MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

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SUPREME COURT.

CHIEF JUSTICE.

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FRANZ C. KUHN, MT. CLEMENS, . . .	Dec. 31, 1917

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GRANT FELLOWS, HUDSON	Dec. 31, 1923

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[2]Appointed August 10, 1917, in pursuance of Act No. 216, Public Acts 1917.

[3]Appointed August 10, 1917, in pursuance of Act No. 200, Public Acts 1917.

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MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT.

WILLIAM F. CONNOLLY, EDWARD J. JEFFRIES.

SUPERIOR COURT OF GRAND RAPIDS, MAJOR L. DUNHAM.

JUDICIAL CIRCUITS.

Counties.	Circuits.
Alcona	23
Alger	11
Allegan	20
Alpena	26
Antrim	13
Arenac	34
Baraga	12
Barry	5
Bay	18
Benzie	28
Berrien	2
Branch	15
Calhoun	37
Cass	36
Charlevoix	13
Cheboygan	33
Chippewa	11
Clare	21
Clinton	29
Crawford	34
Delta	25
Dickinson	25
Eaton	5
Emmet	33
Genesee	7
Gladwin	34
Gogebic	32
Grand Traverse	13
Gratiot	29
Hillsdale	1
Houghton	12
Huron	24
Ingham	30
Ionia	8
Iosco	23
Iron	25
Isabella	21
Jackson	4
Kalamazoo	9
Kalkaska	28
Kent	17
Keweenaw	12
Lake	19
Lapeer	40
Leelanau	13
Lenawee	39
Livingston	35
Luce	11
Mackinac	33
Macomb	16
Manistee	19
Marquette	25
Mason	19
Mecosta	27
Menominee	25
Midland	21
Missaukee	28
Monroe	38
Montcalm	8
Montmorency	26
Muskegon	14
Newaygo	27
Oakland	6
Oceana	14
Ogemaw	34
Ontonagon	32
Osceola	19
Oscoda	23
Otsego	34
Ottawa	20
Presque Isle	29
Roscommon	34
Saginaw	10
St. Clair	31
St. Joseph	15
Sanilac	24
Schoolcraft	11
Shiawassee	35
Tuscola	24
Van Buren	36
Washtenaw	22
Wayne	3
Wexford	28

TABLE OF CASES REPORTED.

	PAGE
Acme White Lead & Color Works, Miller *v*.	435
Allen *v*. Hook	122
Alpena Hide & Leather Co., Dove *v*.	132
Alpena Power Co., Holcomb *v*.	165
American Insurance Company of Newark, N. J., Crossman *v*.	304
Anders *v*. Clover	763
Anderson, People, *ex rel.* Simmons, *v*.	38
Andre *v*. Donovan	256
Angel *v*. Grand Rapids & Indiana Railway Co.	9
Arntz, Otis *v*.	196
Benjamin Douglas Co., Travelers' Insurance Co. *v*.	457
Benore *v*. Benore	113
Bernard *v*. Michigan United Traction Co.	497
Bischoff *v*. Harris	59
Blair, Rouse *v*.	176
Bloss *v*. Schreiter	249
Board of Wayne County Auditors, Campau *v*.	468
Boston Piano & Music Co. *v*. Seckinger	312
Brown *v*. Hurt	276
Brown's Estate, *In re*	544
Bryant, Tattan *v*.	515
Bump, Loveland *v*.	564
Bury *v*. Detroit United Railway	447
Cadillac Motor Car Co., Porth *v*.	501
Campau *v*. Board of Wayne County Auditors	468
Canterbury's Estate, *In re*	743
Charles Hoertz & Son, Cook *v*.	129

PAGE
Child, Hulswit & Co., Ramsey *v*..... 658
Churchill Lumber Co. *v*. Detroit & Mackinac Railway Co. 469
Cincinnati Northern Railroad Co., Guy *v*..... 140
Clover, Anders *v*..... 763
Cook *v*. Charles Hoertz & Son..... 129
Crossman *v*. American Insurance Company of Newark, N. J..... 304

Dattner *v*. Weisz..... 367
De Golia, Rodenhouse *v*..... 402
Detroit & Mackinac Railway Co., Churchill Lumber Co. *v*..... 469
———, Fletcher Paper Co. *v*..... 469
———, Island Mill Lumber Co. *v*..... 469
———, Michigan Veneer Co. *v*..... 469
———, Richardson Lumber Co. *v*..... 469
Detroit United Railway, Bury *v*..... 447
———, Donlin *v*. 327
———, McNeal *v*. 108
———, Sibert *v*. 117
Dingeman *v*. State Board of Canvassers..... 135
Donlin *v*. Detroit United Railway..... 327
Donovan, Andre *v*..... 256
Douglas (Benjamin) Co., Travelers' Insurance Co. *v*. 457
Dove *v*. Alpena Hide & Leather Co..... 132
Dundee Hydraulic Power Co., Potter *v*..... 585
Du Pont de Nemours (E. I.) Powder Co., Parsons *v*. 409

E. I. Du Pont De Nemours Powder Co., Parsons *v*. 409

Federal Life Insurance Co., Warren *v*..... 342
Fisk *v*. Liverpool & London & Globe Insurance Co. 270

PAGE

Flax *v.* Mutual Building & Loan Association of Bay County 676
Fletcher Paper Co. *v.* Detroit & Mackinac Railway Co. 469
Flokstra *v.* Grand Rapids Railway Co..... 629
Freeman *v.* Mitchell 207

Gagush *v.* Hoeft..... 263
Gardnier *v.* Smith..... 203
Gardnier's Estate, *In re*..... 203
Garland, Stevens *v*..... 24
Goldberg *v.* Parker..... 396
Grace Hospital, Hartwig *v*..... 725
Grand Rapids & Indiana Railway Co., Angel *v*.. 9
———, Sergeant *v*..... 385
Grand Rapids Railway Co., Flokstra *v*..... 629
Grand Rapids Terminal Belt Railway Co. *v.* Pere Marquette Railroad Co..... 285
——— *v.* Waters..... 285
Grier, Harrison *v*..... 672
Guy *v.* Cincinnati Northern Railroad Co..... 140

Hagenback-Wallace Shows, Jacobs *v*..... 73
Hansen *v.* Manning..... 743
Harris, Bischoff *v*..... 59
Harrison *v.* Grier 672
Hartwig *v.* Grace Hospital..... 725
Hodgman *v.* Sears..... 421
Hoeft, Gagush *v*..... 263
Hoertz (Charles) & Son, Cook *v*..... 129
Holcomb *v.* Alpena Power Co..... 165
Hook, Allen *v*..... 122
Hopkins *v.* Tripp..... 94
Howard *v.* Lovett..... 710
Hurt, Brown *v*..... 276

Independent Brewing Co., Stapleton *v*..... 170

PAGE
In re Brown's Estate 544
——— Canterbury's Estate 743
——— Gardnier's Estate 203
——— Rehfeld's Estate 249
——— Spark's Estate 421
Island Mill Lumber Co. *v.* Detroit & Mackinac Railway Co. 469

Jacobs *v.* Hagenback-Wallace Shows 73
———, Lipp *v.* 357
Jenison, Wilcox *v.* 182
Joy, Saier *v.* 295

Kauri *v.* Messner 126
Kruce *v.* Lakeside Biscuit Co 736

Lakeside Biscuit Co., Kruce *v.* 736
Lamberton, Matthews *v.* 746
Langguth, McNamara *v.* 776
Lipp *v.* Jacobs 357
Liverpool & London & Globe Insurance Co., Fisk *v.* 270
Lord, Sparks *v.* 415
Loveland *v.* Bump 564
Lovett, Howard *v.* 710

Macatawa Resort Co., Weihe *v.* 334
McCarty, Pollock *v.* 66
McDonald *v.* Young 620
McLawson *v.* Paragon Refining Co 222
McNamara *v.* Langguth 776
McNeal *v.* Detroit United Railway 108
McPhee *v.* Millers' National Insurance Co 215
McRae, Township School District of Wakefield *v.* .. 693
Manning, Hansen *v.* 743
Matthews *v.* Lamberton 746
Messner, Kauri *v.* 126

PAGE
Michigan Central Railroad Co., Podkastelnea *v*.. 321
Michigan Railway Co., Township of Sandstone *v*.. 234
Michigan United Traction Co., Bernard *v*..... 497
———, Wilmarth *v*..... 428
Michigan Veneer Co. *v*. Detroit & Mackinac Railway Co. 469
Miller *v*. Acme White Lead & Color Works..... 435
Miller's Estate, People's State Bank of Holland *v*. 783
Millers' National Insurance Co., McPhee *v*..... 215
Mills *v*. Waters..... 637
Minneapolis, St. Paul & Sault Ste. Marie Railway Co., Sandstrom *v*..... 99
Mitchell, Freeman *v*..... 207
Mutual Building & Loan Association of Bay County, Flax *v*..... 676

Neal *v*. Novelty Leather Works..... 598
Novelty Leather Works, Neal *v*..... 598

Otis *v*. Arntz 196
Oxnam, Township of Rockland *v*..... 373

Page, People *v*..... 524
Paragon Refining Co., McLawson *v*..... 222
Parker, Goldberg *v*..... 396
Parsons *v*. E. I. Du Pont De Nemours Powder Co. 409
Peerless Wire Fence Co., Stombaugh *v*..... 445
Pellston Planing Mill & Lumber Co. *v*. Van Wormer 648
Pennock, Powell *v*..... 573
People *v*. Page..... 524
———, *ex rel.* Simmons, *v*. Anderson..... 38
People's State Bank of Holland *v*. Miller's Estate. 783
Pere Marquette Railroad Co., Grand Rapids Terminal Belt Railway Co. *v*..... 285
Podkastelnea *v*. Michigan Central Railroad Co.. 321

PAGE
Pokorney, Raniak *v*. 567
Pollock *v*. McCarty 66
Porth *v*. Cadillac Motor Car Co 501
Potter *v*. Dundee Hydraulic Power Co 585
———, Rennells *v* 49
Powell *v*. Pennock 573

Ramsey *v*. Child, Hulswit & Co 658
Raniak *v*. Pokorney 567
Rehfeld's Estate, *In re* 249
Rennells *v*. Potter 49
Richardson Lumber Co. *v*. Detroit & Mackinac Railway Co. 469
Robinson *v*. Taber 767
Rockland Township *v*. Oxnam 373
Rodenhouse *v*. De Golia 402
Rosema, Trussed Concrete Steel Co. *v* 160
Rouse *v*. Blair 176

