See QUIETING TITLE.

EQUITY PRACTICE—See APPEAL AND ERROR (11).

ESCROWS.

In delivering conveyances to a third party in escrow with a direction to keep them until the grantees call for them, the grantor is presumed to have intended an irrevocable delivery, creating a present interest in the property transferred. *Cooper* v. *Cooper*, 304.

See DEEDS (3).

ESTATES—See WILLS (1).

ESTATES OF DECEDENTS—See COMPROMISE AND SETTLEMENT (1); EXECUTORS AND ADMINISTRATORS (1-3); HUSBAND AND WIFE (1); RECEIVERS; TRUSTS (1); WILLS (4, 7, 9); WITNESSES (1).

ESTOPPEL.

1. Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in

ESTOPPEL—Continued.

equity, from asserting rights, which might otherwise have existed, as against another person who has in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who acquires some corresponding right, either of property, of contract, or of remedy. *Porter* v. *Goudzwaard*, 158.

2. An estoppel to question the validity of a guardian's sale does not arise in favor of parties who know the actual facts, are not induced to act to their prejudice or to lose rights by the acts of the owners. *Houlihan* v. *Fogarty*, 493.

3. The lessor is estopped as against his lessee from asserting ownership of a smaller interest, but not from asserting title to a larger interest than the instrument expresses. *Id.*

4. In an action not founded on a lease recitals contained in it do not operate by way of estoppel, as to a party with whom no covenants are made. *Id.*

See CORPORATIONS (16); FRAUDS, STATUTE OF (1); FRAUDULENT CONVEYANCES (1, 5); INSURANCE (1, 5); INTOXICATING LIQUORS (4); JUDGMENT (1); JUSTICES OF THE PEACE (2); LANDLORD AND TENANT (3); MASTER AND SERVANT (18); PRINCIPAL AND AGENT (1, 5); QUO WARRANTO.

EVIDENCE.

1. Testimony of a conversation between the plaintiff and his wife concerning the purse, which was found by her on a train; the talk occurring after he met her and they were going from the station to the post office, was competent as a verbal act to show his intent. *Schattler* v. *Daily Herald Co.*, 115.

2. That the prosecutor dropped the criminal case against plaintiff because of the latter's ill health was not competent evidence. *Id.*

3. Conversations of plaintiff and his wife with third persons, tending to show their intent, should have been received in evidence. *Id.*

4. Articles published in another local paper, having a similar slanderous effect, could not be received in evidence to mitigate the damages, or for any other purpose. *Id.* 116.

5. In an action for damages for negligently driving a traction engine on the highway in dry, windy weather, without a sufficient spark arrester, testimony that the engine set another fire on the same morning under similar weather conditions, although it appeared that a different fuel was in use and the drafts were differently arranged, was competent. *Ainsworth* v. *Hover*, 135.

6. No error was committed in receiving evidence of a fire set on the following day by the same engine under similar conditions of weather. *Id.*

7. It was competent to show that the engineer subsequently, on the same day, took the spark arrester from a barrel on the water tank of the engine and used a screen which was offered

EVIDENCE—Continued.

to him by a witness, because it was finer than the one belonging to the engine, since the evidence has some tendency to show, not that repairs were made, but that no spark arrester was in use at the time of the fire. *Id.*

8. Testimony, on cross-examination of defendant's witness, in an action for slander, elicited by an immaterial question and not prejudicial, is not a ground for reversal. *Kelley* v. *Paulsen*, 169.

9. No error was committed in refusing to permit the defendant to explain why he had asked plaintiff to get his name off a certain note; the subject being immaterial. *Id.*

10. It was proper to permit the inquiry, on cross-examination, as to defendant's understanding of, and his intent in using, the words "take" and "steal." *Id.*

11. Slanderous utterances made subsequent to the time declared and relied on are inadmissible to prove the slander charged, although they are competent evidence of malice. *Id.*

12. Testimony being introduced that a witness found the goods received to be defective, in an action for breach of contract for the sale of springs, which the purchaser claimed were imperfect, an objection that the defective condition was shown by hearsay testimony concerning complaints of customers is not maintainable. *H. Scherer & Co.* v. *Independent Steel & Wire Co.*, 173.

13. What the boy said to a minister, to whose house he fled from the place of the assault, concerning the cause of his injuries, was competent as a part of the *res gestæ*. *People* v. *Hennard*, 225.

14. Evidence as to the appearance of the barn, the curry comb, and the wounds, was admissible as tending to show whether or not the injury was produced by a horse. *Id.*

15. In the discretion of the circuit judge, leading questions may be properly put to hostile witnesses of the prosecution by the prosecutor. *Id.*

16. While parol contemporaneous evidence is inadmissible to vary the terms of a written contract, subsequent oral negotiations modifying its terms are admissible in evidence. *Marx* v. *King*, 258.

17. Testimony tending to contradict plaintiffs' testimony and showing admissions made by them is admissible. *Id.*

18. An opinion that a testatrix was incompetent, in proceedings for the probate of a will, may only be given after the witness has testified to circumstances upon which it is predicated and which tend to justify his conclusion. *In re Hoyles' Estate*, 275.

19. A physician who attended deceased at intervals up to three days before she executed her will, and who saw her a few days after, who testified that she had locomotor ataxia, that she was nearly blind, and was helpless, that the disease had

EVIDENCE—Continued.

produced physical and mental debility, and stated other circumstances relating to her appearance and condition, is sufficiently qualified to express an opinion as to her competency to transact business. *Id.*

20. The court will take judicial notice of the fact that in the operation of street cars, conductors are in control of and may cause them to be stopped at any time or place, if circumstances require it. *Orth* v. *Saginaw Valley Traction Co.*, 353.

21. Letters and telegrams purporting to come from respondent at a place where he stated he intended to go, sent in accordance with a previous arrangement to the mother of the prosecutrix, and containing references to matters previously discussed between them, were admissible in evidence without identifying the handwriting. *People* v. *Adams*, 371.

22. Testimony showing that respondent procured witnesses to make false depositions was admissible, in a prosecution for seduction, in connection with the depositions themselves, as was also expert testimony that the several signatures of ostensibly different deponents were in one handwriting. *Id.*

23. No error was committed in refusing to permit a question on cross-examination of a witness for the people, who testified that respondent told him certain facts and procured him to depose to the same of his own knowledge, and who was asked if he had not heard other members of the household make similar statements. *Id.* 372.

24. Hearsay evidence is harmless where the same facts are shown by competent proof. *Id.*

25. The jury is entitled to consider the reasonableness of testimony, and are not bound to believe a witness whose testimony is inconsistent with the circumstances, although no other testimony bears on the question. *Zart* v. *Singer Sewing Machine Co.*, 388.

26. Declarations of an agent and declarations made in his presence at the time of doing an act within the scope of his authority, and relating to the subject-matter of the act, are admissible in evidence as part of the *res gestæ*. *Id.*

27. The court must base its decree upon testimony given in open court, not upon knowledge which the judge may have of the situation. *McCamman* v. *Davis*, 435.

28. Knowledge gained by the court, upon a view of the premises, might with propriety be used to determine which of two methods of sale should be adopted in partition proceedings, where both are supported by proofs; but may not be made the sole basis of a decree. *Id.*

29. A witness who possessed no knowledge on which to base his conclusion, was not qualified to express an opinion that an infant's services would be worth to his father from $4,000 to $5,000 or more. *Feldman* v. *Detroit United Ry.*, 486.

30. Testimony that after the car struck the infant, and a crowd had gathered about the conductor and motorman and had

EVIDENCE—Continued.

assaulted both and were threatening further violence, the motorman stated that it was his fault, is not admissible, since the statement was not voluntary or spontaneous. *Id.*

31. Parol proof that defendant was a director of a corporation was admissible after the foundation was laid for its admission by a showing that the secretary was unable to find the corporate records. *Deloria* v. *Van Winkle*, 660.

See ACCOUNT STATED; ASSAULT AND BATTERY (1); BROKERS (1, 2); CARRIERS (6); COMPROMISE AND SETTLEMENT (2-4); CONTRACTS (7, 8); CORPORATIONS (9, 12); DAMAGES (1, 4); DEEDS (3); EMINENT DOMAIN (2, 4); EQUITY (7); FRAUDULENT CONVEYANCES (2); JUDGMENT (3); LIBEL AND SLANDER (1, 4); LIFE ESTATES (2); NEGLIGENCE (1, 8); PARTITION (1); PLEADING (4, 7); PRINCIPAL AND AGENT (4); SALES (4); SEDUCTION (2, 4); TRIAL (12, 16); WATERS AND WATERCOURSES (8); WILLS (8, 10-14); WITNESSES.

Best evidence rule, see COMPROMISE AND SETTLEMENT (2).

EVIDENCE OF INJURIES—See CARRIERS (8).

EXCEPTIONS—See APPEAL AND ERROR (5).

EXCEPTIONS, BILL OF.

1. After the denial of a motion for a new trial the moving party has twenty days in which to settle a bill of exceptions, and if more than eighty days have elapsed since the entry of judgment, the time may be extended on motion made and cause shown, so as to grant a reasonable time to settle the same. Cir. Ct. Rule 47; 3 Comp. Laws, § 10504. *Kaiser* v. *Wayne Circuit Judge*, 247.

2. Mandamus will issue to vacate an order made without a showing of cause, eighty-four days after judgment and twenty-two days after denial of a motion for a new trial, extending the time sixty days in which to settle a bill of exceptions. *Id.* 248.

EXCESSIVE CLAIM—See MECHANICS' LIENS (1).

EXCESSIVE VERDICT—See CARRIERS (9).

EXECUTORS AND ADMINISTRATORS.

1. An administrator, in the matter of selecting a depository for the funds of an estate, is required to use the care which an ordinarily prudent person would use, and to deposit trust funds in his trust capacity, not as an individual. *In re Curtis' Estate*, 47.

2. Purchasing a draft by an administrator in his own name and indorsing it to the beneficiary of the estate is not a sufficient designation of the trust to relieve him from liability in case of the failure of the bank before payment. *Id.*

3. The fact that a receipt was given by the beneficiary for the amount of the draft before it was dishonored does not warrant a finding that the administrator paid the sum, as a matter of law, where he had acknowledged his liability and re-

EXECUTORS AND ADMINISTRATORS—Continued.

ceived back the draft which he filed with a claim for the amount involved in the bankruptcy court administering the estate of the insolvent drawee. *Id.*

4. Without a lawful license, no valid sale of real estate can be made by executor, administrator, or guardian. *Houlihan* v. *Fogarty*, 492.

5. The sale of real estate by an administrator who also controlled the same property as a guardian of a part of the interested owners, is shown to be a sale in his capacity of guardian by evidence that as such guardian he published a notice, acknowledged the deed and filed an account of the sale. *Id.*

See APPEAL AND ERROR (7); COMPROMISE AND SETTLEMENT (1); RECEIVERS.

EXECUTORY TRUST MORTGAGE—See CORPORATIONS (6).

EXHAUSTING LEGAL REMEDIES—See CORPORATIONS (19).

EXHAUSTING REMEDIES PROVIDED BY BENEFICIAL ASSOCIATION—See INSURANCE (4, 5).

EXPENSE OF CLEARING TITLE—See PARTITION (3).

EXPERT EVIDENCE—See EVIDENCE (18, 22); WILLS (11).

EXPRESS COMPANIES—See CARRIERS (7).

EXPRESS CONTRACTS—See CONTRACTS (4).

EXTENSION OF RAILWAY SYSTEM—See STREET RAILWAYS (2).

EXTRA COMPENSATION—See CONTRACTS (1, 2).

EXTREME CRUELTY—See DIVORCE (5, 6, 8, 12).

FALSE TESTIMONY—See EVIDENCE (22).

FARM POLICIES—See INSURANCE (9).

FELLOW-SERVANTS—See MASTER AND SERVANT (1–4, 7, 19); NEGLIGENCE (3).

FIDUCIARY RELATION—See CORPORATIONS (13, 14); PRINCIPAL AND AGENT (9–13).

FINAL JUDGMENT—See APPEAL AND ERROR (7).

FINDINGS OF COURT—See TRIAL (5, 6).

FIRE INSURANCE—See INSURANCE (1, 6, 8, 9, 11); VENDOR AND PURCHASER (4).

FIRES—See EVIDENCE (5–7); NEGLIGENCE (1).

FLOWAGE RIGHTS—See WATERS AND WATERCOURSES (4).

FLOWING LANDS—See WATERS AND WATERCOURSES (1).

FORECLOSURE OF LAND CONTRACTS—See VENDOR AND PURCHASER (3).

FOREIGN CORPORATIONS—See APPEAL AND ERROR (10); CONSTITUTIONAL LAW (1); CORPORATIONS (1); INTOXICATING LIQUORS (6).

FORFEITURE—See INSURANCE (1).

FRANCHISES—See CORPORATIONS (15); MUNICIPAL CORPORATIONS (3); STREET RAILWAYS (2–4).