Saginaw Milling Co. *v*. Schram 773
Saier *v*. Joy 295
Sandstone Township *v*. Michigan Railway Co 234
Sandstrom *v*. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 99
Schram, Saginaw Milling Co. *v* 773
Schreiter, Bloss *v* 249
Sears, Hodgman *v* 421
Seckinger, Boston Piano & Music Co. *v* 312
Sergeant *v*. Grand Rapids & Indiana Railway Co. 385
Shermer, Vezina *v* 757
Sibert *v*. Detroit United Railway 117
Simmons, People, *ex rel.*, *v*. Anderson 38
Smith, Gardnier *v* 203
Sparks *v*. Lord 415
Spark's Estate, *In re* 421
Stapleton *v*. Independent Brewing Co 170
State Board of Canvassers, Dingeman *v* 135

PAGE
Stevens *v.* Garland 24
Stombaugh *v.* Peerless Wire Fence Co..... 445
Stotts *v.* Stotts..... 605

Taber, Robinson *v*..... 767
Tattan *v.* Bryant..... 515
Tilden Saw Co., Wray *v*..... 461
Township of Rockland *v.* Oxnam..... 373
Township of Sandstone *v.* Michigan Railway Co.. 234
Township School District of Wakefield *v.* McRae.. 693
Travelers' Insurance Co. *v.* Benjamin Douglas Co. 457
Tripp, Hopkins *v*..... 94
Trussed Concrete Steel Co. *v.* Rosema..... 160

Van Wormer, Pellston Planing Mill & Lumber Co. *v.* 648
Vezina *v.* Shermer..... 757

Wakefield Township School District *v.* McRae... 693
Warren *v.* Federal Life Insurance Co..... 342
Waters, Grand Rapids Terminal Belt Railway Co. *v.* 285
———, Mills *v*..... 637
Wayne County Board of Auditors, Campau *v*.... 468
Weihe *v.* Macatawa Resort Co..... 334
Weisz, Dattner *v*..... 367
Wilcox *v.* Jenison..... 182
Williams *v.* Williams..... 1
Wilmarth *v.* Michigan United Traction Co..... 428
Wray *v.* Tilden Saw Co..... 461

Young, McDonald *v*..... 620

TABLE OF CASES CITED.

PAGE

Ablard *v.* Railway, 139 Mich. 248..... 112
Aiken *v.* Weckerly, 19 Mich. 482..... 206
Allen *v.* Cadwell, 55 Mich. 8..... 365
——— *v.* City of Detroit, 167 Mich. 464..... 734
——— *v.* Conklin, 112 Mich. 74..... 668
——— *v.* Electric Co., 144 Mich. 370..... 169
Allis *v.* McLean, 48 Mich. 428..... 656
Allison *v.* Smith, 16 Mich. 405..... 563
American Building & Loan Ass'n *v.* Bear, 48 Neb. 455.... 354
Anson *v.* Savings Bank, 155 App. Div. 939..... 252
Antoszewski *v.* Plumbing Co., 185 Mich. 215..... 572
Application of Brooklyn Elevated R. Co., 125 N. Y. 434.... 245
Apsey *v.* Railroad Co., 83 Mich. 432.....332, 333
Archibald *v.* Thomas, 3 Cow. (N. Y.) 284..... 692
Arkansas Railroad Rates, *In re*, 168 Fed. 720..... 493
Ashland, etc., Cement Co. *v.* Shores, 105 Wis. 122..... 384
Ayres *v.* Birtch, 35 Mich. 501..... 767

Baldwin *v.* Railway Co., 128 Mich. 417..... 22
Baldy *v.* Stratton, 11 Pa. 316..... 269
Barker, State, *ex rel.*, *v.* Railroad Co., 265 Mo. 646..... 493
Barr *v.* Motor Co., 172 Mich. 299..... 572
Barras *v.* Barras, 192 Mich. 584..... 420
Barrett *v.* Miller, 144 Mich. 454..... 283
Barry & Finan Lumber Co. *v.* Insurance Co., 136 Mich. 42.. 275
Barth *v.* Hospital Ass'n, 196 Mich. 642.....302, 304
Bassett *v.* Menage, 52 Minn. 121..... 32
Bayer *v.* Bayer, 191 Mich. 423..... 127
Bayne *v.* Cartage Co., 181 Mich. 378..... 444
Beach *v.* City of St. Joseph, 192 Mich. 296..... 228
Bean *v.* Bean, 163 Mich. 379..... 689
Beattie *v.* City of Detroit, 137 Mich. 319..... 195
Beaubien *v.* Cicotte, 8 Mich. 9..... 206
Beaumont *v.* Reeve, 8 Q. B. (Eng.) 483..... 269
Becker *v.* Headsten, 137 Mich. 478..... 692
Beckwith's Estate *v.* Spooner, 183 Mich. 323..... 444
Beld *v.* Darst, 146 Mich. 143..... 418
Belknap *v.* Board of Canvassers, 94 Mich. 516.....138, 139
Bellamy *v.* Railway Co., 220 Fed. 876..... 493
Belles *v.* Burr, 76 Mich. 1..... 48
Bennett *v.* Clark, 181 Mich. 690..... 572
Bernard *v.* Traction Co., 188 Mich. 504..... 498
Berry *v.* Insurance Co., 132 N. Y. 49..... 310
Blades *v.* Water Com'rs of Detroit, 122 Mich. 366..... 255

PAGE
Blaess *v.* Dolph, 195 Mich. 137..... 134
Blake *v.* Cornwell, 65 Mich. 467..... 169
Blakeslee & Co. *v.* Manufacturing Co., 153 Mich. 230.... 760
Blanchard *v.* Ridgeway, 179 Mich. 491..... 617
Bliss *v.* Tyler, 159 Mich. 502..... 366
Board of Park Com'rs *v.* Diamond Ice Co., 130 Iowa, 603.. 413
Boigneres *v.* Boulon, 54 Cal. 146..... 269
Bonnette *v.* Molloy, 153 App. Div. 73..... 251
Booth *v.* Baptist Church, 126 N. Y. 215.....200, 201
Boston, etc., R. Co. *v.* Dana, 1 Gray (Mass.), 83..... 628
Boston Piano & Music Co. *v.* Seckinger, 198 Mich. 312..565, 673
Bouma *v.* Dubois, 169 Mich. 422..... 195
Bovine *v.* Selden, 155 Mich. 556..... 620
Brackett *v.* Perry, 201 Mass. 502..... 668
Brawley *v.* United States, 96 U. S. 168..... 708
Brinkman *v.* Zuckerman, 192 Mich. 624.....173, 174
Bristol *v.* Braidwood, 28 Mich. 191..... 354
Brockway *v.* Power & Light Co., 175 Mich. 339..... 589
Brooks *v.* Hydorn, 76 Mich. 273..... 255
Brown *v.* Smedley, 136 Mich. 65..... 617
Brunswick-Balke-Collender Co. *v.* Assurance Co., 142 Mich. 29 307
Burke *v.* Shaver, 92 Va. 345.....269
Burt *v.* Gamble, 98 Mich. 402..... 654
Burton *v.* Koch, 184 Mich. 256..... 48
Bush *v.* Delano, 113 Mich. 321..... 428
Button *v.* Hibbard, 82 Hun. (N. Y.) 289..... 269

Cabot *v.* Winsor, 1 Allen (Mass.), 546.....708, 709
Cameron *v.* Adams, 31 Mich. 426..... 652
Campau *v.* Board of Public Works, 86 Mich. 372..... 469
——— *v.* Godfrey, 18 Mich. 27..... 652
Canerdy *v.* Railway Co., 156 Mich. 211..... 106
Casgrain *v.* Hammond, 134 Mich. 419.....202, 560
Cashin *v.* Pliter, 168 Mich. 386..... 400
Casterton *v.* Plotkin, 188 Mich. 333..... 262
Ceeder *v.* Lumber Co., 86 Mich. 541..... 604
Chapman *v.* Pfarr, 145 Iowa, 196..... 228
Chase *v.* Railroad Co., 208 Mass. 137..... 645
——— *v.* Telephone Co., 121 Mich. 631..... 772
Chesapeake & Curtis Bay Railroad Co., *In re*, Public Utilities Reports 1915F, p. 346..... 291
Church *v.* Case, 110 Mich. 621..... 617
City of Detroit, *v.* Martin, 34 Mich. 170..... 355
——— *v.* Plank Road Co., 43 Mich. 144..... 246
City of Sault Ste. Marie *v.* Railway Co., 192 Mich. 65..... 179
Clark *v.* Traction Co., 167 Mich. 694..... 112
Clary *v.* Fitzgerald, 155 App. Div. 659..... 251
Clay Fire & Marine Ins. Co. *v.* Manufacturing Co., 31 Mich. 346 399
Coggs *v.* Bernard, Lord Raymond, 909..... 91
Colborne *v.* Railway, 177 Mich. 139.....330, 645
Cole *v.* Loan Society, 124 Fed. 113..... 87
Collins *v.* Clough, 222 Pa. 472..... 195

PAGE
Colman *v.* Post, 10 Mich. 422 617
Columbian Ins. Co. *v.* Lawrence, 2 Pet. (U. S.) 25 220
Combs *v.* Little, 4 N. J. Eq. 310 654
Comfort *v.* Robinson, 155 Mich. 143 670
Commercial Fire Ins. Co. *v.* Capital City Ins. Co., 81 Ala. 320. 311
Congdon *v.* Preston, 49 Mich. 204 355
Connolly *v.* Bollinger, 67 W. Va. 30 269
Converse *v.* Blumrich, 14 Mich. 109 353
Cook *v.* Curtis, 68 Mich. 611 617
Cooper *v.* Cooper, 162 Mich. 304 72
Cornwell Manfg. Co. *v.* Swift, 89 Mich. 503 169
Coster *v.* Lorillard, 14 Wend. (N. Y.) 265 .....201, 559
Crane Iron Works *v.* United States, 209 Fed. 238 291
Cruikshank *v.* Home for Friendless, 113 N. Y. 337..200, 201, 563
Cuddy *v.* Horn, 46 Mich. 596 333
Culver *v.* Armstrong, 77 Mich. 194 47
Culy *v.* Upham, 135 Mich. 131 72
Cumberland Bone Co. *v.* Insurance Co., 64 Me. 466 311
Cunningham *v.* Castle, 127 App. Div. 580 173
Cutter *v.* Steele, 93 Mich. 204 617

Damon *v.* Deeves, 62 Mich. 465 691
Daugherty *v.* Thomas, 174 Mich. 371 174
Davie *v.* Padgett, 117 Ark. 544 269
Dayton *v.* Imperial Sales & Parts Co., 195 Mich. 397 724
Delray Connection Railroad *v.* Railroads, vol. 3, No. 2, Orders and Opinions Mich. Railroad Com., p. 80 291
Deneen *v.* Railway Co., 150 Mich. 235 331
Densmore *v.* Evergreen Camp, No. 147, 61 Wash. 230 301
Detroit *v.* Martin, 34 Mich. 170 355
——— *v.* Plank Road Co., 43 Mich. 144 246
Detroit, etc., R. Co. *v.* Railroad Commission, 171 Mich. 335 ..... 479, 490
——— *v.* ———, 178 Mich. 250 480
——— *v.* ———, 235 U. S. 402 480
——— *v.* ———, 240 U. S. 564 490
Detzur *v.* Brewing Co., 119 Mich. 282 432
Devlin *v.* Smith, 89 N. Y. 470 513
Dewey *v.* Parke, Davis & Co., 76 Mich. 631 512
Dieterle *v.* Enamel Co., 143 Mich. 416 354
Dolph *v.* Railway Co., 149 Mich. 278 457
Donallen *v.* Lennox, 6 Dana (Ky.), 89 269
Dubois *v.* Luthmers, 147 Iowa, 315 228
Dutton *v.* Shaw, 35 Mich. 431 .....740, 742

Earl *v.* Jacobs, 177 Mich. 163 58
Edmonds *v.* Hughes, 115 Ky. 561 269
Edwards *v.* Investment Co., 132 Mich. 1 213
Ehrman *v.* Insurance Co., 1 Fed. 471 399
Ellis *v.* Republic Oil Co., 133 Iowa, 11 228
Emmons *v.* Van Zee, 78 Mich. 171 691
Erichsen *v.* Tapert, 172 Mich. 457 734
Estate of Beckwith *v.* Spooner, 183 Mich. 323 444
Eve *v.* Rogers, 12 Ind. App. 623 269

PAGE
Fairbairn *v.* Moody, 116 Mich. 61..... 34
Fairview *v.* City of Detroit, 150 Mich. 1..... 255
Farwell *v.* Myers, 59 Mich. 179..... 629
F. B. Holmes & Co. *v.* City of Detroit, 158 Mich. 137....708, 709
Feige *v.* Burt, 118 Mich. 243..... 125
Felske *v.* Railway, 166 Mich. 367..... 456
Felt *v.* Felt, 155 Mich. 237..... 72
First Nat. Bank of Ovid *v.* Steel, 146 Mich. 308.....668, 669
First State Bank *v.* Day, 188 Mich. 228..... 691
Fisk *v.* Fire Ass'n, 192 Mich. 243..... 274
FitzGerald *v.* City of Big Rapids, 123 Mich. 281..... 560
Flynn *v.* Flynn, 68 Mich. 20..... 617
Foerster's Estate, *In re*, 193 Mich. 440..... 180
Foley *v.* Railway Co., 193 Mich. 233..... 179
Foster *v.* Krause, 187 Mich. 630..... 751
——— *v.* Whelpley, 123 Mich. 350..... 364
Francis *v.* Hurd, 113 Mich. 250..... 354
Franck *v.* McGilvray, 144 Mich. 318..... 294
Fraser *v.* Jennison, 42 Mich. 206..... 580
French *v.* Camp, 18 Me. 433..... 413
——— *v.* Newberry, 124 Mich. 147..... 366
Friar *v.* Smith, 120 Mich. 411.....282, 284
Fye *v.* Chapin, 121 Mich. 679..... 332

Gage *v.* Sanborn, 106 Mich. 269..... 687
Ganun's Estate, *In re*, 174 Mich. 286..... 580
Garton *v.* National Bank, 34 Mich. 279..... 617
Garvey *v.* McDevitt, 72 N. Y. 556.....200, 201
German Ins. Co. *v.* Hyman, 34 Neb. 704..... 311
Getchell *v.* Insurance Co., 109 Me. 274..... 309
Gimbel Bros. *v.* Barrett, 215 Fed. 1004..... 492
Ginter *v.* Ginter, 22 L. R. A. 1024..... 580
Gold *v.* Railway, 169 Mich. 178..... 105
Goldsmith *v.* Lichtenberg, 139 Mich. 163..... 165
Gordon *v.* Insurance Co., 197 Mich. 226..... 308
Gordon Grate Co. *v.* Gordon, 142 Mich. 488..... 724
Gorton *v.* Harmon, 152 Mich. 473.....638, 644
Graham *v.* Insurance Co., 48 S. C. 195..... 311
Grand Rapids, etc., R. Co. *v.* Michigan Railroad Com'n, 183 Mich. 383 293
Granger *v.* Brewing Co., 25 Misc. Rep. 701..... 466
Green *v.* Grant, 134 Mich. 462..... 691
Greiner *v.* Klein, 28 Mich. 12..... 201
Griffin *v.* Coffey, 9 B. Mon. (Ky.) 452..... 654
Groat *v.* Railway, 153 Mich. 165..... 760
Grosvenor *v.* Duffy, 121 Mich. 220..... 255
Grove *v.* Paper Co., 184 Mich. 449..... 444
Grover *v.* Fox, 36 Mich. 453..... 367
Guest *v.* Insurance Co., 66 Mich. 98..... 307
Guggenheim *v.* Railway Co., 66 Mich. 158..... 646

Hagerman *v.* Empire Slate Co., 97 Pa. 534..... 399
Haines *v.* Hayden, 95 Mich. 332..... 580
Hall *v.* Insurance Co., 93 Mich. 184..... 307
Hamilton *v.* Hamilton, 51 Mont. 509..... 654

PAGE
Hammerslough *v.* Savings Ass'n, 79 Mo. 80 354
Hampel *v.* Railroad Co., 138 Mich. 1 332
Hanks *v.* Naglee, 54 Cal. 51 269
Harrison *v.* Fortlage, 161 U. S. 57 309
——— *v.* Grier, 198 Mich. 672 565
Hartley *v.* Miller, 165 Mich. 115 173
Hawley *v.* James, 16 Wend. (N. Y.) 61 .....201, 559
Hayes *v.* Insurance Co., 170 Mass. 492 311
Haynes *v.* Sherman, 117 N. Y. 433 .....200, 201
Hebert *v.* Dewey, 191 Mass. 403 384
Hibbard *v.* Baker, 141 Mich. 124 580
Hibbler *v.* Railway, 172 Mich. 368 112
Hilton Lumber Co. *v.* Railroad Co., 136 N. C. 479, 141 N. C. 171 495
Hoar *v.* Merritt, 62 Mich. 386 512
Hoffman *v.* Buschman, 95 Mich. 538 618
Hoffman's Estate, *In re*, 151 Mich. 595 580
Holcomb *v.* Alpena Power Co., 175 Mich. 500 166
Holland *v.* Rea, 48 Mich. 218 708
Home Ins. Co. *v.* Mendenhall, 164 Ill. 458 311
Home *v.* Van Schaick, 7 Paige (N. Y.), 231 201
Hoose *v.* Insurance Co., 84 Mich. 309 307
Hopkins *v.* Crossley, 132 Mich. 612 560
Howard *v.* Bellows, 148 Mich. 410 169
——— *v.* Daly, 61 N. Y. 362 466
Hubbard *v.* Railroad Co., 162 Mass. 132 645
Humphreys *v.* McKissock, 140 U. S. 304 772

Imperial Fire Ins. Co. *v.* Coos County, 151 U. S. 452 220
In re Arkansas Railroad Rates, 168 Fed. 720 493
——— Chesapeake & Curtis Bay Railroad Co., Public Utilities Reports 1915F, p. 346 291
——— Foerster's Estate, 193 Mich. 440 180
——— Ganun's Estate, 174 Mich. 286 580
——— Hoffman's Estate, 151 Mich. 595 580
——— McIntyre's Estate, 193 Mich. 257 580
——— Mansbach's Estate, 150 Mich. 348 206
——— Naylor Manfg. Co., 135 Fed. 206 .....397, 401
——— Rehfeld's Estate, 198 Mich. 249 .....579, 785
——— Reynolds' Estate, 163 N. Y. Supp. 803 252
——— Shepard's Estate, 161 Mich. 441 580
——— Thayer's Estate, 188 Mich. 269 206
——— Transportation of Wool, Hides and Pelts, 23 I. C. C. R. 151 494
——— Williams' Estate, 185 Mich. 97 580
In the Matter of the Investigation into the Substitution of Tonnage at Transit Points, 26 I. C. C. R. 204 495
——— Transportation of Salt from Hutchinson, Kansas, 10 I. C. C. R. 1 291
Insurance Co. *v.* Norton, 96 U. S. 234 220
International Harvester Co. *v.* Eaton Circuit Judge, 163 Mich. 55 341
Iron Mountain R. Co. *v.* City of Memphis, 96 Fed. 123 246
Irving *v.* De Kay, 9 Paige (N. Y.), 529 201
Ives *v.* Welden, 114 Iowa, 476 228

PAGE
Jackson Bridge & Iron Co. *v.* Insurance Co., 122 Mich. 433.. 105
Jacox *v.* Clark, Walk. Ch. 249..... 169
James *v.* Allen County, 44 Ohio St. 226..... 466
——— *v.* Irvine, 141 Mich. 376..... 732
Jaskolski *v.* Morawski, 178 Mich. 325..... 268
Jencks *v.* Alexander, 11 Paige (N. Y.), 619..... 691
Jennings *v.* Sheldon, 44 Mich. 92..... 628
Jennison *v.* Haire, 29 Mich. 219..... 572
Jensen *v.* Gamble, 191 Mich. 233..... 742
John Schweyer & Co. *v.* Mellon, 196 Mich. 590..... 673
Johnson *v.* Surety Co., 194 Mich. 292..... 180
——— *v.* Waters, 111 U. S. 640..... 572
Jones *v.* Hoge, 47 Wash. 663..... 173
——— *v.* Village of Portland, 88 Mich. 613..... 755
Judd *v.* Judd, 192 Mich. 198..... 116
Judy *v.* Sterrett, 153 Ill. 94..... 269
Just *v.* Township of Wise, 42 Mich. 573..... 745