FRAUD—See CANCELLATION OF INSTRUMENTS; COMPROMISE AND SETTLEMENT (1); CONTRACTS (1); LANDLORD AND TENANT (4, 5); PRINCIPAL AND AGENT (10, 11); TRADE-NAMES (1–3); TRUSTS (1); VENDOR AND PURCHASER (4).

FRAUDS, STATUTE OF.

1. The objections that a contract within the statute of frauds may be modified only by writing, and that the defendant, who was alleged to have furnished defective springs and an insufficient quantity under the contract relied on, was entitled to additional time under the agreement, were *held* to be met by testimony showing that the defendant acknowledged the defective condition of the materials, advised plaintiff to purchase elsewhere and charge the loss to defendant, and assented to charges so made. *H. Scherer & Co.* v. *Independent Steel & Wire Co.*, 173.

2. As between a grantor who has reserved a life estate in real property, and the remainderman, an oral agreement evidenced by no writing modifying the terms of the original conveyance, by providing for possession by the remainderman and for the support of the tenant for life is invalid. *Herpel* v. *Herpel*, 606.

See CONTRACTS (7); EVIDENCE (16); LANDLORD AND TENANT (1); PRINCIPAL AND AGENT (10).

FRAUDULENT CONVEYANCES.

1. A creditor is not estopped from enforcing his remedy under the "Bulk Sales Act" (Act No. 223, Pub. Acts 1905) by the fact that he was present when the consideration for a transfer of his debtor's stock was paid, without knowing the details of the transaction, which failed to comply with the provisions of statute; the purchaser taking no different or prejudicial course because of any conduct of the creditor. *Porter* v. *Goudzwaard*, 158.

2. Upon a question of fact as to the fraudulent character of a debtor's transfer of land, a decree setting aside the deed in favor of a judgment creditor is *held* to be warranted. *Welton* v. *McBride*, 193.

3. The sale of a stock of merchandise in bulk, without a compliance with the statute requiring notice to the creditors of the vendor, and the making of an inventory, renders the vendee liable to the creditors of the vendor as a receiver. Act No. 223, Pub. Acts 1905. *Marquette County Sav. Bank* v. *Koivisto*, 554.

FRAUDULENT CONVEYANCES—Continued.

4. It is immaterial that the purchaser of the stock was ignorant of the requirements of the statute. *Id.*

5. Two years' delay by a creditor, which has not received the statutory notice, does not estop it from acting under the provisions of the "sales in bulk act," unless the purchaser has changed his position in reliance on the conduct of the creditor, even though an oral statement had been made to the creditor that the transfer had taken place. *Id.*

6. A bill of sale of a stock of merchandise, made without a compliance with the bulk-sales law (Act No. 223, Pub. Acts 1905), executed soon after the grantor executed a bond for costs of an action, which he subsequently became liable to pay, the conveyance being placed on record only the day after judgment was rendered on the bond, and not being accompanied, at the time of executing the transfer, by a change of possession, is properly *held* to be fraudulent as to the obligee in the bond. *Hanna* v. *Hurley*, 601.

7. A creditor is one who has a right to require of another the fulfillment of a contract or obligation. *Id.*

See DEBTOR AND CREDITOR (1).

GEOGRAPHICAL TERMS—See TRADE-NAMES (2).

GOOD FAITH—See DAMAGES (2); FRAUDULENT CONVEYANCES (4); GUARDIAN AND WARD (3, 4); MARRIAGE; MECHANICS' LIENS (1); TAXATION (7).

GOVERNMENTAL AGENCY—See MUNICIPAL CORPORATIONS (6).

GRAND LEDGE CHARTER—See MUNICIPAL CORPORATIONS (1).

GUARANTY—See CORPORATIONS (8, 9).

GUARDIAN AND WARD.

1. No valid sale of real estate is executed where the guardian having control of the property obtains no license, in advance of the sale, although he procures the subsequent execution of a license dated back to a proper time, where he gave no bond upon the sale, took no oath in writing, published an incorrect and incomplete notice of sale, accepted a bid not made at the place of sale or in the county in which the land was situated, and failed to execute a deed in accordance with the alleged authority. 3 Comp. Laws, §§ 9094, 9129. *Houlihan* v. *Fogarty*, 492.

2. A confirmation of guardian's sale of realty made 30 days after the sale and 15 days after the execution of a deed transferring the property, but dated two days later than the date of sale at the request of the guardian, is not a valid confirmation. *Id.* 493.

3. A purchase at public sale, by a guardian, of property held by him in trust for others, is void, where the title has not passed to a bona fide purchaser without notice. 3 Comp. Laws, § 9095. *Id.*

GUARDIAN AND WARD—Continued.

4. Where purchasers have notice by a reference in the guardian's deed that license to sell was granted on the day of sale, and where fatal defects in the proceedings appear, no title is conveyed. *Id.*

See EQUITY (5); ESTOPPEL (2); EXECUTORS AND ADMINISTRATORS (5); HABEAS CORPUS (1, 3-5, 10).

GUESTS—See INTOXICATING LIQUORS (1).

HABEAS CORPUS.

1. In proceedings to determine the right of a parent or guardian to the care and custody of a child, the determination of the right by a court of competent jurisdiction is conclusive on another court exercising the same jurisdiction upon the same facts. *In re Mould*, 1.

2. On appeal from such finding, the court would not disturb a finding of fact based upon competent testimony. *Id.*

3. Courts are bound to consider the interest of the child in awarding custody to either claimant. *Id.*

4. That the petitioner is described as guardian of the child is immaterial except to show petitioner's interest in habeas corpus to determine the legality of detention by a probation officer of an alleged delinquent resident of another county. Act No. 6, Pub. Acts Extra Session 1907. *Id.*

5. Any person may make the application (3 Comp. Laws, § 9860); and the issue is between the child and the person detaining her, between the child and the law and procedure invoked as authority for her detention. *Id.*

6. A petition for habeas corpus in favor of an infant of twelve years, alleging that she is not a person mentioned by 3 Comp. Laws, § 9859, and is unlawfully imprisoned on a charge of having committed a felony in a county where she does not reside, under a commitment by the probate court to the probation officer, is not concluded by a refusal of another court exercising like jurisdiction to discharge the accused. *Id.*

7. The amendment of a commitment for contempt of court in habeas corpus proceedings, by correcting a date to correspond with the true facts, is not ground to quash the commitment, though corrected by the attorney for the petitioner, and subsequently approved by the court. *In re Knott*, 10.

8. The commitment of a respondent in habeas corpus for failure to make a more complete and explicit return to the petition as ordered by the court, is not an exercise of inherent jurisdiction to compel obedience to orders, but is the method which the statute specifies in case of failure to return the facts relating to any transfer of custody. 3 Comp. Laws, §§ 9869-9873. *Id.*

9. A petition for the writ of habeas corpus by the mother of an infant less than five years old, showing that the father who lives in the county where the petition is filed has surrepti-

HABEAS CORPUS—Continued.

tiously removed the infant from her custody and control and unlawfully restrains the child of his liberty, in said county or elsewhere, with other averments showing jurisdiction, sufficiently alleges the petitioner's right of custody in order to give the court jurisdiction. *Id.* 11.

10. Although the provisions of 3 Comp. Laws, § 8701, confer upon the father, as the natural guardian of the infant, the right to be appointed guardian in preference to any other person, and in case of his decease give to the mother the right, they do not conflict with the authority of a court of competent jurisdiction to award the custody to any suitable person, as required by the best interests of the infant. *Id.*

11. But until the right to such custody has been judicially determined, and as between parents of a minor who are living together, there is no rule, statute or other authority which permits either, as of right, to dispose of a child to the exclusion of the other. *Id.*

12. After separation of the parents, the right of custody is *prima facie* in the mother. *Id.*

13. Both parents of the infant being in the jurisdiction of the court and the home of the child being in Wayne county where the writ is issued, a petition which so alleges and shows that the child is detained in the county or elsewhere, by the father, contains a sufficient allegation that the control of the imprisonment and of the child's person is within the jurisdiction to enable the court to issue the writ. *Id.*

14. The wife need not allege that the respondent is an unfit person to have the custody of the child, or that he is not properly caring for it, or that the petitioner is a suitable custodian of the infant, when the petition shows the detention by the one parent as against the other. *Id.*

15. A return that the child is outside the jurisdiction of the court is not conclusive and is traversable. *Id.*

16. The return of the respondent to the writ is incomplete, inexplicit, and insufficient, under 3 Comp. Laws, § 9869, where the respondent admits removing the infant from his mother's care, but denies having the child in custody or under his power from the time of the application for the writ, claiming that the child was in Canada when he last heard of it. *Id.* 12.

HABENDUM CLAUSE—See WILLS (1).

HABIT—See MASTER AND SERVANT (1, 2); NEGLIGENCE (1).

HEARING IN EQUITY—See EVIDENCE (27).

HEARSAY EVIDENCE—See EVIDENCE (12, 23, 24).

HIDDEN DANGERS—See MASTER AND SERVANT (14, 16).

HIGHWAYS AND STREETS.

1. Where proceedings for laying out a highway were regular, and a notice was duly served by the highway commissioner, after

HIGHWAYS AND STREETS—Continued.

April 1st, to remove a fence in the highway, within thirty days, the notice was sufficient and a substantial compliance with the statute requiring a notice of not less than sixty days, and providing that the removal shall not be required between April 1st and November 1st, the commissioner having taken no action until after November 1st. *Hoag* v. *Boehmer*, 330.

2. Under conflicting claims and evidence of the respective parties, in an action for negligent conduct in operating an automobile, resulting in plaintiff's horse becoming frightened and overturning his buggy, the question of contributory negligence *held* to be a question of fact. *Chapman* v. *Strong*, 623.

3. On motion for a new trial the verdict is *held* not to be against the weight of the evidence. *Id.*

4. Evidence that defendant did not stop his automobile when plaintiff signaled to stop, and that he failed to turn out sufficiently to permit plaintiff to pass, although contradicted by defendant's witnesses, raises an issue of fact as to the negligence of the defendant. *Id.* 624.

5. In an action by the operator of a motorcycle against the driver of an automobile who collided with him, a request to charge that plaintiff is governed by the motor vehicle law, is sufficiently covered by a charge that he was bound to observe the same rules of the road as defendant, and was *prima facie* guilty of contributory negligence if he was operating his motorcycle at a greater speed than the laws of the State or the ordinances of the city permit. *Scott* v. *Dow*, 636.

6. The charge was more favorable to defendant than he was entitled to, and sufficiently stated the rule that plaintiff was governed by the city traffic ordinance. *Id.* 637.

7. Breach of an ordinance is evidence of negligence, not negligence *per se*. *Id.*

8. Failure to give a requested instruction that the presumption is against the person on the wrong side of the road, is not error where the court charged that if the plaintiff cut the corner, and the collision resulted, whether by carelessness of the motorman a little greater or more than that of the plaintiff, he could not recover. *Id.*

See NEGLIGENCE (10-12).

HOLDING OUT—See PRINCIPAL AND AGENT (5).

HOMESTEAD.

Without the wife's signature, a deed by the husband of the homestead on which both parties live, consisting of a quarter of a section of land, is invalid as to the portion to which the wife has a homestead right, although no actual selection of a homestead has been made by the grantor. *Cooper* v. *Cooper*, 304.

HOSTILE WITNESSES—See EVIDENCE (15).

HUSBAND AND WIFE.

1. A wife is not liable for services rendered to her husband in nursing either member of the family during his lifetime, since the contract does not concern her separate estate and the husband alone is liable. *In re Reidy's Estate*, 155.

2. Upon allegations of a bill of complaint that defendant corporation was formed by complainant and his wife and sons, to carry on a business which the husband claimed to have built up, and that he consented to the creation of the company upon the promise that he should have 100 shares of the stock, and that no stock has been issued to him, no relief can be granted, where the proofs fail to support the charge, under a theory not contemplated by the bill, that the parties are living together and the husband is entitled to control or share in the community property. *Pearll* v. *Pearll Advertising Co.*, 439.

3. A wife, compelled by circumstances to assume control of her husband's business, which she conducts for twenty-five years with the aid of her sons, dealing with her husband as with a stranger, and recognized by him as entitled to earn and disburse funds independently, will not be required to turn over the business to him, and to desist from interfering with it. *Id.* 440.

4. Evidence that complainant deeded to his wife land incumbered by a mortgage for its full value, without consideration, that she controlled it for 21 years as the owner, improved it, paid taxes and remortgaged it to rebuild, without complainant making any claim of ownership, does not warrant a decree vesting an interest in the husband. *Id.*

See CANCELLATION OF INSTRUMENTS (2); DIVORCE (1, 7, 10, 13); HOMESTEAD; MARRIAGE.

IGNORANCE OF LAW—See FRAUDULENT CONVEYANCES (4).

ILLEGAL CONTRACTS—See BROKERS (6).

IMMATERIALITY—See EVIDENCE (8, 9, 24).

IMPEACHMENT—See EVIDENCE (17).

IMPLIED AUTHORITY—See PRINCIPAL AND AGENT (7).