Kalamazoo Trust Co. *v.* Merrill, 159 Mich. 649..... 401
Keedy *v.* Long, 71 Md. 385..... 466
Kempsey *v.* McGinniss, 21 Mich. 123..... 580
Kennedy *v.* Lumber Co., 102 Wis. 284..... 466
Kercheval *v.* Wood, 3 Mich. 509..... 365
Kimball *v.* Myers, 21 Mich. 276..... 617
King *v.* Railway Co., 176 Mich. 645.....112, 636
——— *v.* Ringling, 145 Mo. App. 285..... 88
Kirby-Sorge-Felske Co. *v.* Doty, 190 Mich. 553..... 284
Klock *v.* Cronkhite, 1 Hill (N. Y.), 109..... 691
Knickerbocker Trust Co. *v.* City of Kalamazoo, 182 Fed. 871. 246
Kotcher *v.* Perrin, 149 Mich. 690..... 36
Kruis *v.* Railway Co., 190 Mich. 105..... 434
Kuennan *v.* Guaranty Co., 159 Mich. 122..... 399

Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404..... 399
LaFrance *v.* Cullen, 196 Mich. 726..... 313
Lagden *v.* Insurance Co., 188 Mich. 689..... 221
Lake *v.* Loan Ass'n, 72 Ala. 207..... 354
Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274..... 646
Lamb Knit Goods Co. *v.* Lamb Glove & Mitten Co., 120 Mich. 159 720
Lamson *v.* City of Marshall, 133 Mich. 250..... 384
Lathrop *v.* Elsner, 93 Mich. 599..... 689
Laurel Cotton Mills *v.* Railroad Co., 84 Miss. 349..... 494
Leathers *v.* Canfield, 117 Mich. 277..... 284
Ledyard's Appeal, 51 Mich. 623..... 561
Lee *v.* Enos, 97 Mich. 276..... 366
——— *v.* Lake, 14 Mich. 12..... 341
Lewis *v.* Amorous, 3 Ga. App. 50..... 173
Lincoln *v.* Railway Co., 179 Mich. 206..... 229
Linsteadt *v.* Lumber Co., 190 Mich. 451..... 444
Logan *v.* Agricultural Society, 156 Mich. 537..... 88
Loomis *v.* Loomis, 178 Mich. 221..... 72
——— *v.* Mack, 183 Mich. 674.....555, 562
Lounsbury *v.* Burial Ass'n, 170 Mich. 645..... 560
Love *v.* North American Co., 229 Fed. 103..... 491

PAGE
McArthur *v.* Sears, 21 Wend. (N. Y.) 190..... 91
McCain *v.* Smith, 172 Mich. 1.....291, 294
McDonald *v.* Township of Springwells, 152 Mich. 28..... 255
McElroy *v.* Savings Bank, 8 App. Div. 46..... 252
McGinnis *v.* Kempsey, 27 Mich. 373.....206, 745
McIntyre *v.* Orner, 166 Ind. 57..... 173
McIntyre's Estate, *In re*, 193 Mich. 257..... 580
McKee *v.* City of Grand Rapids, 137 Mich. 200..... 169
McNair *v.* Parr, 177 Mich. 334..... 284
Macomb *v.* Wilkinson, 83 Mich. 486..... 617
Malmsten *v.* Railroad Co., 49 Mich. 94..... 333
Manor *v.* Railway Co., 118 Mich. 1..... 112
Mansbach's Estate, *In re*, 150 Mich. 348..... 206
Mansfield Coal & Coke Co. *v.* McEnery, 91 Pa. 185..... 513
Marine Savings Bank *v.* Norton, 160 Mich. 614..... 400
Marsac *v.* DeFord, 184 Mich. 389..... 9
Matter of Meehan, 59 App. Div. 156..... 252
Maynard *v.* Hoskins, 9 Mich. 485..... 366
——— *v.* Vinton, 59 Mich. 154..... 750
Mayo *v.* Wright, 63 Mich. 32..... 755
Merrett *v.* Insurance Co., 42 Iowa, 11..... 310
Merry *v.* Bostwick, 13 Ill. 398..... 654
Methodist Episcopal Church *v.* Clark, 41 Mich. 730..... 560
Michigan Beef & Provision Co. *v.* Coll, 116 Mich. 261..... 364
Michigan Cent. R. Co. *v.* Wayne Circuit Judge, 156 Mich. 459 490
Michigan Railroad Commission *v.* Railroad Co., 159 Mich. 580 490
——— *v.* Railway Co., 178 Mich. 230..... 490
——— *v.* ———, 182 Mich. 234..... 480
——— *v.* ———, 184 Mich. 242..... 481
——— *v.* ———, 185 Mich. 649.....481, 495
Michigan Savings Bank *v.* Dime Savings Bank, 162 Mich. 297 721
Millard *v.* Truax, 50 Mich. 343..... 691
Miller *v.* Bank of Belleville, 148 Mich. 339..... 589
——— *v.* Cornwell, 71 Mich. 270..... 169
Milroy *v.* Mining Co., 43 Mich. 231.....741, 742
Miner *v.* Ice Co., 93 Mich. 97..... 213
Misch *v.* Lehman, 178 Mich. 225..... 262
Mishawaka Woolen Manfg. Co. *v.* Stanton, 188 Mich. 237.. 353
Molin *v.* Lumber Co., 177 Mich. 524.....230, 231
Moore *v.* Curry, 176 Mich. 456..... 262
——— *v.* Moore, 47 Barb. (N. Y.) 260.....200-202
——— *v.* Township of Kenockee, 75 Mich. 332..... 353
Morgan *v.* Railroad Co., 162 Mich. 573..... 647
Morrison *v.* Carpenter, 179 Mich. 207..... 103
——— *v.* City of Ironwood, 189 Mich. 117..... 432
——— *v.* Lee, 13 N. D. 591..... 228
——— *v.* Power Co., 181 Mich. 624..... 170
Mowrey *v.* Vandling, 9 Mich. 39..... 617
Mullen *v.* City of Owosso, 100 Mich. 103.....332, 333
Murphy *v.* Cady, 145 Mich. 33..... 194
Myers *v.* Building Ass'n, 117 Mich. 389.....353, 354
Mynning *v.* Railroad Co., 67 Mich. 677..... 229

PAGE
National Loan & Investment Co. *v.* City of Detroit, 136 Mich. 451 692
Naumann *v.* Board of Canvassers, 73 Mich. 252..... 139
Naylor Manfg. Co., *In re*, 135 Fed. 206.....397, 401
Negaunee National Bank *v.* LeBeau, 195 Mich. 502....253, 256
Nelson *v.* Breitenwischer, 194 Mich. 30..... 407
——— *v.* Extract Co., 184 Mich. 111..... 106
Newlove *v.* Callaghan, 86 Mich. 297..... 364
New York, etc., Bridge Co. *v.* Smith, 148 N. Y. 540..... 245
Niedzinski *v.* Traction & Electric Co., 160 Mich. 517..... 456
Nield *v.* Burton, 49 Mich. 53..... 629
Northern Michigan Building & Loan Ass'n *v.* Fors, 190 Mich. 69 688
Northwestern Cooperage & Lumber Co. *v.* Scott, 123 Mich. 357 771

Olmstead *v.* Bach & Son, 22 L. R. A. 74 (78 Md. 132)..... 466
O'Neil *v.* Iron Co., 63 Mich. 690..... 510
Owen *v.* Moreland, 132 Mich. 477..... 469

Pacific Gas & Electric Co. *v.* San Francisco, 211 Fed. 202.... 493
Paducah, etc., Power Co. *v.* Parkman, 52 L. R. A. (N. S.) 537 434
Papinaw *v.* Railway Co., 189 Mich. 441..... 444
Paul *v.* Clements, 176 Mich. 251..... 424
Payne *v.* Paddock, Walk. Ch. 487..... 169
Penberthy Injector Co. *v.* Lee, 120 Mich. 174..... 721
Pennock *v.* Mitchell, 17 Ont. L. Rep. 286..... 413
Penny *v.* Croul, 76 Mich. 471..... 561
People *v.* Bemis, 51 Mich. 422..... 536
——— *v.* Brott, 163 Mich. 150..... 538
——— *v.* Droste, 160 Mich. 66..... 539
——— *v.* Elliott, 74 Mich. 264..... 319
——— *v.* Gage, 188 Mich. 635..... 87
——— *v.* Goodwin, 22 Mich. 496..... 137
——— *v.* Harshaw, 60 Mich. 200..... 139
——— *v.* Horton, 4 Mich. 67..... 779
——— *v.* Salsbury, 134 Mich. 537..... 48
——— *v.* Schweitzer, 23 Mich. 301..... 538
——— *v.* Simonson, 126 N. Y. 299.....200, 201
——— *v.* Swartz, 118 Mich. 292..... 542
People's State Bank *v.* Miller's Estate, 198 Mich. 783..... 579
People's St. R. Co. *v.* Spencer, 156 Pa. 85..... 311
Peterson *v.* Standard Oil Co., 55 Or. 511..... 228
Phelps *v.* Abbott, 116 Mich. 624..... 742
Plumb *v.* Hecla Co., 157 Mich. 562..... 382
Popa *v.* Insurance Co., 192 Mich. 237..... 274
Pound *v.* Board of Canvassers, 120 Mich. 181..... 138
Powell *v.* Pennock, 181 Mich. 538..... 574
Powers *v.* Railroad Co., 143 Mich. 379..... 230
Prentis *v.* Bates, 93 Mich. 245..... 206
Price *v.* Insurance Co., 92 Minn. 238..... 228
Prince *v.* Railway, 192 Mich. 194..... 636
Provost *v.* Brueck, 110 Mich. 136..... 195
Pruner *v.* Railway, 173 Mich. 146..... 333

PAGE
Pullman's Palace Car Co. *v.* Railway Co., 115 U. S. 587.... 772
Purdon *v.* Seligman, 78 Mich. 132.....668, 669
Putnam *v.* Railway, 164 Mich. 342.....331, 636

Quinlan *v.* Insurance Co., 133 N. Y. 356..... 275

Randall *v.* Dudley, 111 Mich. 437..... 771
Rast *v.* Van Deman & Lewis Co., 240 U. S. 342..... 320
Rayner *v.* Furniture Co., 180 Mich. 168..... 444
Reagan *v.* Murray, 176 Mich. 231..... 580
Reason *v.* Peters, 148 Mich. 532..... 169
Reck *v.* Whittlesberger, 181 Mich. 463..... 444
Reed *v.* Brown, 184 Mich. 515..... 72
Rehfeld's Estate, *In re*, 198 Mich. 249.....579, 785
Reid, Murdoch & Co. *v.* Ferris, 112 Mich. 693.....741, 742
Reynolds' Estate, *In re*, 163 N. Y. Supp. 803..... 252
Rice *v.* Barrett, 102 N. Y. 161.....200, 201
——— *v.* Benedict, 19 Mich. 132..... 125
——— *v.* Railway, 122 Mich. 677..... 248
——— *v.* Rice, 50 Mich. 448..... 580
Richardson *v.* Insurance Co., 27 Grat. (Va.) 749..... 125
——— *v.* Richardson, 100 Mich. 364..... 572
Richmond *v.* Railway Co., 87 Mich. 380..... 646
Riggs *v.* Insurance Co., 125 N. Y. 7..... 310
——— *v.* Standard Oil Co., 130 Fed. 199..... 128
Rivard *v.* Rivard, 109 Mich. 98..... 206
Robinson *v.* Motor Car Co., 170 Mich. 163..... 572
——— *v.* Railroad Co., 222 U. S. 506..... 492
Rohrbach *v.* Insurance Co., 62 N. Y. 47..... 309
Rose *v.* Rose, 4 Abb. Dec. (N. Y.) 108..... 201
Ross *v.* Butler, 19 N. J. Eq. 294..... 302
——— *v.* Mead, 5 Gil. (Ill.) 171..... 652
Ross Township *v.* Railways Co., 165 Mich. 28..... 248
Rothschild *v.* Dickinson, 169 Mich. 200..... 782
Rough *v.* Breitung, 117 Mich. 48.....399, 771
Rouse *v.* Blair, 185 Mich. 632..... 177
——— *v.* Railway, 128 Mich. 149..... 112
Rouston *v.* Railway, 151 Mich. 237..... 457
Ruch *v.* Ruch, 159 Mich. 231..... 617
Rutter *v.* Collins, 96 Mich. 510..... 64
Ryan *v.* Towar, 128 Mich. 463..... 103

St. John *v.* Antrim Iron Co., 122 Mich. 68..... 624
St. Louis Hoop & Stave Co. *v.* Danforth, 160 Mich. 226..364, 365
Sanborn *v.* Sanborn, 104 Mich. 180..... 353
Sanford *v.* Railway Co., 190 Mich. 390..... 645
Sault Ste. Marie *v.* Railway Co., 192 Mich. 65..... 179
Saxon *v.* Wood, 4 Ind. App. 242..... 269
Schadt *v.* Brill, 173 Mich. 647.....262, 734
Schaeffer *v.* Insurance Co., 113 Iowa, 652..... 310
Schneider *v.* Vosburgh, 143 Mich. 476..... 580
School Directors *v.* People, 79 Ill. 511..... 48
Schroeder *v.* Young, 161 U. S. 334..... 654
Schroetke *v.* Jackson-Church Co., 193 Mich. 616..... 446

PAGE
Schweyer (John) & Co. *v.* Mellon, 196 Mich. 590..... 673
Scott *v.* Athletic Ass'n, 152 Mich. 684..... 88
——— *v.* Railroad Co., 182 Mich. 514..... 89
Scovel *v.* City of Detroit, 159 Mich. 95..... 617
Seeba *v.* Railway Co., 189 Mich. 308..... 331
Seith *v.* Electric Co., 24 L. R. A. (N. S.) 978..... 434
Sewell *v.* Railway, 158 Mich. 407.....456, 457
Shafer *v.* Parke, Davis & Co., 192 Mich. 577..... 128
Sheffield Car Co. *v.* Hydraulic Co., 171 Mich. 423..... 589
Shepard's Estate, *In re*, 161 Mich. 441..... 580
Shepherd *v.* Judge of Recorder's Court, 175 Mich. 193.... 255
Sherrard *v.* Murphy, 193 Mich. 352..... 262
Shippy *v.* Village of Au Sable, 85 Mich. 280..... 332
Showen *v.* Owens Co., 158 Mich. 321..... 399
Siefert *v.* Siefert, 123 Mich. 664..... 604
Simmons *v.* Board of Sup'rs of Alcona Co., 144 Mich. 591.. 210
——— *v.* Simmons, 8 Mich. 318..... 64
Smalley *v.* Gearing, 121 Mich, 190..... 34
——— *v.* Railway Co., 131 Mich. 560..... 195
Smith *v.* Dresselhouse, 152 Mich. 451..... 689
——— *v.* Maxey, 186 Mich. 151..... 617
——— *v.* Michigan State Bank, 102 Mich. 5..... 654
——— *v.* Nixon, 145 Mich. 597..... 125
Sneed *v.* People, 38 Mich. 248..... 536
Sondheimer Co. *v.* Railroad Co., 20 I. C. C. R. 606..... 495
Soule *v.* Henry, 197 Mich. 473..... 207
South Branch Ranch Co. *v.* Emery, 191 Mich. 188..... 341
Southwestern, etc., Telephone Co. *v.* Robinson, 50 Fed. 810.. 434
Sparks *v.* Accident Ass'n, 100 Iowa, 458..... 399
Spellings *v.* Parks, 104 Tenn. 351.....268, 269
Spencer *v.* Stearns, 28 Mich. 463..... 210
Spooner *v.* Detroit Saturday Night Co., 187 Mich. 125.... 444
Spring Valley Water Co. *v.* San Francisco, 165 Fed. 667.... 493
Sramek *v.* Sklenar, 73 Kan. 450..... 269
Stahelin *v.* Sowle, 87 Mich. 124..... 418
State *v.* Holmes, 115 Mich. 456.....201, 560
——— *v.* Howard, 264 Mo. 386..... 269
———, *ex rel.* Barker, *v.* Railroad Co., 265 Mo. 646..... 493
State Bank of Croswell *v.* Johnson, 151 Mich. 538.....578, 579
Stebbins *v.* Patterson, 108 Mich. 537..... 668
Steinfeld *v.* Levy, 16 Abb. Prac. (N. S.) 26..... 269
Stevens *v.* Hope, 52 Mich. 65..... 563
Stewart *v.* Stark, 181 Mich. 408..... 262
Stickel *v.* Steel, 41 Mich. 350.....740, 742
Stickley *v.* Township of Sodus, 131 Mich. 510..... 341
Stock *v.* City of Hillsdale, 155 Mich. 375..... 169
Stoddard *v.* Loan Ass'n, 138 Mich. 73..... 354
Stoepel *v.* Satterthwaite, 162 Mich. 467..... 560
Stoll *v.* Laubengayer, 174 Mich. 701..... 433
Stone *v.* Ingham Circuit Judge, 105 Mich. 234..... 58
Strohauer *v.* Voltz, 42 Mich. 444..... 617
Strong *v.* Insurance Co., 10 Pick. (Mass.) 40..... 311
Stuart *v.* Holt, 166 Mich. 549..... 382
Summers *v.* Beeler, 48 L. R. A. 54..... 734

PAGE
Taff *v.* Hosmer, 14 Mich. 309 206
Taft *v.* Taft, 59 Mich. 185 72
Tayloe *v.* Gould, 10 Barb. (N. Y.) 398 201
Teachout *v.* Railway Co., 179 Mich. 398 229
Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426 .. 492
Thatcher *v.* St. Andrews Church, 37 Mich. 264 73
Thayer's Estate, *In re*, 188 Mich. 269 206
Thomas *v.* Railway Co., 86 Mich. 504 646
Thompson *v.* Fairbanks, 196 U. S. 516 400
Thorogood *v.* Bryan, 8 C. B. 115 332
Tobin *v.* Railway Co., 192 Mich. 549 91
Tompkins *v.* Hollister, 60 Mich. 470 .....354, 668, 669
Toms *v.* Williams, 41 Mich. 552 561
Torrent *v.* Hamilton, 95 Mich. 159 572
Torrey *v.* Cement Co., 150 Mich. 86 213
Totten *v.* Totten, 172 Mich. 565 424
Township of Ross *v.* Railways Co., 165 Mich. 28 248
Transit Case, 24 I. C. C. R. 340 494
Transportation of Wool, Hides and Pelts, *In re*, 23 I. C. C. R. 151 494
Trask *v.* Green, 9 Mich. 358 366
Travelers' Indemnity Co. *v.* Railway, 193 Mich. 375 636
Trevidick *v.* Mumford, 31 Mich. 467 617
Trowbridge *v.* Metcalf, 5 App. Div. 318 .....200, 201
Trufant *v.* Nunneley, 106 Mich. 554 200
Truman *v.* Machine Co., 169 Mich. 153 656
Tucker *v.* Tucker, 5 N. Y. 417 201
Turner *v.* Hart, 71 Mich. 128 589
Turpie *v.* Lowe, 158 Ind. 314 654
Tuttle *v.* Campbell, 74 Mich. 652 624

Union Street R. Co. *v.* Saginaw Circuit Judge, 113 Mich. 694 245
Union Trust Co. *v.* Radford, 176 Mich. 50 692
United States *v.* Throckmorton, 98 U. S. 61 572

Van Auken *v.* Railway Co., 96 Mich. 307 .....638, 644, 646
Vance *v.* Board of Canvassers, 95 Mich. 462 138
——— *v.* Village of Pewamo, 161 Mich. 528 341
Vanderpool *v.* Richardson, 52 Mich. 336 64
Van Gorder *v.* Motorcar Co., 195 Mich. 588 446
Van Husan *v.* Heames, 91 Mich. 519 469
Vannoy *v.* Martin, 41 N. C. 169 654
Velten *v.* Carmack, 23 Or. 282 617
Vereycken *v.* Vanden Brooks, 102 Mich. 119 355
Vernor *v.* Secretary of State, 179 Mich. 157 255
Village of Fairview *v.* City of Detroit, 150 Mich. 1 255