IMPLIED CONTRACTS—See CONTRACTS (4, 6).

IMPROVEMENTS.

Permanent improvements made by a remainderman of his own accord, who assumes possession and cultivates the property for the life tenant, are presumed to be made for his own benefit. *Herpel* v. *Herpel*, 606.

IMPUTED NEGLIGENCE—See NEGLIGENCE (5, 6).

INCORRECT THEORY—See TROVER AND CONVERSION.

INDEMNITY BONDS — See INTOXICATING LIQUORS (2-4, 8-11); JUDGMENT (3).

INDEPENDENT CONTRACTORS—See NEGLIGENCE (2, 3, 7).

INDIVIDUAL CAPACITY — See EXECUTORS AND ADMINISTRATORS (2).

INDORSEMENT—See PRINCIPAL AND AGENT (7, 8).

INFANTS—See CRIMINAL LAW (1–3); DIVORCE (7); HABEAS CORPUS (1, 3–6, 9–16); NEGLIGENCE (5, 6).

INHERITANCE TAX—See COSTS (5).

INJUNCTION—See EQUITY (1); INTOXICATING LIQUORS (8, 9, 11); MANDAMUS; MUNICIPAL CORPORATIONS (1); TRADE-NAMES (1, 2, 4); TRUSTS (1); WATERS AND WATERCOURSES (3, 7).

INSANE PERSONS—See DEEDS (3); EVIDENCE (18).

INSOLVENCY—See INSURANCE (7, 8, 11, 12).

INSTRUCTIONS—See CARRIERS (5); DAMAGES (5, 7); HIGHWAYS AND STREETS (5, 6, 8); INTOXICATING LIQUORS (1); LIBEL AND SLANDER (1); NEGLIGENCE (13); SALES (6, 7); TRESPASS VI ET ARMIS; TRIAL (2, 3, 7, 16).

INSUFFICIENT LIGHTS—See MASTER AND SERVANT (21).

INSURANCE.

1. In an action on a policy of fire insurance of an intestate brought by a son and administrator, to whom the parties in interest assigned their rights, commenced after the discharge of the administrator and assignment of the real estate by the probate court and by act of the heirs, a waiver of forfeiture for breach of the terms of the policy is established by a showing that, although they had knowledge of the transfer of the property, the officers of the insurer made no objection on that ground, and dealt with him as if they intended to pay the loss, making no tender of assessments paid until after the institution of suit, and that in reliance on their action plaintiff employed attorneys and expended money. *Reimold* v. *Farmers' Mut. Fire Ins. Co.*, 69.

2. It is not a misjoinder, in an action on a life insurance policy payable in stated amounts to several beneficiaries, to join them as parties plaintiff. *Ruterbusch* v. *Supreme Court I. O. F.*, 213.

3. The burden of proof in such action is on the defendant to show that the insured committed suicide, as a defense under the terms of the policy. *Id.*

4. Failure to give notice of the association's decision as to a claim for insurance against a fraternal beneficiary association, until after the time had elapsed for taking an appeal to a higher tribunal of the order, waives the by-law limiting the time for appeal. *Id.*

5. Where defendant had deprived plaintiff of his right to appeal within the order, by failing to give notice of its determina-

INSURANCE—Continued.

tion in time to permit an appeal under its by-laws, plaintiff did not lose his right to institute an action by attempting to obtain a hearing before the final tribunal of the association. *Id.*

6. A mutual fire insurance company organized under chapter 195, 2 Comp. Laws, whose charter contemplates the issuance of policies, not mutual, for a cash premium, has no power to issue such policies, which are expressly prohibited by statute. 2 Comp. Laws, § 7256. *Ely* v. *Oakland Circuit Judge*, 466.

7. Policies of such mutual insurance company in the standard form, containing an additional clause declaring the policy subject to the statutory assessment liability, although the policy provides for a fixed premium, are subject to assessment as mutual policies, although those issued without the additional clause are void. *Id.*

8. The assessment made by the receiver after insolvency should be determined in amount by including, as a liability to be met, unearned premiums of all outstanding cash premium policies and all valid loss claims. *Id.*

9. Policies of insurance on farm property issued *ultra vires* in violation of statute are illegal and void, and the holders are equitably entitled to a return of the unearned premiums paid. *Id.*

10. Unearned premiums on cash premium policies subject to assessment may be set off by the holders against *pro rata* assessments by the receiver of the insurer. *Id.*

11. An assessment to pay liabilities of an insolvent mutual fire insurance company in a receiver's charge, should be based on the number and classes of policies, the amount of unearned premiums due on them, the amount required to pay losses under valid insurance, and the costs and expenses of administration. *Id.*

12. The costs of an application of a receiver to the court for instruction may be paid out of the assets of the insolvent. *Id.* 467.

See VENDOR AND PURCHASER (4).

INTENT—See EVIDENCE (1, 3); LIBEL AND SLANDER (4); WILLS (2, 5, 6).

INTERPRETATION OF CONTRACT—See CONTRACTS (3, 7).

INTERPRETATION OF FRANCHISE—See STREET RAILWAYS (4).

INTOXICATING LIQUORS.

1. It was not error to charge the jury, in a criminal proceeding for violation of the liquor law in a county which had adopted prohibition, that obtaining intoxicating liquor, keeping it on ice with intoxicants belonging to another in respondent's bedroom, and permitting third persons to come and drink of it at will, constituted a violation of law. *People* v. *Peterson*, 156 Mich. 235 (120 N. W. 570, 21 L. R. A. [N. S.] 134), distinguished. *People* v. *Bedell*, 230.

INTOXICATING LIQUORS—Continued.

2. The bond of a liquor dealer and his sureties running to the city of Kalamazoo, instead of to the people of the State of Michigan, as provided by 2 Comp. Laws, § 5386, omitting the recitals and covenants prescribed by the statute, and containing a differently phrased condition, is not a substantial compliance with the law. *Kirkpatrick* v. *Phillips*, 251.

3. It is the duty of a liquor dealer to see that a proper bond is given, and the same is a condition precedent to his conducting the business and avoiding criminal responsibility. *Id.*

4. In an action on such irregularly executed bond, which contains a proviso that the principal shall conduct his saloon in conformity to the laws of the State, the defendants are estopped, by acting on it and conducting the business, to deny their liability under its terms. *Id.*

5. Procuring intoxicating liquors as agent for the purchaser, who provided the money, in a county which had adopted prohibition, was a violation of law. 2 Comp. Laws, §§ 5412–5435. *People* v. *Lapham*, 394.

6. It is unlawful to solicit orders for the purchase of intoxicating liquors at wholesale without complying with Act No. 291, Pub. Acts 1909, requiring a bond and license, although the solicitor has no authority to make contracts for his principal and the orders are subject to acceptance by the company which is a nonresident corporation. *People* v *Swenson*, 397.

7. Under 2 Comp. Laws, § 2769, villages have authority to suppress the sale of intoxicating liquors, and the prior statute is not repealed by implication by Act No. 291, Pub. Acts 1909; wherefore, mandamus will not lie to compel the common council of a village to approve a liquor bond. *Lake* v. *Village of Cedar Springs*, 569.

8. Under 1 Comp. Laws, § 2556, the prosecuting attorney may file a bill to enjoin the unlawful approval of liquor dealers' bonds by a village council. *Village of Wolverine* v. *Cheboygan Circuit Judge*, 713.

9. Injunction is the proper remedy to restrain the council of a village from approving a liquor dealer's bond which has been protested by a majority of the voters. Act No. 321, Pub. Acts 1907. *Id.*

10. The action of a village council in holding that a protest of the majority of the voters against the approval of a liquor dealer's bond did not comply with the statute is not final. *Id.*

11. It is a proper exercise of discretion to restrain, by a preliminary injunction, the approval of liquor dealers' bonds and the issuance of licenses to sell intoxicating liquors at retail where the court finds that a majority of the resident voters for governor at the last election protest against the bonds which are executed by a surety company. Act No. 321, Pub. Acts 1907. *Id.*

See CONSTITUTIONAL LAW (4); MANDAMUS; TRIAL (4).

INTOXICATION—See MASTER AND SERVANT (1–4).

JOINDER OF PARTIES—See INSURANCE (2).

JOINT DEFENDANTS—See JUDGMENT (2).

JOINT LIBELS—See EVIDENCE (4).

JOINT TORT-FEASORS—See TRESPASS VI ET ARMIS.

JUDGMENT.

1. A justice's judgment cannot be collaterally attacked by proof that a judgment was entered after the ten-day limit fixed by Act No. 475, Local Acts 1903, as amended by Act No. 660, Local Acts 1907, without the defendant's consent, where the record shows the consent of both parties to the irregular continuance. *Troy* v. *Rodgers*, 28.

2. Granting a new trial to a surety, against whom a judgment was rendered jointly with the principal on an indemnity bond creating a joint and several liability, vacates the prior judgment only as to the surety. *McPharlin* v. *Fidelity & Deposit Co. of Maryland*, 141.

3. As against the surety, such judgment against the principal is admissible in evidence on the new trial as *prima facie* proof of liability. *Id.*

4. An unsatisfied judgment against the principal of a joint and several obligation is not a bar to recovery against the surety. *Id.*

See APPEAL AND ERROR (1); COSTS (3); EQUITY (8); JUSTICES OF THE PEACE (1, 7); LIFE ESTATES (2).

JUDGMENT CREDITORS—See CORPORATIONS (19).

JUDICIAL NOTICE—See EVIDENCE (20).

JURISDICTION—See APPEAL AND ERROR (7); CRIMINAL LAW (3); DIVORCE (2); EQUITY (2); HABEAS CORPUS (9, 13); JUSTICES OF THE PEACE (3, 5).

JURY—See EVIDENCE (25).

JUSTICES OF THE PEACE.

1. Under the acts applicable to the city of Detroit, the justice who had jurisdiction of the parties and subject-matter had no authority ten days subsequent to the trial for any purpose except to render judgment. *Troy* v. *Rodgers*, 28.

2. Consent to an irregular adjournment, with knowledge of the facts, creates an estoppel to insist on a discontinuance thereby. *Id.*

3. It is proper to overrule a special appeal from justice's court unless the record shows want of jurisdiction. *Rock Island Plow Co.* v. *Smith*, 180.

4. The defense, on appeal from justice's court, that the judgment in the court below was rendered while the justice was absent from the jurisdiction, should not be presented by a plea *puis darrein continuance*, but by a special notice of defense. *Swantek* v. *Jarmoszki*, 617.

JUSTICES OF THE PEACE—Continued.

5. The circuit court has no jurisdiction to review by certioraria justice's judgment which has been removed by appeal of the opposite party to the circuit court, before the writ of certiorari was issued. *Id.*

6. The circuit court may exercise some discretion in refusing to permit an appeal from justice's court to be dismissed by the appellant. *Id.*

7. The entry of judgment upon the docket of the justice imports the presence of the justice within the jurisdiction, constitutes the best evidence of such presence, and may not be disputed on appeal. *Id.*

See COSTS (4); JUDGMENT (1).

JUVENILE DELINQUENTS—See HABEAS CORPUS (1-6).

LACHES—See COSTS (3); EQUITY (5); FRAUDULENT CONVEYANCES (5); LANDLORD AND TENANT (3); PRINCIPAL AND SURETY (1, 2); TAXATION (8).

LACHES OF STATE—See CORPORATIONS (16).

LAND CONTRACTS—See VENDOR AND PURCHASER (1, 4).

LANDLORD AND TENANT.

1. By letting into possession tenants who agreed to execute a written lease for three years, and who, after obtaining possession, refused to surrender the premises; and by afterwards notifying them that they might remain for a year, if they paid rent in accordance with their agreement, the landlord gave them no right to remain more than the year. *Gault* v. *Gault*, 85.

2. Acceptance of rent after the expiration of the year, although ineffective proceedings for dispossession were pending, and a subsequent notice to quit or to pay rent due, while inconsistent with the theory that the tenancy had been terminated, did not create a tenancy at will, terminable by a three months' notice to quit, or a tenancy from year to year. *Id.*

3. At the end of the second year of occupancy, the landlord had the right to terminate the tenancy without notice, and repossess himself of the premises, and did not, by delaying nearly a month, estop himself from proceeding to oust the occupants, in the absence of evidence of his express or implied consent to the continued possession. *Id.*

4. In the absence of fraud there is no implied covenant that premises are fit for the purpose for which they are leased. *Morton* v. *Hanes*, 366.

5. Where the landlord makes false or fraudulent representations as to material facts not obvious to the lessee, or, knowing such facts, of which the lessee is excusably ignorant, and which would seriously impair the value of the lease, conceals them, he may be held liable to the lessee for damages incurred in consequence thereof in an action for fraud and de-

LANDLORD AND TENANT—Continued.

ceit, or the lessee may recoup damages in the landlord's suit for rent. *Id.*

6. While the tenant, by remaining in possession, waives the right to rescind the lease, he does not waive his claim for damages for the fraud and deceit whereby he was induced to enter into the lease. *Id.*

See IMPROVEMENTS; REPLEVIN.