Wainer *v.* Insurance Co., 153 Mass. 335 311
Walter *v.* Soule, 138 Mass. 570 668
Walz *v.* Walz, 101 Mich. 167 689
Warren *v.* Holbrook, 95 Mich. 185 427
——— *v.* Insurance Co., 31 Iowa, 464 .....220, 311
Wasey *v.* Whitcomb, 167 Mich. 58 401
Waterman *v.* Seeley, 28 Mich. 77 781
Waters-Pierce Oil Co. *v.* Deselms, 18 Okl. 107 228

PAGE
Watson *v.* Reissig, 24 Ill. 281 654
——— *v.* Stever, 25 Mich. 386 624
Wavle *v.* Railways Co., 170 Mich. 81 331
Weidert *v.* Insurance Co., 19 Or. 261 274
Wellington *v.* Kerosene Oil Co., 104 Mass. 64 232
Welsh *v.* Richards, 41 Mich. 593 367
Westcott *v.* Middleton, 43 N. J. Eq. 478 301
Westphal *v.* Railway Co., 134 Mich. 239 112
Wheeler *v.* Board of Canvassers, 94 Mich. 448 139
——— *v.* Hatheway, 58 Mich. 77 354
Wheelock *v.* Tract Society, 109 Mich. 141 560
White *v.* Forbes, Walk. Ch. 112 589
Wilbur *v.* Flood, 16 Mich. 40 424
Wildey *v.* School District, 25 Mich. 419 384
Williams *v.* Insurance Co., 107 Mass. 377 310
Williams' Estate, *In re*, 185 Mich. 97 580
Wing *v.* Warner, 2 Doug. 288 210
Wingert *v.* Railway, 177 Mich. 199 112
Winnett *v.* Railway, 171 Mich. 629 119
Wipfler *v.* Detroit Pattern Works, 140 Mich. 677 782
——— *v.* Wipfler, 153 Mich. 18 116
Wolfe *v.* Stacke, 153 Mich. 445 106
Wolverton *v.* Village of Saranac, 171 Mich. 419 424
Wood *v.* Carpenter, 101 U. S. 135 ..... 668, 671
Wood Mowing & Reaping Mach. Co. *v.* Gaertner, 55 Mich. 453 617
Woodman *v.* Pitman, 79 Me. 456 413
Woods *v.* Ayres, 39 Mich. 345 291
——— *v.* Palmer, 151 Mich. 30 284

Yates *v.* Yates, 9 Barb. (N. Y.) 324 201
York Manfg. Co. *v.* Cassell, 201 U. S. 352 400
Youmans *v.* Loxley, 56 Mich. 197 652

Zibble *v.* Zibble, 131 Mich. 655 428
Zoller *v.* Goldberg, 183 Mich. 197 734

LAWS CITED AND CONSTRUED.

UNITED STATES STATUTES.

	PAGE
35 U. S. Stat. chap. 149, §§ 1, 3 (U. S. Comp. Stat. 1916, §§ 8657, 8659)	145
——— ——— § 5 (U. S. Comp. Stat. 1916, § 8661)	143, 145

CONSTITUTION OF MICHIGAN.

	PAGE
Art. xvi, § 2	48

REVISED STATUTES 1846.

	PAGE
Chapter 14, §§ 96, 97, 102	194

COMPILED LAWS 1857.

	PAGE
§§ 2248, 2249	45

COMPILED LAWS 1871.

	PAGE
§§ 3586, 3587	45

HOWELL'S STATUTES (1ST ED.).

	PAGE		PAGE
§§ 1473 *et seq*	336	§§ 5037, 5057	45

COMPILED LAWS 1897.

	PAGE		PAGE
§§ 1332	365	§§ 8796, 8797	200, 559
4650, 4670	45	8805, 8818	200
4823 *et seq*	42	8839	200, 560
7217	351, 355	8847	200
7246	276	10427, 10428	412
8783 *et seq*	559	10710	37

HOWELL'S STATUTES (2D ED.).

	PAGE		PAGE
§§ 5523 *et seq*	201	§§ 11417	364
9888	47	12864	361
9891	40	13769	34
10675	781	13774	32
10677	781	13769	31
11321	363	14392	419

COMPILED LAWS 1915.

	PAGE
§§ 507	365
2486	193
3350 *et seq*	468
3776 *et seq*	136
4268 *et seq*	406
4825	174
5423 *et seq*	127, 391, 498
5445	322
5465	443
5652	45
5669	46, 47
5672	40, 45
5892 *et seq*	42
5893	47
5909 *et seq*	695
6349 *et seq*	400
8038 *et seq*	579
8040	250, 785
8109 *et seq*	474
8119	494
9054 *et seq*	554
9151	274
9351	351, 355
9475	218
9481	218
10007	687
10011	692
10034 *et seq*	337
10054	337
11099 *et seq*	562
11519 *et seq*	559
11532, 11533	200, 559
11541, 11554	200
§§ 11571	781
11573	781
11575	200, 560
11583	200
11821	745
11998	364
12323	660, 665
12330	660, 666
12493	654
12546	207, 209
12587	356
12635	760
12897	363
12911	652
12912	652, 655
12916	656
12921	656
12927	650
12928	652
13688, subd. 5	419
13763	420
14417	372
14565	420
14568 *et seq*	391
14577, 14578	412
14796	37
14799	31, 34
14804	32
14949	687
15192	536
15431	174
15739	535

SESSION LAWS.

	PAGE
1877, Act 122	336
1887, Act 69	336
—— Act 208	138
1889, Act 164	337
1891, Act 179	34
1893, Act 199	34
1897, Act 167	220
—— Act 230	337
1901, Act 84, § 2	274
1903, Act 21	46
—— Act 154	41
—— —— § 2	47
—— Act 171	554
1907, Act 101	400
—— Act 122	555, 560, 561, 563
—— Act 312	471, 474
1909, Act 33	174
—— Act 117	695
—— Act 248	579
—— —— § 3	250, 785
—— Act 300	474
—— —— § 10, subd. *g*	476, 483
—— —— § 19	477
—— —— § 22	475
—— —— § 25	476
—— —— §§ 26, 32, 47	477
—— Act 318	174
1911, Act 91	406
—— Act 128	218, 221
—— Act 139, § 10, subd. *g*	483
—— Act 246	218
1912 (Extra Session), Act 10	127, 391, 498

SESSION LAWS—Continued.

	PAGE
1912 (Extra Session), Act 10, pt. 1, §§ 1, 2, 3, 6	499
—— —— pt. 2, § 15	322
—— —— pt. 3, § 12	443
1913, Act 215	274
—— Act 320	136
1915, Act 89	420
—— Act 196	193
—— Act 217	391
—— Act 251	468
—— Act 280	555, 561, 562
—— Act 302, § 29	174
—— Act 314, chap. 9, § 13	660, 665
1915, Act 314, chap. 9, § 20	660, 666
—— —— chap. 14, § 4	209
—— —— chap. 17, § 5	654
—— —— —— § 58	207
—— —— chap. 18, § 15	356
—— —— —— § 63	760
—— —— chap. 23, § 96	652
—— —— —— § 97	652, 655
—— —— —— §§ 101, 106	656
—— —— —— § 112	650
—— —— —— § 113	652
—— —— chap. 50, § 28	420
—— —— chap. 78, § 17	372

CIRCUIT COURT RULES.

	PAGE
No. 23, § 2	372
No. 43, subd. 3	418

IN MEMORIAM.

ROLLIN H. PERSON.

Upon the convening of court on the 23d of October, 1917, the Honorable EDWARD CAHILL, of Lansing, presented the following resolution, prepared by a committee of the Ingham County Bar Association, and moved the court to place it on the records of the court:

At a meeting of the Ingham county bar held in the circuit court room in the city of Lansing on the 1st day of October, 1917, the committee, theretofore appointed for that purpose, reported the following memorial and resolutions which were, after appropriate addresses by members of the bar and the court, unanimously adopted and ordered spread on the journal of the court:

Again within a year the Ingham county bar has been called upon to mourn the sudden death of one of its most distinguished members: Judge PERSON, in the prime of life and apparently in perfect health, on the second day of June last, went from his office to his home at noon to pass away, three hours later, the victim of some unsuspected malady.

ROLLIN HARLOW PERSON was born on a farm in Iosco township, Livingston county, Michigan, October 15, 1850. His father, CORNELIUS HARLOW PERSON, in addition to being a farmer, was a teacher in the common schools of Livingston county for many years. This was true also of his mother, LUCINDA SPAFFORD, and it was doubtless to the studious atmosphere of his home that their son was largely indebted for that taste for learning which always characterized him.

He never had much training in the schools. He attended the country school of his neighborhood and the high school at Howell. Later he had six months in the law department of the Michigan University. But his real education, for he was a man of broad learning, was achieved through his studious habits out of school. In 1871 he entered the office of his uncle, who was register of deeds, as his assistant, and devoted his spare time to the study of the law in the office of Dennis Shields, the father of his later partner. In 1873 he was admitted to the bar of Livingston county and soon after was married to IDA M. MADDEN, to whose helpful companionship he largely ascribed his subsequent success in life. Shortly after his marriage he started with his new wife to seek his fortune in the then far West. He settled in Nebraska and began the practice of his profession, but the plagues of that frontier soon made him long for his old home, and he returned to Michigan in 1875, resuming the practice of law in Howell. His natural ability and his extraordinary diligence were soon rewarded by such success as it is possible to achieve in a small rural community.

When the 30th judicial circuit was created, in 1891, it contained the counties of Ingham and Livingston, and Mr. PERSON was appointed by Governor WINANS to the vacant judgeship and served by subsequent election until December 31, 1899, when he voluntarily retired to enter upon the practice of his profession in Lansing, to which place he had removed with his family soon after he ascended the bench.

In his new field he was markedly successful from the first. His learning and his ability attracted a large and lucrative practice, and no lawyer in central Michigan stood higher in his profession than Judge PERSON, when, in 1915, he was appointed a Justice of the Supreme Court to fill the vacancy created by

the death of the late Justice MCALVAY. The vicissitudes of party politics soon sent him back to the bar but not before he had established a proud record for ability and industry in the highest court of the State.

Upon retiring from the bench at the close of last year, Judge PERSON took a much needed and a too long delayed vacation, but subsequent events soon indicated that his vacation was not long enough or soon enough to preserve his valuable life.

Resolved, That in the death of Judge PERSON the bar of the State of Michigan and the people of the State at large have suffered a great loss. We recognize in him a leader fallen in the battle of life before his time; a man whose wise counsel and inspiring example will be long remembered, and whose kindly friendship we cannot cease to mourn.