LANDS UNDER WATER—See BOUNDARIES.

LARCENY—See LIBEL AND SLANDER (1, 2, 4).

LAW OF THE ROAD—See HIGHWAYS AND STREETS (5, 8); NEGLIGENCE (10, 13).

LEADING QUESTIONS—See EVIDENCE (15); TRIAL (12, 13).

LEASES—See ESTOPPEL (3, 4); LANDLORD AND TENANT (1, 3, 4, 6).

LEGACIES—See WILLS (3–5).

LIABILITY OF DIRECTORS—See CORPORATIONS (1, 18).

LIBEL AND SLANDER.

1. It is error, in an action of libel for publishing a charge that plaintiff stole a purse, to instruct the jury that the burden of proof was on the plaintiff to show the false and defamatory character of the words. *Schattler* v. *Daily Herald Co.*, 115.

2. Words charging a person with larceny are libelous *per se*. *Id.*

3. Without proof of injury from the words, the plaintiff was entitled to recover the actual damages to his reputation and feelings which the law presumes will flow from the commission of the act. *Id.*

4. Plaintiff could only be guilty of larceny if he himself formed an intent to feloniously appropriate the purse, or aided and abetted his wife in so appropriating it, after she had communicated to him her intent to do so, and a secret resolve on her part, inferable from conduct or words, would have no tendency to establish his guilt. *Id.* 116.

5. In an action for slander and malicious prosecution, the question of the fairness and truthfulness of defendant's statement to the prosecutor being in issue, it was not error to refuse to direct a verdict for defendant on the ground that he acted on the advice of the prosecutor. *Kelley* v. *Paulsen*, 170.

See DAMAGES (2, 3); EVIDENCE (1–4, 8, 9, 11); TRIAL (2).

LICENSES—See EXECUTORS AND ADMINISTRATORS (4); GUARDIAN AND WARD (1, 4); INTOXICATING LIQUORS (6).

LIEN FOR ALIMONY—See TRUSTS (3).

LIEN FOR TAXES—See TAXATION (2, 3).

LIFE ESTATES.

1. Where premises were conveyed subject to a life lease, and possession reserved in the grantor, failure to institute ejectment proceedings to dispossess the remainderman, who assumes to take possession of the premises, does not operate as a waiver of the stipulated installments constituting the agreed purchase price. *Herpel* v. *Herpel*, 606.

2. A decree for rent due from the remainderman in possession to the life tenant, is improper, where the evidence is insufficient to determine the rental value of the premises. *Id.*

See FRAUDS, STATUTE OF (2); IMPROVEMENTS; WILLS (1).

LIFE INSURANCE—See INSURANCE (2-4).

LIGHTS AND LOOKOUT—See RAILROADS (3).

LIMITATION OF ACTIONS.

1. The provisions of Act No. 383, Local Acts 1899, suspending the effect of statutes of limitations upon debts for taxes assessed in the city of Detroit, does not stop the running of the statute as to the lien upon land occupied adversely as against the city which purchased the same at the tax sale. *Klatt* v. *City of Detroit*, 186.

2. Where credits are shown by a plaintiff in order to rescue a claim from the operation of the statute of limitations and the defendant is surprised and unable to go forward for want of preparation, his remedy is an application to the trial court for further time. *Cairbre* v. *McQuillen*, 680.

See PRINCIPAL AND SURETY (2).

LIMITATION OF LIABILITY—See CARRIERS (7).

LIMITATIONS, STATUTE OF—See ADVERSE POSSESSION (1); CONSTITUTIONAL LAW (3); LIMITATION OF ACTIONS (2); PLEADING (7); TAXATION (2).

LOCAL-OPTION LAW—See INTOXICATING LIQUORS (1, 5); TRIAL (4).

LOGS AND LOGGING—See DEEDS (1); SALES (3).

MALICE—See DAMAGES (3); EVIDENCE (11).

MALICIOUS PROSECUTION—See LIBEL AND SLANDER (5).

MANDAMUS.

In an application for mandamus to compel the dissolution of a temporary injunction issued in a suit by the prosecuting attorney on the relation of residents of a village, to prevent the approval of liquor dealers' bonds, the objection that the prosecuting attorney is an improper party is not meritorious where the attorney general has intervened and approved of his action. *Village of Wolverine* v. *Cheboygan Circuit Judge*, 713.

See COSTS (1); EXCEPTIONS, BILL OF (2); INTOXICATING LIQUORS (7).

MARRIAGE.

A bigamous marriage, entered into by the wife in good faith and by the husband with knowledge that he had a living wife in another State, becomes valid after the removal of his disqualification by the death of the first wife, and continued cohabitation by the living parties, although the wife never learned of the existence or death of the prior wife and the husband was ignorant of her decease. *In re Fitzgibbons' Estate*, 416.

See SEDUCTION (1).

MARRIED WOMEN—See HUSBAND AND WIFE.

MARSHALING ASSETS—See INSURANCE (8).

MASTER AND SERVANT.

1. A question for the jury, relative to the defendant's negligence in retaining in its employ an incompetent servant, is presented by a showing that a fellow-servant of plaintiff, while under the influence of intoxicating liquor, permitted a box to fall on plaintiff's foot, that the intoxicated employé was in the habit of drinking and had previously promised defendant's superintendent to amend, but continued to drink liquor to excess. *Johnson* v. *Lake Shore, etc., R. Co.*, 301.

2. The defendant could not be said to have performed its duty, though after receiving his promise to amend it did not discover the servant intoxicated while on duty, it appearing that his habit of using liquor to excess was notorious with those who associated with him. *Id.*

3. Notwithstanding that a sober employé might have caused a similar injury, it could not be held as a matter of law that the intoxication of the fellow-servant was not the cause of the accident, since he would be less competent to perform his duties while under the influence of liquor. *Id.*

4. The question of plaintiff's contributory negligence in the exercise of care after discovering his associate's condition was properly left to the jury. *Id.*

5. It is not negligent for a roadmaster to order an engineer in charge of an engine to move it when another employé, who is working in the way, with his back to the engine, has a free method of escape, if customary warning is given. *Hammond* v. *Michigan Cent. R. Co.*, 431.

6. One who gives orders to a railroad engineer is not required to see that the track is clear of all persons, before communicating the order. *Id.*

7. Failure of the engineer to use due care in executing orders of his superior, cannot be charged to the latter, unless the customary care would not be commensurate with the danger, and the superior servant knew the circumstances. *Id.*

8. A fireman who willingly enters upon a journey in a tug at so late an hour that he would arrive in the dark at a place difficult of navigation, and who was familiar with the situation

MASTER AND SERVANT—Continued.

and difficulties likely to be encountered, assumes the risk of any alleged negligence for starting at an unseasonable time. *Lapier* v. *Beaubien Ice & Coal Co.*, 533.

9. Alleged negligence in the use of a towline full of kinks and turns, one of which caught and injured plaintiff, was not actionable, where plaintiff knew of the condition of the towline and might have remedied the defects. *Id.*

10. And plaintiff could not recover for failure to provide sufficient lights, where insufficient illumination resulted from the smoky condition of a light of which he and another servant were in charge. *Id.* 534.

11. The denial of a new trial on grounds which were disputed by affidavits of the opposing party was not an abuse of discretion. *Id.*

12. With a crew of three persons besides the captain, and with two barges of ice in tow and the outfit aground in the dark, it cannot be said that the post of duty for the captain was in the pilot house, or the post of duty of the engineer in the engine house, all of the time. *Id.*

13. No duty is imposed on a tug of under 30 tons burden, making trips of less than 40 miles on inland lakes, to have medical attendance and means of cure aboard for sick or injured seamen; and reasonable diligence is exercised where the captain puts into port without unnecessary delay and secures sufficient treatment and attendance. *Id.*

14. Deceased had been in the employ of defendant for three days, assisting in constructing a cement power dam to replace a wooden structure in the Escanaba river. His superintendent ordered deceased to take a scow of gravel and stop a leak in the new dam which was being built below the old one, but failed to warn the employé of the presence of submerged timber braces between the two structures, near the surface of the water. In attempting to propel the scow out of the current running through the sluiceway of the old dam, deceased caused it to collide with the timbers, concealed from his view, and the boat became unmanageable, the deceased attempted to save himself by swimming, but failed, was carried through the sluiceway of the cement dam and drowned: *Held* that defendant's failure to warn him of the hidden dangers was negligence. *Snow* v. *Escanaba Power Co.*, 579.

15. The servant assumes only such risks as are incident to his employment. *Id.* 580.

16. The deceased did not assume the risk of the obstruction, which was not obvious, since it appeared that he was employed to stay on shore and wheel sand, in a place where the danger was not visible; and he had not been employed long enough to raise a presumption of knowledge. *Id.*

17. Deceased having met the known dangers with safety, it was for the jury to determine whether or not he was guilty of contributory negligence in the way he adopted to protect himself against the hidden danger. *Id.*

MASTER AND SERVANT—Continued.

18. That the superintendent instructed decedent to load the scow and not to leave shore until the superintendent returned, would not preclude a recovery, where the evidence disclosed the fact that the superintendent was present on the dam when the scow approached, and made no protest and gave no caution. *Id.*

19. Nor did the fact that a co-employé knew of the hidden timbers, but failed to inform deceased of them, although he accompanied deceased in the scow, operate to relieve defendant of its duty. *Id.*

20. A common laborer employed to wheel brick, does not assume the risk of negligence in constructing a scaffold built according to the employer's direction, by a method which was insufficiently strong, although the employé himself aided in the work and observed the method, but had no knowledge of how scaffolding should be constructed. *Goda* v. *Maurer*, 621.

21. The duty of the master to provide a safe place does not apply to work in a mine where conditions constantly change by reason of blasting and removing rock, so as to require the master to maintain sufficient lights for temporary contingencies. *Strepanski* v. *Grand Rapids Plaster Co.*, 696.

See NEGLIGENCE (3); NUISANCE (3); PRINCIPAL AND AGENT (6).

MATERIALMEN—See MUNICIPAL CORPORATIONS (4).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED —See WITNESSES.

MECHANICS' LIENS.

1. The filing of an excessive claim in entire good faith does not bar the attaching of a mechanic's lien. *Vaughan* v. *Ford*, 37.

2. A mechanic's lien under 3 Comp. Laws, §§ 10710–10745, being a direct lien in behalf of the person entitled to it, not one by subrogation, the claimant is not bound by stipulations in the original contract to which they are not parties except as to the contract price. *Id.*

3. A damage suit by an adjoining proprietor against the original contractor whose agreement provides indemnity against such claims, does not bar or restrict a subcontractor in the enforcement of a mechanic's lien when the evidence fails to show a breach or failure of performance of the contract. *Id.*

See CONTRACTS (2).

MEDICAL SERVICES—See DAMAGES (1); MASTER AND SERVANT (13).

MINES AND MINERALS—See CORPORATIONS (15).

MISREPRESENTATION—See CONTRACTS (1).

MODIFICATION OF CONTRACT—See CONTRACTS (1).

MORTGAGES—See CORPORATIONS (5, 6).

MOTIONS—See APPEAL AND ERROR (7).

MOTOR VEHICLES—See HIGHWAYS AND STREETS (2, 5, 6, 8).

MULTIFARIOUSNESS—See PLEADING (1).

MUNICIPAL CORPORATIONS.

1. The charter of the city of Grand Ledge provides that the bridge across Grand river in that city shall be maintained, repaired, and rebuilt, when necessary, by the city and the township in which it is located, jointly. No provision is made for the levy and collection of taxes for such purpose by the township, or for adjusting any disagreement which might arise between the municipalities. Nor does the title of the act (Act No. 322, Local Acts 1893) indicate the purpose to burden the township with the expense of maintaining the bridge. The city proceeded to construct a new bridge without requesting the township to participate. *Held*, that an injunction at the instance of a taxpayer of the city would not lie, and that the provision of the charter imposing a liability on the township is without force. *Chambers* v. *City of Grand Ledge*, 344.

2. A municipal ordinance, regulation, or contract, designed for a city at large, operates throughout its boundaries as enlarged or extended from time to time. *People* v. *Detroit United Ry.*, 460.

3. Franchises being strictly construed as against the grantee, no vested rights claimed under the franchise of that portion of railway which respondent purchased are injured. *Id.*

4. Under an agreement with the principal contractor to furnish hardware trimmings in accordance with plans and specifications of the original contract to construct a municipal fire station, a firm which furnished the hardware were not materialmen but subcontractors, from whom a notice to the contractor and the board of fire commissioners was required as a condition precedent to an action on the statutory bond under Act No. 187, Pub. Acts 1905. *Avery* v. *Board of Sup'rs of Ionia Co.*, 71 Mich. 538 (39 N. W. 742). *People, for use of Buhl Sons Co.*, v. *Finn*, 481.