Resolved, That these proceedings and resolutions be presented to the circuit court of Ingham county and to the Supreme Court, with the request that they be entered at large in their journals, and that an engrossed copy of the same be sent to the family of the deceased.

FRANK L. DODGE,
EDWARD CAHILL,
CHARLES F. HAMMOND,
HARRIS E. THOMAS,
RICHARD RAUDABAUGH,
Committee.

Mr. CAHILL also presented the following testimonial adopted by the State Bar Association on June 30, 1917:

ROLLIN H. PERSON, late president of this association, and Justice of the Supreme Court of this State, departed this life at the city of Lansing on June 2, 1917, at the age of 66 years. Judge PERSON had lived a busy and useful life. He prepared for admission to the bar in the office of DENNIS A. SHIELDS, in the

village of Howell, Livingston county. A few years succeeding his admission to the bar were spent in the State of Nebraska, from which State he returned to Howell and engaged in the active practice of his profession until the year 1891, at which time he was appointed circuit judge by Governor WINANS. He remained on the bench until December 31, 1899. He then returned to the practice of his profession, having in the meantime removed to the city of Lansing. He continued his private practice until July, 1915, when he was appointed a member of the Supreme Court to succeed the late Justice MCALVAY. He remained a member of the Supreme Court until January 1, 1917, when he resumed the practice of his profession at Lansing, as a member of the firm of Person, Thomas, Shields & Silsbee. During all the years of his active life he was interested in public questions and public affairs. He always displayed a deep interest in the work of this association, and advocated the highest ideals of the profession. As a circuit judge, he was careful, painstaking and patient. As a member of the court of last resort, he was faithful, able and industrious. His opinions demonstrated his breadth of thought and his learning in the law. As a citizen, his time and efforts were directed to good government and good citizenship. As a lawyer, he was always faithful to the interests of his client, conscientious in his advice and painstaking in the presentation of his cases. We deplore his untimely taking off; we revere his memory; and commend his life and his ideals to the profession.

L. E. KNAPPEN,
A. C. DENISON,
GRANT FELLOWS.

Mr. CAHILL further spoke as follows:

I desire to say that the resolutions I have just read

meet with my hearty approval. Before sitting down, I will add a word of personal recollection.

My acquaintance with Judge PERSON began a good many years ago when we were both young men. He was then beginning his practice in Howell, after his return from the West. My acquaintance made at that time continued, but I did not know him intimately until he moved to Lansing as judge of this circuit. From that time on, I knew him as thoroughly perhaps as any member of that bar, as we were not far from the same age and had similar tastes.

As a circuit judge, he made a good record with the bar and the public. He was diligent. He was clear-headed and anxious to get at the real merits of every controversy that was brought before him; not less so when the responsibility was shared with a jury, than when he bore it alone. His charges to juries were often models for clearness of statement of the issues in the case and of the law applicable. If he was fairly treated by counsel, he reciprocated the courtesy, but it was not well for any one to be disrespectful to the court. I doubt if the records of this court would disclose a case in which the attitude of Judge PERSON toward the parties or counsel was the subject of adverse criticism.

After he left the circuit bench and resumed the practice of his profession, my acquaintance with him was even more intimate, as I was associated with him and conducted cases against him, but whether he was with me or against me I could but admire the careful diligence with which he looked after the interest of his clients. I discovered that he was a man of remarkable industry, too much so, I often told him, for his own good. He spent more hours and more days in his office than a man of his age should spend if he wanted to preserve his health.

The fact, so well known to us all, that during the

past two years three eminent lawyers in Lansing have passed away suddenly and untimely, as we all agree —this fact, I say, ought to be an admonition to us and to the profession generally to beware lest in their zeal for professional success they work too hard and too long.

Your honors know more about Judge PERSON while he was on the bench than any member of the bar can know. We judge by the record he made in the reports, you judging by his every-day life among you, and I have no doubt but that your honors have found, as the members of the bar have found, that he was a lawyer of great ability, and an upright and painstaking judge.

I give way now to Mr. THOMAS who was associated with Judge PERSON in practice during the last year of his life and probably knows more about him than any of us.

Mr. Harris E. Thomas:

I have been asked to say something on this occasion, as one of Judge PERSON'S associates in business. Judge PERSON'S reputation as a lawyer confirmed his standing as the head of the present active members of the bar of Ingham county, and his reputation also extended as well throughout the State, and to no small extent beyond its borders.

It is hardly necessary that I should here say anything of his attainments as a lawyer, but I do desire to speak of his great facilities of analyzing and coordinating the facts and law of a situation. His powers were great in this respect, and while he never came to a conclusion quickly, and never without mature thought and deliberation, yet when he came to a conclusion he had so thoroughly analyzed both the facts and the law, that the work of his office was very much simplified, and in the end hastened; and the

loss, not only of his labors but of his mature and unerring judgment and counsel, is sadly felt.

But I desire here to recur more especially to some of the other of his various qualities and attainments. While the busy hours of his life had always been assiduously applied to his profession, to the exclusion of all other things, he nevertheless found ample time to educate himself in many other lines of thought. He was in every respect a highly self-educated man. This not alone in the sense that he was well informed in many branches and activities of human interest, but his mind was a thoroughly disciplined one; it had the double quality of a good memory and a sound judgment, qualities not often combined. It was disciplined not only to set itself to the task of solving the many intricate and difficult problems which beset the busy practitioner, but always held itself concentrated to the work before it until the end was accomplished. So thorough was this discipline, that hard and constant study was the daily habit of his life—study had become with him a pleasure and not a labor—continuing to the very hour of his untimely death.

So active and strong were his mental faculties, and so fixed had the habit become, that his studies stopped not at the law, and the great stores of information and knowledge acquired by him had been gathered from the fields of politics, economics, literature, art, science and religion, as well as other fields.

His active and restless mind and his broad interest in all public questions kept him constantly a student of, and a participant in, all public matters. This characteristic, together with his active memory and disputative temperament, made him a most interesting and agreeable conversationalist. He delighted in spending his leisure hours in that interesting and instructive conversation which was at once the delight and profit of all who had the opportunity of availing

themselves of the privileges of his company; and all who chose could do so. He was very democratic in his associations. While he enjoyed the association of the greatest, he equally embraced that of the humblest.

His mind was of that peculiar combination so often found in strong men. It was at once conservative and radical. In his personal business affairs, in accumulating and conserving his property affairs, he was peculiarly conservative; far more so than the average of his profession, or than is even usual amongst them; not in the sense of being penurious or parsimonious, for he was not, but on the contrary was liberal, but not extravagant in his habits of living, and was a willing giver in any worthy cause, but in the sense that he trod the beaten paths before him and ventured not as the pioneer in new fields or searched out new roads of business. He took few chances financially, and although the processes of accumulation were slow, he had succeeded, after educating his children, in laying by a competence that should insure himself and family comfort and ease in his declining years.

Opposed to this conservative disposition, his political, social, and religious views were liberal to the point of radicalism. In political, social, and economic questions he was always ready and open to study any new or advanced ideas, and always disposed to discuss and adopt any and all that appealed to his speculative disposition, and never allowed his thoughts to be hampered by tradition or established ideas and customs. Some of the more conservative were disposed to denominate him socialistic in these respects, which he would not refute, were he allowed, himself, to define socialism. In his views of the present war devastating the world, he was most radical, and condemned in unsparing terms the German dynasty that had precipitated the conflict, and he willingly and early gave

his youngest son to the army to defend democracy from the attacks of autocracy.

In religion the same tendencies were evidenced, and while a regular attendant and actively identified with the work of one of the more conservative orthodox churches, he was extremely liberal in his religious views and subscribed to few, if any, of the tenets of the more conservative creeds. Yet he had great faith in the uplifting and humanizing power of Christianity itself, as revealed by the great founder of that faith, and he acknowledged the essential services of the churches in its work of spreading and maintaining that faith; notwithstanding their many narrow creeds and controversial dogmas over the nonessentials of religion.

Judge PERSON was a profound believer in immortality and that there is some great cause directing the destinies of man. In one of my last conversations with him, only the day before his death, he discussed freely and with great interest, his views on those subjects. He expressly stated that he had no fear of death, and so far as he was individually concerned, aside from his family considerations, was willing to go. He did not believe in the soul of man going to either annihilation or to eternal punishment. So active was he in studying the concerns of human life that he stopped not at the things of this world, but projected his thoughts into the world to come. His eager mind seemed interested to discover what was beyond that impenetrable veil that screens the things of this world from that mysterious beyond which has excited the imagination and reverence of all ages, and which still invites the speculation of the wisest minds of modern scholarship. He could not believe that all the mental discipline and self-improvement he had imposed upon himself, through years of toil and thought, should go for naught and be obliterated with his passing, but

had great faith that somehow he should profit from it in the future life; otherwise all were vanity, and life and endeavor a useless thing.

Judge PERSON had run the gauntlet of the many vicissitudes which follow the lives of most of his profession. He had labored earnestly and constantly at the bar and on the bench during all the mature years of his life; had made for himself an enviable position in his profession; had provided for himself and family in comfort and ease; had seen his children grow to maturity and become honored and useful members of society, secure in their own vocations; had made business arrangements by which he could continue in his chosen profession at his pleasure, and in a manner to his liking, when he was cut off in the very acme of his success when it would seem he should enjoy, in ease and comfort, the results of a long life of toil; such is the uncertainty and vicissitude of life.

By Judge PERSON'S death the bar of Michigan has lost one of its ablest members, Lansing and Ingham county one of its best and chiefest citizens, his associates a valuable friend, colaborer and counsellor and an agreeable and accomplished companion; and we do miss him, and shall continue to miss him sorely, but we are consoled by his own hope, and belief that he is reaping the just reward of his labors.

Remarks by Louis E. Howlett of Howell:

It was my good fortune in early life to form the intimate acquaintance of this eminent gentleman and jurist, whose achievements have been here recalled and whose splendid qualities have been appropriately eulogized. In the spring of 1888, as a youth of 20 years, I entered the office of Judge PERSON at Howell, as a law student, and, except while attending the University at Ann Arbor, remained with him until his elevation to the bench of the newly-created judicial

circuit comprising Ingham and Livingston counties. That association, in the formative period of my existence, made a great impression upon me and gave me ideals of a lawyer and his duties, that have affected my life in no small degree.