5. In an action based on the statute, and tried on the theory that a statutory bond had been given, the plaintiffs were not entitled to recover on the theory that the bond had not been filed in accordance with the statute, and that they were thereby excused from complying with the law. *Id.*

6. A board of supervisors in constructing a water system for the poor farm of a county perform a governmental function, in the execution of which they are exempt from liability for negligent construction. *Kilts* v. *Board of Sup'rs of Kent County*, 646.

See BRIDGES; ELECTIONS; INTOXICATING LIQUORS (8-11); MANDAMUS; NUISANCE (1); PARTIES (1); STREET RAILWAYS (2); TAXATION (4); WATERS AND WATERCOURSES (1-3).

MUNICIPAL CORPORATIONS—Continued.

Purchase of land at tax sale by city, see TAXATION (3).

Street railway lines, as affected by extension of city limits, see STREET RAILWAYS (2, 4).

MUTUAL BENEFIT ASSOCIATIONS—See INSURANCE (2, 4, 5).

MUTUAL FIRE INSURANCE COMPANIES — See INSURANCE (1, 6, 7, 11).

NAMES—See TRADE-NAMES (1).

NAVIGATION—See MASTER AND SERVANT (12, 13).

NECESSITY—See EMINENT DOMAIN (2, 3).

NEGLIGENCE.

1. Instructions to the jury referring to evidence that plaintiff was in the habit of smoking about the place of the fire, charging that if they found it more probable that the fire was thereby caused, plaintiff could not recover, but that they must find, as a matter of fact, the inference that the fire originated in that way, when read in connection with instructions that plaintiff had the burden of proof, are not open to the objection that they impose the burden of proof on the defendant. *Ainsworth* v. *Hover*, 136.

2. After having been warned to take his ladder down when he had finished certain work, as it was getting windy, the alleged negligence of a painter in leaving his ladder resting on the freshly-painted surface of the house, so that it could and did blow down and injure the employé of another contractor, was a question for the jury. *Haxer* v. *Griessel*, 310.

3. The employé of a contractor engaged in painting a house is not the fellow-servant of a carpenter employed by a different contractor. *Id.*

4. The injured employé cannot be held to have been guilty of contributory negligence, as a matter of law, for failing to protect himself from the danger, which, it appeared, he had not observed or appreciated. *Id.*

5. In actions brought by an infant in its own right the negligence of the parent is not imputable to the child; in actions brought by the parent for loss of services, the want of care of the plaintiff will bar recovery; in actions brought under the "death act" (3 Comp. Laws, § 10427), if the parent is the real beneficiary, his contributory negligence will be imputed to the infant. *Feldman* v. *Detroit United Ry.*, 486.

6. In an action by a parent as administrator, for the wrongful death of his infant son of the age of four years, who was killed by a street car, the fact that the child was unattended on the street at the time of the accident established *prima facie* the negligence of his parents, and whether their conduct should be excused or justified by the alleged circumstances was a question of fact for the jury. *Id.*

7. Contractors constructing a water tower at a county poor farm,

NEGLIGENCE—Continued.

under an agreement with the board of supervisors, are not liable for injuries to an employé of the contractors, caused by a collapse of the structure, from the negligence of subcontractors who furnished insufficient "I" beams to support it, under plans which the board of supervisors have approved, since the neglect was that of independent contractors. *Kilts* v. *Board of Sup'rs of Kent County*, 646.

8. Negligence cannot be established alone by proof of an injury. *O'Donnell* v. *Lange*, 654.

9. But the manner of the accident and the circumstances surrounding it may warrant an inference or presumption of negligence. *Id.*

10. Evidence that defendant drove her horse against a street cleaner who was rightfully in the street, in the daylight, while there was plenty of room on either side of him, and no other vehicles in the way, and that the horse was within defendant's control, going slowly, presents a question of fact as to defendant's negligence. *Id.*

11. Whether the plaintiff was using ordinary care in the performance of his work was a question for the jury, and he was not bound to neglect his work to escape collision with those who were not using reasonable care. *Id.*

12. The question of the plaintiff's contributory negligence was for the jury, where she testified that she drove to a street car track, paused before crossing it, to avoid an approaching car, and defendant's automobile collided with her. *Ketchum* v. *Fillingham*, 704.

13. A charge to the jury that the operation of an automobile required the use of ordinary care, that it included the duty of having the car under control when approaching street intersections, and that defendant must use such care as an ordinarily prudent man would have used, with further instructions concerning the duty of exercising due care on the part of both plaintiff and defendant, sufficiently defined the issues of negligence. *Id.*

See APPEAL AND ERROR (5); BRIDGES; CARRIERS (1-4, 7-9); DAMAGES (1); DEATH; EVIDENCE (5-7); EXECUTORS AND ADMINISTRATORS (1); HIGHWAYS AND STREETS (2, 4, 7); MASTER AND SERVANT (1-10, 12-14, 17, 18, 20, 21); MUNICIPAL CORPORATIONS (6); NUISANCE; PLEADING (3, 4); RAILROADS; STREET RAILWAYS (1).

NEGOTIABLE INSTRUMENTS—See CORPORATIONS (13); PRINCIPAL AND AGENT (7, 8).

NEWSPAPERS—See EVIDENCE (4).

NEW TRIAL—See DISMISSAL AND NONSUIT (2); EXCEPTIONS, BILL OF (1); HIGHWAYS AND STREETS (3); JUDGMENT (2-4); MASTER AND SERVANT (11).

NONRESIDENTS—See CONSTITUTIONAL LAW (4); HABEAS CORPUS (6).

NOTICE—See ESTOPPEL (2); FRAUDULENT CONVEYANCES (3, 5); HIGHWAYS AND STREETS (1); MASTER AND SERVANT (2, 19, 20); MUNICIPAL CORPORATIONS (4); PRINCIPAL AND SURETY (1); TAXATION (5, 6, 8, 9).

NOTICE TO QUIT—See LANDLORD AND TENANT (2, 3).

NUISANCE.

1. A nuisance involves not only a defect but threatening or impending danger to the public, or, if a private nuisance, to the property rights or health of persons sustaining peculiar relations to the same. *Kilts* v. *Board of Sup'rs of Kent County*, 646.

2. A nuisance is a use made by one of his own property, which works an irreparable injury to another's property, or which deprives his neighbor of the reasonable or comfortable enjoyment and use of his property, or which violates the unwritten but accepted law of decency, or which endangers or renders insecure the life and health of his neighbor. *Id.*

3. Neither the board of supervisors nor the principal contractor are liable to the employé killed by a collapse of a water tower, as for a nuisance, which they owed him a duty not to construct. *Id.*

See NEGLIGENCE (7).

OBJECTIONS—See PLEADING (2).

OBSTRUCTIONS, REMOVAL OF—See HIGHWAYS AND STREETS (1).

OFFER AND ACCEPTANCE—See CONTRACTS (6).

OFFICERS—See CORPORATIONS (8, 12–14, 18).

OPERATION OF TRAINS—See MASTER AND SERVANT (5); RAILROADS (3, 5).

OPINION EVIDENCE—See EVIDENCE (18, 19, 29); WILLS (11).

OPTION—See CORPORATIONS (4).

ORDERS OF EMPLOYER—See MASTER AND SERVANT (18).

ORDINANCES—See HIGHWAYS AND STREETS (7); MUNICIPAL CORPORATIONS (2); STREET RAILWAYS (2, 4).

PARENT AND CHILD—See DIVORCE (7); HABEAS CORPUS (1, 10–16); NEGLIGENCE (5, 6).

PAROL CONTRACT—See FRAUDS, STATUTE OF (2).

PAROL EVIDENCE—See ACCOUNT STATED; COMPROMISE AND SETTLEMENT (2); CONTRACTS (7); EVIDENCE (16, 31).

PARTIAL PAYMENT—See SALES (3).

PARTICULARITY—See TRUSTS (2).

PARTIES.

1. The Detroit city treasurer is properly made a party to a suit to quiet title against a tax title held by the city, because of which he refused to furnish a certificate of payment of taxes required to entitle a deed to registration. *Klatt* v. *City of Detroit*, 187.

2. He could not be required to determine the validity of a claim by adverse possession. *Id.*

3. The corporation is a proper party defendant to a bill to require the trustees for creditors to recognize the plaintiff's rights, since it has an interest in the surplus or residue of the trust fund. *Wheeler* v. *Ocker & Ford Manfg. Co.*, 205.

See COSTS (3); ESTOPPEL (4); HABEAS CORPUS (5); INSURANCE (2); INTOXICATING LIQUORS (8); MANDAMUS; MECHANICS' LIENS (2); PARTITION (2); QUO WARRANTO; TRIAL (14); WATERS AND WATERCOURSES (8).

PARTITION.

1. While the primary object of the partition sale is to obtain the highest possible sum for distribution, and the court may subdivide a parcel for purposes of the sale, if convinced upon a proper showing that such course would produce a higher bid, an order so providing must be based on proofs. *McCamman* v. *Davis*, 435.

2. Former owners of tax titles, whose claims to real property are adverse, are not proper parties to partition proceedings. *Id.* 436.

3. Complainants who procure an abstract of title and who, in good faith, purchase the interest of holders of tax titles against the premises at less expense than would be required by litigation to remove the consequent cloud upon the title, are entitled to be reimbursed from the proceeds of the partition sale. *Id.*

See EVIDENCE (27, 28).

PARTNERSHIP—See RECEIVERS.

PATENT DEFECTS—See SALES (7).

PAYMENT—See APPEAL AND ERROR (12); COMPROMISE AND SETTLEMENT (2); CORPORATIONS (4); EXECUTORS AND ADMINISTRATORS (3); PLEADING (6, 7); SALES (1); TAXATION (3, 10).

PENAL STATUTES—See BROKERS (7); STATUTES (1).

PENALTIES—See STATUTES (1).

PERSONAL INJURIES—See BRIDGES; CARRIERS (1-6, 8, 9); DAMAGES (1, 7); HIGHWAYS AND STREETS (2, 5, 8); MASTER AND SERVANT; NEGLIGENCE (2, 10, 12); PLEADING (4); RAILROADS; STREET RAILWAYS (1).

PERSONAL PROPERTY—See REPLEVIN.

PETITIONS—See EMINENT DOMAIN (1); INTOXICATING LIQUORS (8-11).

PHYSICIANS AND SURGEONS—See CARRIERS (8); EVIDENCE (19).

PLEADING.

1. A bill in equity is not multifarious for adding to an equitable cause of action a claim in which there is no equity, and which may be treated as surplusage. *Wheeler* v. *Ocker & Ford Manfg. Co.*, 205.

2. In an action for money loaned to defendant, a variance of a few days between the dates named in the bill of particulars and the dates shown by plaintiff's testimony, was not fatal to plaintiff's claim, where no objection was made to the admissibility of the evidence, and no opportunity given to amend the bill of particulars, and where no claim was made that defendant's attorney was surprised or misled. *Bennett* v. *Maurice*, 254.

3. A ruling that plaintiff must elect whether he would proceed under a count under the death act or a count under the survival act was erroneous, where the decedent was struck by a falling trolley pole and wheel of the car on which he was riding, and died after being unconscious from five to twenty minutes. *Ely* v. *Detroit United Ry.*, 287.

4. Evidence of uterine trouble, caused to plaintiff, a passenger, by the derailment of a street car, is admissible, under a declaration which alleges bodily and internal injuries, a bruised side, derangement of her nervous system, and permanent injuries. *Mueller* v. *Detroit United Railway*, 313.

5. On demurrer to a declaration, the pleading must be considered more critically than if the defendant had gone to trial upon a plea to the merits, and unless on its face the declaration affirmatively shows actual negligence, the demurrer must be sustained. *Hammond* v. *Michigan Cent. R. Co.*, 431.

6. The plaintiff's bill of particulars need not show credit items of payments made by defendant. *Cairbre* v. *McQuillen*, 679.

7. The plaintiff in an action of assumpsit for money loaned may testify to payments not credited on his bill of particulars. *Id.*

See APPEAL AND ERROR (5); COMPROMISE AND SETTLEMENT (3); DAMAGES (7); DIVORCE (1); EMINENT DOMAIN (1); EQUITY (1, 9); HABEAS CORPUS (8, 9, 13-16); HUSBAND AND WIFE (2); JUSTICES OF THE PEACE (4); QUO WARRANTO; VENDOR AND PURCHASER (3); WATERS AND WATERCOURSES (5, 6).

PLEA PUIS DARREIN CONTINUANCE—See JUSTICES OF THE PEACE (4).

POSSESSION—See FRAUDULENT CONVEYANCES (6); REPLEVIN.

PRACTICE—See APPEAL AND ERROR (11); EQUITY (7, 9).

PRACTICE IN WAYNE COUNTY—See COSTS (2).

PREGNANCY—See SEDUCTION (2).

PRESCRIPTION—See WATERS AND WATERCOURSES (4, 5).

PRESUMPTIONS—See EMINENT DOMAIN (2); HIGHWAYS AND STREETS (8); LIBEL AND SLANDER (3); MASTER AND SERVANT (16); NEGLIGENCE (9).

PRIMARY NOMINATIONS—See ELECTIONS.

PRINCIPAL AND AGENT.

1. Advice by the principal to a purchaser of goods from a salesman, who had been making prices to the purchaser below the usual invoice rates, that any prices or arrangements made by the salesman would be satisfactory to the principal, binds the latter and estops him to claim that the prices thereafter made were unauthorized. *Marx* v. *King*, 258.

2. Persons dealing with an agent may rely on his apparent authority. *Id.*

3. The apparent power of the agent is to be determined by the acts of the principal and not by the acts of the agent. *Id.*

4. It is incompetent, for the purpose of showing apparent authority of an agent or as characterizing his employment, to introduce evidence of acts not authorized or known to the principal or to the one with whom he dealt. *Id.*

5. Estoppel is the basis of the doctrine that a principal is bound to third persons who have relied in good faith on the apparent authority of an agent. *McBroom* v. *Cheboygan Brewing & Malting Co.*, 323.

6. Evidence that plaintiff went to a branch store of defendant for repairs on her sewing machine; that the managing salesman arranged to call and get her machine, and did so, bringing afterwards another machine to use pending its return; that the substituted machine was apparently second-hand and he told her he wanted to sell it because he was about to be married; that plaintiff bought it, paying part down, and, on her refusal to pay the balance until he should return the old machine, he and another during business hours committed an assault in attempting to remove the second machine, presents a question of fact whether he was acting within the scope of his authority or for his personal benefit, upon a showing by the defendant company that the machine did not belong to it, and it received no benefit from the sale. *Zart* v. *Singer Sewing Machine Co.*, 387.

7. A traveling salesman having authority to collect accounts has no authority thereby to take a note in payment of an account and negotiate the paper at a bank by indorsing his employers' names. *Lonier* v. *Ann Arbor Sav. Bank*, 541.

8. In trover for the conversion of a promissory note claimed to belong to plaintiffs whose salesman indorsed their names and negotiated the paper at a bank, the case should be submitted to a jury upon testimony of defendant's witnesses that the paper was not discounted by the bank, but a loan was made on it to the maker direct; it also appearing that the cashier

PRINCIPAL AND AGENT—Continued.

of the bank supposed he was dealing with one of the plaintiffs instead of their salesman. *Id.*

9. The purchaser of timber, upon land which is held for delinquent taxes that the owner directs the purchaser to pay, and charge to her account, becomes her agent for that purpose. *Backus* v. *Cowley*, 585.

10. The defense of the statute of frauds is not available to an agent that purchases, in his own name, without the knowledge or consent of his principal, State tax lands which he has been directed to redeem on behalf of the owner from funds to be paid her for timber purchased. *Id.*

11. Such a purchase is a fraud on the principal. *Id.*

12. And would be governed by the exception to the statute prohibiting resulting trusts. 3 Comp. Laws, §§ 8835, 8836. *Id.*

13. While the relation so created was not a strict fiduciary relation, the vendee of the timber owed the vendor loyalty and good faith. *Id.* 586.

See EVIDENCE (26, 30); INTOXICATING LIQUORS (5); TAXATION (9); WITNESSES (2).

PRINCIPAL AND SURETY.

1. Notice of the principal's default, given promptly to the general agents of the surety corporation for whom they signed as attorneys, and subsequently acted as agents, complies with the requirement of notice. *McPharlin* v. *Fidelity & Deposit Co. of Maryland*, 141.

2. Although a delay of more than the period limited in the bond for instituting action took place, it was waived by the vice president of the company notifying plaintiff after the expiration of that period, to complete the building which the principal failed to construct. *Id.*

See BANKS AND BANKING; DEBTOR AND CREDITOR; FRAUDULENT CONVEYANCES (6); INTOXICATING LIQUORS (2, 4); JUDGMENT (2-4).

PRIVILEGE—See LIBEL AND SLANDER (5).

PROBATE APPEALS—See APPEAL AND ERROR (1).

PROBATE COURT—See GUARDIAN AND WARD (1); HABEAS CORPUS (6).

PROCESS—See HABEAS CORPUS (7).

PROCURING CAUSE—See BROKERS (2).

PROFITS—See CORPORATIONS (11).

PROPERTY RIGHTS—See HUSBAND AND WIFE (2).

PROSECUTING ATTORNEY—See INTOXICATING LIQUORS (8); LIBEL AND SLANDER (5); MANDAMUS.

PROXIMATE CAUSE—See MASTER AND SERVANT (3); NEGLIGENCE (1).

PUBLICATION—See EVIDENCE (4); LIBEL AND SLANDER (1).

PUBLIC BUILDINGS AND WORKS—See MUNICIPAL CORPORATIONS (6).

PUBLIC GRIEVANCE—See QUO WARRANTO.

PUBLIC IMPROVEMENTS—See MUNICIPAL CORPORATIONS (4).

PUBLIC OFFICERS—See INTOXICATING LIQUORS (8, 9); PARTIES (1).

PUBLIC POLICY—See DIVORCE (3).

PURCHASE—See TAXATION (4).

QUESTIONS REVIEWABLE—See JUSTICES OF THE PEACE (3).

QUIETING TITLE.

An adequate remedy at law exists barring a bill to quiet title against a defendant who is in possession under a claim of title to real property. *Miscotten* v. *Hellenthal*, 402.

See PARTIES (1).

QUITCLAIM—See TAXATION (7).

QUO WARRANTO.

A plea to an information in quo warranto, claiming in defense to the writ that no public grievance exists, and the writ is prosecuted for the private benefit of relator, and that he is estopped to assert any defects arising from the expiration of the corporate charter, does not constitute a sufficient defense to the information. *Attorney General, ex rel. Linnell*, v. *Gay*, 612.

See CORPORATIONS (16).

RAILING—See BRIDGES.

RAILROADS.

1. It was proper to submit to a jury the respective claims of negligence and contributory negligence in the injury of plaintiff at a railroad crossing, at which plaintiff claims the occupants of her conveyance stopped and listened some distance from the track, and then proceeded with care, still looking and listening after the pause, but were struck by a train running at an excessive rate of speed, which failed to give the statutory signals: the testimony of either party being in dispute, and defendant claiming that the driver of the vehicle should have stopped at a different place where the highway crossed an adjacent parallel railroad track and the view was unobstructed. *Hinkley* v. *Wabash R. Co.*, 546.

2. Ordinarily when a traveler drives upon a railway track without stopping to listen, where his view is obstructed, and in

RAILROADS—Continued.

consequence thereof he is injured, he is guilty of contributory negligence, but the rule that he shall stop is not imperative under all circumstances. *Morgan* v. *Pere Marquette R. Co.*, 573.

3. Under testimony tending to show that plaintiff was struck by a train which was operated without lights, and with the engine running backwards, at a rate of speed in violation of a city ordinance, with no lookouts; that plaintiff before crossing the track stopped his horse to a very slow walk and looked and listened, the question of contributory negligence was for the jury. *Id.*

4. Travelers upon the highway have a right to assume that trains will be operated in the usual manner and that the customary warnings will be given. *Id.*

5. Although the provisions of 2 Comp. Laws, § 6290, regulating the making up of passenger trains, were intended to protect not only passengers but travelers on the highway, they have no application to a case where the engine was at the head of the train but was running backward. *Id.* 574.

See CARRIERS (1); EMINENT DOMAIN; MASTER AND SERVANT (1–7); STREET RAILWAYS.

RATIFICATION—See CORPORATIONS (13).

REAL PROPERTY—See DEEDS; EQUITY (5); ESTOPPEL (2–4); EXECUTORS AND ADMINISTRATORS (4, 5); FRAUDS, STATUTE OF (2); GUARDIAN AND WARD.

RECEIPT—See CARRIERS (7); EXECUTORS AND ADMINISTRATORS (3).

RECEIVERS.

Creditors of a partnership are entitled to the appointment of a receiver of the firm assets where, after the death of one partner, the other continued the business and made a contract with the heirs of the deceased partner, conveying to them his interest in the business which they continued until after the decease of the survivor, and where they subsequently procured the appointment of an administrator of the estate of the first deceased partner and turned over to him all the firm assets. *Vermont Marble Co.* v. *Spafford*, 549.

See INSURANCE (7, 8, 10–12).

RECORD—See APPEAL AND ERROR (1); JUSTICES OF THE PEACE (7).

REDEMPTION—See TAXATION (8, 10).

REGISTER IN CHANCERY—See TAXATION (10, 11).

REGISTER'S FEE—See APPEAL AND ERROR (12).

REINCORPORATION—See CORPORATIONS (17).

RELIEF—See EQUITY (1, 2, 6); VENDOR AND PURCHASER (1, 3, 4); WATERS AND WATERCOURSES (7).

REMAINDERS—See IMPROVEMENTS; LIFE ESTATES.

REMEDIES—See APPEAL AND ERROR (6); EQUITY (3); INSURANCE (9); LIFE ESTATES (1); LIMITATION OF ACTIONS (2); TAXATION (11).

RENT—See LANDLORD AND TENANT (2); LIFE ESTATES (2).

REPEALS BY IMPLICATION—See STATUTES (2).

REPLEVIN.

Under an agreement by a son to work the farm belonging to his father for the crops raised, and to care for the father during the current year, in pursuance of which the father purchased a team and tools for use on the place, and to belong to the father, the right of possession vests in the parent upon a breach of the contract by the other party, and the question of ownership should be submitted to the jury, where the son claims he purchased the property with his own funds. *Opsomere* v. *Opsomere*, 65.

REPORTS OF CORPORATIONS—See CORPORATIONS (1, 18).

REPUGNANCY—See STATUTES (2); WILLS (1).

REPUTATION—See DAMAGES (2); EVIDENCE (4).

RESCISSION—See CANCELLATION OF INSTRUMENTS (2); COMPROMISE AND SETTLEMENT (1); CORPORATIONS (7).

RESERVATION—See DEEDS (1).

RES GESTÆ—See EVIDENCE (13, 26, 30).

RES JUDICATA—See HABEAS CORPUS (1, 6).

RETURN OF RESPONDENT—See HABEAS CORPUS (8, 15, 16).

REVIEW BY CERTIFYING RECORD—See APPEAL AND ERROR (6).

RIGHT OF ACTION—See BROKERS (6, 7).

RIPARIAN RIGHTS—See BOUNDARIES.

SAFE APPLIANCES—See MASTER AND SERVANT (9, 10).

SAFE PLACE—See MASTER AND SERVANT (21).

SALES.

1. Plaintiffs sold their output of poles and posts to the Michigan Cedar & Lumber Co. which paid for them by notes and directed plaintiffs to ship the timber to defendant. After the maturity of one of the notes, defendant paid it and sent a statement crediting themselves with that amount on their account with plaintiffs. In response, plaintiffs mailed a statement to defendant adopting the balance so shown and adding other items which defendant subsequently paid according to the invoices. The Michigan Cedar & Lumber Co. gave its notes for the amount then claimed by plaintiffs to be due on the

SALES—Continued.

original contract, and, becoming subsequently bankrupt, defaulted in paying them. Plaintiffs brought action against the consignees of the lumber and sought to recover the amount credited for the payment of the first note. *Held*, that the payment was properly credited on defendant's account and the striking of balances and settlement by the several notes constituted an account stated. *Harstad* v. *H. A. Bauman Co.*, 162.

2. Correspondence between the vendor and vendee of automobile gears, showing a contract and an attempt to reduce the number ordered, was properly adjudged, as a matter of law, by the court, to constitute a breach of contract. *Barcus* v. *Wayne Automobile Co.*, 177.

3. Under the provisions of an agreement of defendant to buy wood of plaintiffs at $2.10 a cord, and pay $1.10 in the woods after it was scaled, and $1.00 additional when it was delivered at the railroad, the defendants were liable for all wood cut, scaled, and paid for by them, although fire destroyed a part of the wood before plaintiffs delivered it at the track. *Kelley* v. *East Jordan Chemical Co.*, 525.

4. No error was committed in refusing to direct a verdict for the seller of books, under a contract providing for delivery to the purchaser, where there was a dispute as to the actual delivery of the books to defendant by an express company which carried the merchandise. *Fifth Ave. Library Society* v. *Gates*, 667.

5. The receipt of the books by the carrier, or by the local agent of the company, did not constitute a sufficient delivery. *Id.*

6. A request to charge that the plaintiff must show that he relied upon the warranty is sufficiently covered by a charge that the jury must find that the warranty was made and relied on, and that there must be a warranty and a reliance on it to justify a recovery. *Hardy* v. *Stoppel*, 676.

7. To charge the jury that plaintiff could not recover for breach of warranty of soundness if the defect was patent, and that if it was such as to require the exercise of more than ordinary care to discover it, plaintiff might rely on the warranty, sufficiently covered a requested instruction that if plaintiff could have discovered the defective eyesight by a reasonable examination he was estopped to claim damages therefor. *Id.* 677.

See COMPROMISE AND SETTLEMENT (2); CONTRACTS (7); CORPORATIONS (3, 7); DAMAGES (6); EXECUTORS AND ADMINISTRATORS (4); FRAUDS, STATUTE OF (1); GUARDIAN AND WARD (1); PARTITION (1).

SALES-IN-BULK LAW—See BULK-SALES LAW.

SATISFACTION—See JUDGMENT (4).

SAVING QUESTIONS FOR REVIEW—See APPEAL AND ERROR (2, 5, 8, 10).

SCAFFOLDS—See MASTER AND SERVANT (20).

SCOPE OF EMPLOYMENT—See MASTER AND SERVANT (15).

SEDUCTION.

1. Under evidence tending to support the theory that the complaining witness was seduced by respondent in Michigan, and if improper relations had existed between them in Ohio, where they had been immediately previous to the commission of the offense charged, she had reformed and intended to cohabit with respondent as his lawful wife, but was deceived by false representations and a fraudulent marriage, it was not error to instruct the jury that they might find respondent guilty of seduction if she had reformed and had been subsequently induced by artifice to yield to the respondent. *People* v. *Adams*, 371.

2. The admission of evidence of the witness' pregnancy and of her chaste character did not constitute prejudicial error. *Id.*

3. It is not sufficient, to establish a common-law marriage, that the respondent promised to marry the witness when they should arrive at Detroit, that he attempted to convince her by false papers that they were lawfully wedded, that he made no present promise to take her as his wife, but avoided such an agreement, and that on learning in a day or two of the falsity of his statements she discontinued their relations. *Id.*

4. Admissions of respondent are competent to show a previous marriage, in a prosecution for seduction. *Id.*

See EVIDENCE (21).

SELECTION—See HOMESTEAD.

SENTENCE—See APPEAL AND ERROR (6); CRIMINAL LAW (4).

SEPARATE MAINTENANCE—See DIVORCE (1, 3).

SEPARATE PARCELS—See PARTITION (1).

SEPARATION AGREEMENT—See DIVORCE (13).

SERVITUDES—See WATERS AND WATERCOURSES (1, 4).

SET-OFF AND RECOUPMENT—See EQUITY (6); INSURANCE (10); LANDLORD AND TENANT (5).

SHIPPING—See MASTER AND SERVANT (13).

SIGNALS—See MASTER AND SERVANT (6); RAILROADS (4).

SOLICITING ORDERS—See INTOXICATING LIQUORS (6).

SPARK ARRESTER—See EVIDENCE (7).

SPECIAL APPEAL—See JUSTICES OF THE PEACE (3).

SPECIAL DAMAGES—See DAMAGES (7).

SPECIAL DEFENSES—See JUSTICES OF THE PEACE (4).

SPECIAL QUESTIONS—See TRIAL (8).

SPECIFIC ENFORCEMENT PRO TANTO—See VENDOR AND PURCHASER (2).

SPECIFIC PERFORMANCE.

1. In a suit for the specific performance of a contract to convey to complainant a half interest in a patent, it is *held* that the evidence supports the claim of complainant as to the making of the contract and the bad faith of a transfer of defendant's invention. *Barthel* v. *Crippen*, 150.

2. Mere suspicion of intended wrongful action, unconfirmed by facts, does not excuse a breach of contract relations. *Id.*

See VENDOR AND PURCHASER (1-3).

STATES—See CORPORATIONS (16); COSTS (5).

STATE TAX LANDS—See TAXATION (1, 6, 8).

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS—See LIMITATIONS, STATUTE OF.

STATUTES.

1. Statutes imposing penalties must be strictly construed. *Young* v. *Moore*, 60.

2. Repeals by implication are not favored, and the question of repeal by a subsequent inconsistent statute is largely one of intent, so that if the two statutes can stand, and both have effect, they must be allowed to do so. *Lake* v. *Village of Cedar Springs*, 569.

See APPEAL AND ERROR (4, 6); BROKERS (6, 7); CONSTITUTIONAL LAW; CORPORATIONS (1, 15, 18, 19); COSTS; DIVORCE (1, 2); ELECTIONS; EMINENT DOMAIN (4); EQUITY (10); FRAUDULENT CONVEYANCES; HABEAS CORPUS (4-6, 8, 10, 16); HIGHWAYS AND STREETS (1, 2); INSURANCE (6); INTOXICATING LIQUORS (1, 2, 5-9, 11); LIMITATION OF ACTIONS (1); MECHANICS' LIENS (2); MUNICIPAL CORPORATIONS (1, 4, 5); PRINCIPAL AND AGENT (12); RAILROADS (5); STREET RAILWAYS (3); TAXATION (1); TRADE-NAMES (3); TRIAL (8); WILLS (9); WITNESSES (1).

STATUTORY BOND—See MUNICIPAL CORPORATIONS (4, 5).

STIPULATIONS—See EQUITY (7).

STOCK AND STOCKHOLDERS—See CORPORATIONS (2, 3, 7, 10).

STOCK GAMBLING TRANSACTIONS—See BROKERS (4).

STOCKHOLDERS' LIABILITY—See CORPORATIONS (19).

STREET RAILWAYS.

1. Crossing a street car track when plaintiff's view was obscured by a gust of wind and sleet, so that she could not see

STREET RAILWAYS—Continued.

whether or not a car was approaching from one direction, is negligence contributing to an injury caused by a car coming from that direction. *Davis* v. *Detroit United Railway*, 240.

2. In a prosecution for violation of a municipal ordinance requiring the sale of 8 street railway tickets for 25 cents for transportation anywhere in the city, and giving the railway company a right to extend its tracks to the easterly limits of the city, a purchase of the rights of a street railway outside the city which subsequently changed its boundaries so as to include the purchased line, is properly treated as an extension of the railway system. 2 Comp. Laws, § 6448. *People* v. *Detroit United Ry.*, 460.

3. There are two methods of extending street railways within the meaning of 2 Comp. Laws, § 6448; by construction and by purchase. *Id.*

4. A franchise requiring the sale of tickets at a certain rate, to be good within the city, contemplates the growth and extension of the city, and provides for single fares within the city limits as they may from time to time be fixed, so as to include any street railway subsequently purchased and thereafter included in the city by a change of boundaries. *Id.*

See CARRIERS (2–6, 8); EVIDENCE (20); MUNICIPAL CORPORATIONS (2, 3); NEGLIGENCE (5, 6); PLEADING (4).

SUBCONTRACTORS—See NEGLIGENCE (7).

SUBROGATION—See MECHANICS' LIENS (2).

SUBSCRIPTION TO STOCK—See CORPORATIONS (2).

SUBSEQUENT ACCIDENTS—See EVIDENCE (5, 6).

SUBSEQUENT WRONGFUL ACTS—See EVIDENCE (11).

SUICIDE—See INSURANCE (3).

SUPPLEMENTAL BILL—See WATERS AND WATERCOURSES (6).

SUPPRESSION OF LIQUOR TRAFFIC — See INTOXICATING LIQUORS (7).

SUPREME COURT—See DIVORCE (2, 3).

SURFACE WATERS — See EQUITY (1); WATERS AND WATERCOURSES (1–3).

SURPLUSAGE—See PLEADING (1).

SURPRISE—See LIMITATION OF ACTIONS (2).

SURVIVAL OF ACTIONS—See APPEAL AND ERROR (5); DEATH; PLEADING (3).

TAXATION.

1. That an application to purchase State tax lands was received at the auditor general's office, during the progress of a tax

TAXATION—Continued.

sale at the county treasurer's office, does not avoid the sale, which was consummated by the auditor general after the conclusion of the public sale and the report thereof by the county treasurer, showing that no individual had purchased the land. 1 Comp. Laws, §§ 3960-3962. *McDonald* v. *Miller*, 81.

2. The liability and lien for the tax assessments fixed by the statutes in force at the time of assessment govern, and are not affected, in the absence of express provision, by subsequent acts abolishing or changing the rule of limitations. *Klatt* v. *City of Detroit*, 186.

3. Since the payment of a tax extinguishes both lien and liability, a purchase of the land at the tax sale by the city extinguished the lien and the obligation to pay the tax. *Id.* 187.

4. An equitable title vests in the city which purchases land at a tax sale for special assessments, under the charter of the city of Detroit, without the issuance of a tax deed or of a certificate of sale. *Id.*

5. Of its own motion and without a showing of cause or notice to the taxpayer, the city board of equalization created by 1 Comp. Laws, §§ 3322, 3323, may increase the valuation of any property assessed in its jurisdiction. *Petoskey & Bay Shore Gas Co.* v. *City of Petoskey*, 447.

6. One claiming title by quitclaim from the original purchaser of State tax lands, is limited to the amount and interest which she proves, and in case of her failure to show a tax deed for more than one year, will be limited to that year, although other taxes were unpaid at the time of the purchase. *Backus* v. *Cowley*, 585.

7. Those who take by quitclaim deed are not bona fide purchasers, and take only the interest which their grantor had. *Id.*

8. A purchaser of tax titles more than six years old, by quitclaim deed, who pays less than the amount required for redemption, cannot be considered a bona fide purchaser, and has notice of the stale character of the claim. Act No. 58, Pub. Acts 1907. *Id.* 586.

9. Such notice and knowledge is chargeable to the attorney and adviser, who accepted a conveyance of her interest from the purchaser of the tax interest. *Id.*

10. Where the owner of land sold for delinquent taxes sends a post-office order for a sufficient sum to redeem the property to the register in chancery, who indorses the same, and tenders it to the purchaser from the State, within the period of redemption, a sufficient payment was made to redeem the property. *Backus* v. *Killmaster*, 594.

11. If, by the conduct of the register in chancery, the tax purchaser has lost the money, his remedy is against the officer. *Id.* 595.

See LIMITATION OF ACTIONS (1); PARTIES (1, 2); PRINCIPAL AND AGENT (9).

TAX TITLES—See ADVERSE POSSESSION (1); PARTITION (2).

TENANCY AT WILL—See LANDLORD AND TENANT (2).

TENANCY FROM YEAR TO YEAR—See LANDLORD AND TENANT (1-3).

TENDER—See TAXATION (10).

TERM FEES—See COSTS (2).

TIMBER—See DEEDS (1).

TIME—See APPEAL AND ERROR (4, 11); EXCEPTIONS, BILL OF (1, 2).

TITLE OF ACT—See CONSTITUTIONAL LAW (1).

TOWNSHIPS—See BRIDGES; MUNICIPAL CORPORATIONS (1).

TRACTION ENGINES—See EVIDENCE (5-7).

TRADE-NAMES.

1. In a suit in equity to enjoin the use by a corporation of a name similar to the name of another corporation carrying on business of the same character, relief may be granted if the public is misled, and the corporation first established is defrauded on account of the similarity. *Michigan Sav. Bank* v. *Dime Sav. Bank*, 297.

2. The use of properly descriptive geographical words in a business name will not be enjoined in the absence of estoppel, actual fraud or misleading of the public. *Id.*

3. In enforcing a statute intended to prevent such results (Act No. 232, Pub. Acts 1903), it must be made to appear that they will follow the use of the name sought to be enjoined. *Id.*

4. The proposed use by a bank, subsequently organized, of the name "Bank of Michigan," in the absence of evidence of fraud or estoppel, or of actual injury, will not be enjoined as an infringement upon the rights of a corporation called the "Michigan Savings Bank," doing business in the same place; but the complainant will be left to its remedy if actual injury and confusion result. *Id.*

TRANSACTIONS ON MARGIN—See BROKERS (5).

TRESPASS VI ET ARMIS.

It was not error to instruct the jury, in an action for assault and battery, that defendant, who did not strike plaintiff, could not be held liable unless he counseled and abetted the alleged wrong, and the utterance of the words, "Kill him," etc., would render him liable if they were uttered during the progress of the affray with the intention of instigating and encouraging the assault. *Brink* v. *Purnell*, 147.

TRIAL.

1. A plaintiff, against whom a verdict is directed, is entitled to have the testimony he presents considered as true in disposing, on appeal, of the question of his right to recover. *Opsomere* v. *Opsomere*, 65.

2. Error committed in charging the jury was not corrected by recalling them after they had deliberated two and a half hours, reading the detached paragraphs in question and rereading them in modified form. *Schattler* v. *Daily Herald Co.*, 115.

3. Error assigned on the refusal of requests to charge the jury, which are covered by the general charge of the court, does not warrant a reversal. *Id.* 116.

4. In a prosecution for violation of the local option-law, argument of the prosecutor that persons frequently met at the respondent's room and made it a rendezvous, objected to by respondent's attorney on the ground that the testimony referred to was stricken from the record, was not reversible error where it was withdrawn from the jury by the interposition of the court at the time and later in his charge. *People* v. *Bedell*, 230.

5. The refusal to amend findings of fact made by the trial court, without the aid of a jury, is not reviewable in the Supreme Court, where the findings are supported by the evidence. *McBroom* v. *Cheboygan Brewing & Malting Co.*, 323.

6. Where a case is tried by the court without a jury, and he makes findings of fact, they will not be disturbed, on error, if there is evidence to support them. *Skeels* v. *Snow*, 561.

7. No error is committed in refusing requests to instruct the jury, which are covered by the general charge. *Chapman* v. *Strong*, 624.

8. It is proper to refuse to submit a special question which does not meet the statutory requirements. 3 Comp. Laws, § 10237. *Id.*

9. The circuit judge did not abuse his discretion in permitting cross-examination of defendant and his witnesses relative to their whereabouts on the day of the injury and the amount of intoxicants used by them. *Id.*

10. To ask a witness, on cross-examination, after he has testified that he did not remember making certain conflicting statements on another trial, if his testimony was untrue, is not proper cross-examination. *Scott* v. *Dow*, 636.

11. A reprimand for persisting in improper cross-examination, notwithstanding the adverse ruling of the court, is not reversible error, when it was induced by counsel's conduct. *Id.*

12. It is within the discretion of a trial judge to permit leading questions to be asked of a party, by his counsel. *Cairbre* v. *McQuillen*, 679.

13. It is not an abuse of discretion for the trial court to permit plaintiff's counsel to ask plaintiff questions from the bill

TRIAL—Continued.

of particulars, and ask leading questions to refresh his recollection as to items and dates; the witness being unable to see distinctly or to recall certain dates and amounts. *Id.*

14. Where a party is made a witness by the opposing counsel, he may be cross-examined as to material facts not brought out on direct examination. *Blackwood* v. *Brown*, 32 Mich. 104, overruled. *Id.* 680.

15. Error committed in refusing to permit such cross-examination is waived by the party who subsequently takes the stand in his own behalf and gives testimony upon the principal issues. *Id.*

16. It is error to refuse a properly framed request to instruct the jury that if any witness wilfully testified falsely, as to a material fact, no credit should be given to other uncorroborated testimony of that witness. *Ketchum* v. *Fillingham*, 705.

See APPEAL AND ERROR (10); DAMAGES (5); DISMISSAL AND NONSUIT (1); PLEADING (3); SALES (2); TRESPASS VI ET ARMIS.

TRIAL COURT—See DIVORCE (2).

TRIAL FEE—See COSTS (1).

TROVER AND CONVERSION.

The submission to the jury of the question of a conversion of stock by a broker who never, in fact, bought the stock, was not prejudicial error, where the jury determined in plaintiff's favor by their verdict all the facts necessary to a recovery for breach of contract, and where the measure of damages was the same under either theory. *Goodspeed* v. *Smith*, 642.

See BROKERS (4, 5); PRINCIPAL AND AGENT (8).

TRUST FUNDS—See EXECUTORS AND ADMINISTRATORS (1, 2).

TRUST MORTGAGES—See CORPORATIONS (5, 6).

TRUST RELATION—See PRINCIPAL AND AGENT (9).

TRUSTS.

1. Equity has jurisdiction of a bill of complaint, notwithstanding a possible remedy by an action at law and garnishment proceedings, where it is averred that the defendant by fraudulent representations obtained money deposited with complainant in the name of her deceased husband, that she took the money to another bank, which is made a defendant, and deposited it in her own name, that complainant is liable for the amount of the fund to the estate of her husband, that the wife is insolvent, and has no authority to receive the money, as administratrix or otherwise, and that unless protected by an injunction, as prayed, the complainant will lose the fund, and that the same is a trust fund in the hands of defenadnt. *Traders' Bank of Canada* v. *Fraser*, 315.

TRUSTS—Continued.

2. A legacy of $2,000 in stock to a physician, for the purpose of carrying on the work of relieving suffering through a sanitarium conducted by him, is void for uncertainty of its beneficiaries. *Stoepel* v. *Satterthwaite*, 457.

3. A decree awarding alimony to the wife in divorce proceedings cannot be made a lien upon a trust estate which was created by the father of defendant, providing after the payment of his debts, that the proceeds should be used for the support of himself and family, including defendant, his son, that the trustee might distribute the estate when he should deem it advisable and the trust should terminate in twenty years; notwithstanding that the claims of the other beneficiaries had been satisfied by the trustee with the consent of complainant and defendant, since the payment of alimony is not within the uses to which the trustee was authorized to apply the trust estate. *Gilkey* v. *Gilkey*, 664.

4. Money received by the trustee belonging to defendant, to whose use it has been applied, is, however, applicable to the payment of alimony and may not be held in trust as against defendant's creditors. *Id.*

See CORPORATIONS (6); EQUITY (2, 3); GUARDIAN AND WARD (3); PARTIES (3); PRINCIPAL AND AGENT (10, 12); VENDOR AND PURCHASER (4); WILLS (9).

UNDUE INFLUENCE—See WILLS (13, 14).

UNFAIR COMPETITION—See TRADE-NAMES (1).

VALIDITY OF WRIT—See HABEAS CORPUS (9).

VALUATION, INCREASE OF—See TAXATION (5).

VALUE—See DAMAGES (4, 6).

VARIANCE—See PLEADING (2).

VENDOR AND PURCHASER.

1. The vendor in a land contract who has been dispossessed of a portion of the premises described, by adverse occupation of third parties, may not compel the specific performance of the contract and the payment of the entire purchase price, on the theory that a conveyance of the parcel as bounded and determined by such adverse holding and by the acquiescence of the grantor's predecessors in title, should be accepted as a performance of the agreement. *Nelson* v. *Gibe*, 410.

2. The purchaser may, however, elect to accept the premises to which the vendor has title, as a performance *pro tanto* and abate the purchase price in proportion to the deficiency. *Id.*

3. Under proper pleadings, the purchaser may obtain affirmative relief by virtue of the deficiency, in the form of an accounting for overpayments made, specific enforcement *pro tanto* and an equitable adjustment of the purchase price, whether

VENDOR AND PURCHASER—Continued.

the suit by the purchaser is to foreclose the land contract or compel its specific performance. *Id.*

4. Where, in pursuance of a written contract for the sale of land, the vendee procured insurance payable as the interest of the vendor might appear, but after the expiration of the policy procured another in his own name which, after the loss, he assigned to a third party, equity will enforce the agreement by declaring the proceeds of the insurance a trust fund and applying the same upon the land contract in payment of the balance due the vendor. *Craig* v. *Ins. Co. of the State of Pennsylvania*, 657.

See LIFE ESTATES (1).

VENUE—See CRIMINAL LAW (3); HABEAS CORPUS (6).

VERBAL ACT—See EVIDENCE (1).

VIEW OF PREMISES—See EVIDENCE (28).

VILLAGES—See INTOXICATING LIQUORS (7-11); MANDAMUS; WATERS AND WATERCOURSES (1-3).

VOID POLICIES—See INSURANCE (9).

VOLUNTARY CONVEYANCE—See HUSBAND AND WIFE (4).

VOLUNTARY NONSUIT—See DISMISSAL AND NONSUIT (1).

VOLUNTARY SERVICES—See CONTRACTS (6).

WAIVER—See APPEAL AND ERROR (2); DISMISSAL AND NONSUIT (2); FRAUDULENT CONVEYANCES (5); INSURANCE (1, 4); LANDLORD AND TENANT (6); LIFE ESTATES (1); PRINCIPAL AND SURETY (2); TRIAL (15); WORDS AND PHRASES.

WARNING AND INSTRUCTING SERVANT—See MASTER AND SERVANT (7, 14).

WARRANTY—See CONTRACTS (7, 8); DAMAGES (6); SALES (6, 7).

WATERS AND WATERCOURSES.

1. Residents of villages are subject to the rule, applicable to rural localities, that their land is bound to receive the flow of surface water from adjacent higher land, coming in substantially its natural amount and condition. *Village of Trenton* v. *Rucker*, 19.

2. Municipalities may not collect and discharge surface waters in unnatural volume upon private land. *Id.*

3. In a village which has no sewage system, a property owner may not interfere with the natural flow of water across his lands not in process of improvement, and may be enjoined by the village from interfering with the flowage of surface water which has from time immemorial drained across his land. *Id.* 20.

4. A bill of complaint showing that defendants have maintained

WATERS AND WATERCOURSES—Continued.

for forty years a dam in a stream that flows through the lands of complainants; that the defendants are planning to raise the height of the dam and cause the complainants' land to be overflowed; the defendants admitting in their answer that their right to maintain the dam is based on prescription; that it has settled and that they purpose to reconstruct the dam at its original height, presents a case for a court of equity. *Long* v. *Schroeder*, 690.

5. Under the averments of the answer, defendants have no right to maintain the dam at a greater height than the old dam was at the commencement of suit. *Id.*

6. It is unnecessary to file a supplemental bill to show that complainants after the commencement of suit completed the new dam at a greater height than the old one; the facts entitling the complainants to a decree requiring the reduction of the height of the new dam. *Id.*

7. Nor is the sole relief of the complainants by contempt proceedings for disobedience of a preliminary injunction issued by the trial court. *Id.* 691.

8. That some of the complainants abandoned the suit was immaterial. *Id.*

See BOUNDARIES.

WEIGHT OF EVIDENCE—See HIGHWAYS AND STREETS (3).

WIFE'S SEPARATE ESTATE—See HUSBAND AND WIFE (4).

WILLS.

1. A will creating an estate in fee in testator's wife, limiting, in the same paragraph, the estate granted, by charging it with the payment of legacies after the wife's death, effects the intended purpose, and does not create an unqualified estate in fee simple. *Fecht* v. *Henze*, 52.

2. A will is to be construed as an entirety, so as to give effect if possible to the whole instrument. *Id.*

3. The fact that the estate is of less value than the legacies, in no way affects the widow's estate, merely reducing the legacies *pro rata*. *Id.*

4. Since legacies become a charge upon real estate, either by express direction or by necessary implication, if the language used by the testator indicates that he intended the legacies to be paid, although he knew the personal property to be inadequate for the purpose, they become a charge on the real estate; or, if the real estate and personalty are blended in one mass and legacies bequeathed, they may be charged upon the real estate. *Id.*

5. Where the estate consisted of real property worth $5,000 and personal property worth $1,400 and testator bequeathed legacies amounting to $8,000, to be paid from his estate remaining at his wife's death, and blended the entire estate as one

WILLS—Continued.

mass, it is evidence of his intent to charge the legacies upon the entire estate. *Id.*

6. The court should discover the intent of the testator and if possible give it effect. *Id.* 53.

7. After the execution of a will by which real estate was devised, it became necessary to sell the property for the support of the testatrix who became incompetent. At her death a portion of the proceeds remained. *Held*, that the devisees should take the residue under the will as if no sale had been made. 3 Comp. Laws, §§ 8719, 9141, 9145. *In re Barnes' Estate*, 79.

8. In a case where the evidence is conflicting as to competency of the testatrix, and the trial court has denied a new trial, and the burden of proof is on the defeated party, a verdict will not be set aside as contrary to the weight of the evidence, unless the case is a very clear one affording strong evidence that the jury was biased or prejudiced. *In re Hoyles' Estate*, 275.

9. Since a will speaks from the death of the testatrix, it is not affected by a statute which took effect after her decease. (Act No. 132, Pub. Acts, 1907.) *Stoepel v. Satterthwaite*, 457.

10. In a contest over a will, which contained no provision for the husband of testatrix, evidence was admissible to show that she had executed to him in the stead of a testamentary provision a quitclaim deed of her interest in the homestead held in common by the husband and wife. *In re Woodworth's Estate*, 683.

11. It was not error to reject the opinion of a witness as to the mental incompetency of deceased, supported only by evidence that deceased failed to recognize the witness about the time the will was made, that she might have been asleep or in a stupor, but recognized the witness later when she opened her eyes. *Id.* 684.

12. The question of mental incompetency should not be submitted to the jury, where witnesses give testimony which tends to show the mental capacity of testatrix, and no opinion or facts tending to show incompetency are produced. *Id.*

13. Undue influence cannot be predicated upon opportunity alone. *Id.*

14. It is proper to refuse to submit to the jury the question of undue influence in the absence of evidence tending to show that some person made an attempt to influence the testatrix; and the suggestion of her sister that she should execute a will and provide for her husband did not amount to undue influence. *Id.*

See EVIDENCE (19); TRUSTS (2).

WITNESSES.

1. On the trial of an action against the estate of a decedent for services rendered by the wife of claimant, it was error to admit testimony of the claimant that he knew of the services

WITNESSES—Continued.

rendered and looked to deceased for payment. Act No. 30, Pub. Acts 1903. *In re Reidy's Estate*, 154.

2. As agent of her husband in making the alleged contract for services, testimony of the wife tending to show the making thereof was incompetent under the statute. *Id.*

See EVIDENCE (15); TRIAL (10, 13, 14).

WORDS ACTIONABLE PER SE—See LIBEL AND SLANDER (2).

WORDS AND PHRASES.

A waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. *Marquette County Sav. Bank* v. *Koivisto*, 554.

See EVIDENCE (10); STREET RAILWAYS (3); TRADE-NAMES (2, 4).

WORK AND LABOR—See CONTRACTS (6); CORPORATIONS (3, 6); EQUITY (3); WITNESSES.

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