As I reflect upon the career of Judge PERSON, it seems to me it presents an eloquent commentary upon the opportunities afforded by our civilization to young men of ability who are willing to make the necessary effort and sacrifice to achieve success. He was born and raised upon a farm. His parents were obscure and of very moderate means. He attended various institutions of learning, but for lack of financial resources graduated from none, so far as I know. Nature endowed him with a rugged constitution and a determined will. He was an apt pupil in the school of life and pursued his work therein assiduously. He was a great reader of the best literature, and, possessing a retentive memory, stored his mind with a vast accumulation of valuable knowledge. Thus trained and equipped he fought the battles of life unaided. He was a self-made man in the fullest sense of the term. His paramount personal characteristic, as I observed and knew him, was his determination to acquire legal knowledge. His highest and lifelong ambition was to know the law. The matter of compensation for his work or the accumulation of property was always of secondary importance. He took great pride in solving puzzling and intricate legal problems. He briefed a legal proposition involving very little financial interest as carefully and exhaustively as he did one involving larger interests. His power of discrimination was rare. He was slow and cautious in announcing his conclusions but when announced they were usually correct and could be relied upon. He became an able lawyer. He traveled the whole route from a briefless, penniless country lawyer to the ex-

alted position of a member of this honorable court. The climax was reached only by the most persistent and continuous effort.

How fitting were the words reported to have been uttered by him during the last hour of his life and so soon after his retirement from this court: "This is the end."

He possessed splendid personal qualities. His devotion to his aged parents and the ungrudging assistance he rendered them in their declining years was praiseworthy. His ready willingness to assist a young and inexperienced lawyer has been observed and appreciated by many of the present members of our profession. In the community in which he resided he always advocated and supported those efforts and propositions tending toward the betterment and elevation of society. His home life was ideal; his paternal pride unsurpassed. How truly has he exemplified—

"The man who seeks one thing in life and but one,
May hope to achieve it before life be done."

His pathway to success contained obstacles, as is usual and might be expected. These he met and overcame. In his early years the financial question was always up for solution. His forensic powers were only ordinary; while his logic was sound and his reasoning cogent, yet his victories at the bar were won by a careful preparation and a sensible presentation supported by a reputation acquired by an honorable and consistent life. His lifelong alliance with a minority political party in his State hampered his preferment.

He has gone. His sudden and unexpected death was a shock to his friends. His orders, decrees and opinions are a legacy to the jurisprudence of the State, his career an inspiration to the youth and young men of future generations, his honorable and successful life a rich heritage to his widow and children.

By Chief Justice Kuhn:

Because of his long and intimate acquaintance with the late Justice PERSON, it seemed fitting to the members of this Court that the response on their behalf should be made by Mr. Justice OSTRANDER.

Justice Ostrander:

Judge PERSON, some of whose achievements the memorial presented here truthfully, although modestly, characterize, devoted more than 40 years to the practice and the administration of the law in his native State. He began practice in the community in which he was born, and in which he had grown to manhood. Some 18 years later, a governor of the State, living in that community, appointed him to the bench of the circuit court, an appointment ratified by the electors of the circuit. He was eight years a circuit judge, and, leaving the bench, he resumed the practice of law in the judicial circuit in which he had served as judge. Sixteen years later another governor appointed him a justice of this court, a position he filled from July 16, 1915, to December 31, 1916. He had hardly got again into harness when he died. His life was passed, his work was done, his grave is made, within a few miles of his birthplace.

At best, the law is a difficult profession. A lawyer's measure is soon taken by his brethren, and they not only discover, but in the nature of things they are bound to expose, his weaknesses, pretenses and lack of capacity. A circuit judge goes in and out before all of the people of his circuit, close to them, and, in the course of long service, meeting most of them. The labors of the justices of this court are not small, the responsibility of the position is very great. When, therefore, it is said that without the aid of fortuitous things Judge PERSON earned a leading place at the bar, satisfied the people of his judicial circuit as their

judge, demonstrated his fitness to acceptably fill a place upon this bench; when it is added that he made a home, in which he was happy, married a woman to whom he gave credit for much of his success, reared children, and generally fitted into his social environment with service and with hospitality; when it is considered that his usefulness seemed unimpaired until death came—when these things are said, not only is an earned and eloquent tribute paid to him, but the social loss occasioned by his death is made evident.

This court remembers with appreciation the carefully prepared, instructive, briefs and arguments he made in causes pending here. It has, too, the evidences of his learning and of the care he gave to the conduct of trials, preserved in the records of causes tried before him at the circuit. They gave promise of the aid he rendered the members of the court when he came to this bench and of the quality of the opinions he here delivered. In the consultation room, as elsewhere, he demonstrated that the store of knowledge he possessed was gathered for use and that it was at his command.

Outside of the law, he read widely and with discrimination, with an interest unabated, if not constantly growing, in whatever affected society. He seemed always to be growing, to be working well within his capacity and his limitations, to have powers never called into action. He was genial, unaffected, social.

As concerned his profession, and indeed all service which he gave, it may be thought that when a young man he read and was thereafter influenced by this wisdom of Carlyle:

"Remember now and always that life is no idle dream, but a solemn reality, based on eternity and encompassed by eternity. Find out your task, stand to it; the night cometh when no man can work."

Judge PERSON is now, and I think will be, best remembered as practicing lawyer and circuit judge. When those who knew him are gone, there will remain more than 50 opinions which he delivered from this bench, indisputable evidence of his high attainments, profoundly affecting people and interests born after he passed away.

By Chief Justice Kuhn:

In closing these exercises, I desire to add to the fitting tributes paid our late associate a personal expression of the esteem and high regard which I had for him.

It was my privilege to become acquainted with him while I was presiding in the probate court of Macomb county, and there learned to appreciate his intimate and well-grounded knowledge of the great fundamental principles of the law. We soon became good friends, and the year we spent together in the work of this court was indeed a most pleasant association.

His kindly interest in his associates, his earnest desire to be helpful, and his persevering endeavor to reach the proper conclusion in all the intricate problems which confronted him, made him a most agreeable and valuable associate.

He was intensely interested in the court and its work, and often said that he hoped, upon retiring from the bench, to interest himself in getting legislation enacted to relieve the pressure of the work of this court. This was denied him by his untimely demise.

Michigan has indeed lost a very valuable citizen, the profession a great lawyer, and those who learned to know him a good friend.

The memorials which have been offered and the eulogies here pronounced will find a place in our records and be published in our reports.

JUNE TERM, 1917.*

WILLIAMS *v.* WILLIAMS.

1. DEEDS—LEASES—CANCELLATION OF INSTRUMENTS—UNDUE INFLUENCE—BURDEN OF PROOF.

   In a suit by an aged father against his son and daughter-in-law to set aside a deed of property to them subject to a life lease, in consideration of maintenance and support, the burden is on defendants to show that the agreement with the father is not to his disadvantage, is fair to him and of his own free will; that no advantage has been taken by them because of his age, mental condition, or confidence in them and that they have fulfilled the terms of their agreement, in letter and spirit, so far as permitted by him, and are ready and willing to continue so to do.[1]

2. SAME—EVIDENCE—SUFFICIENCY.

   Evidence *held*, sufficient to show that plaintiff had not made out a case and that the contract was yet in force.

3. EQUITY — DEEDS — LEASES — CHANGED CONDITIONS — DUTY OF COURT.

   If, as the result of unkind feeling developed between the parties to a deed by an aged father to his son and daughter-in-law in consideration of care and support on the premises in which the father retains a life lease, the father cannot agreeably and contentedly live with the children in the friendly relations contemplated by their agreement, it is within the power of the chancery court to subsequently require other suitable provisions to be made for him in other congenial surroundings by them or at their expense.

Appeal from Calhoun; North, J. Submitted April

*Continued from Vol. 197.

[1]On the question of undue influence in conveyance or transfer of property in consideration of support of the grantor or third person, see note in 52 L. R. A. (N. S.) 476.

10, 1917. (Docket No. 118.) Decided September 27, 1917.

Bill by Charles H. Williams against Fred N. Williams and another to set aside a deed. From a decree dismissing the bill, plaintiff appeals. Modified and affirmed.

Edward R. Loud (*J. M. Hatch,* of counsel), for plaintiff.

Stewart & Jacobs, for defendants.

STEERE, J. On March 18, 1914, plaintiff conveyed to defendants, who are his son and daughter-in-law, a house and lot on Walnut street, in the city of Albion. The consideration was stated to be $1, with the following provision:

"This deed being made subject to a life lease made and executed by the said parties of the second part to the said party of the first part, for and during his natural lifetime, conditioned for first party's maintenance and support in sickness and in health so long as he shall live."

Contemporaneous with this deed defendants gave to plaintiff a life lease of the property containing a lengthy agreement to support and care for him during the remainder of his life, stating in part that the deed of the property from him to them of that date was given in consideration of such support and maintenance, which meant—

"his comfortable board, washing, lodging, and kindly treatment at all times, and care, nursing, and medical treatment in times of his sickness and distress as his care shall reasonably appear to demand; * * * the intent being that the parties to these presents shall use and occupy the premises above described for their home as one family in that peace, harmony, and reciprocal courtesy towards one another that should always exist in families of respectability."

The life lease further provided that, if defendants failed to keep their agreement in the particulars before stated, they should at once vacate and reconvey the premises to plaintiff, but by their—

"keeping and fulfilling the terms, covenants, promises, and agreements hereinabove set forth and expressed this lease and warranty deed of said above-described land and premises to first parties shall remain and be in full force and virtue."

About a year after the deed was given plaintiff began this suit to set it aside and obtain a reconveyance, charging, in substance, that the deed was obtained from him by fraud and undue influence, that defendants had failed to live up to their agreement in various specified particulars, that he was dissatisfied, and it was understood between the parties that if they disagreed or he became dissatisfied at any time the property would be reconveyed to him.

Defendants by their answer made total denial of any solicitation, fraud, or influence on their part, undue or otherwise, to induce plaintiff to give the deed, deny there was any misunderstanding or misrepresentation as to the contents of the instruments then executed, allege that they were drawn under plaintiff's direction, on his initiative, by his attorney, and accepted by them on his solicitation; that they were at the time living in their own home, where plaintiff lived with and was cared for by them, but in response to his request and proposal they accepted the deed and assumed the obligations, removing with him to his former home, to which he was then anxious to return, and there kindly supported and cared for him in the manner specified in their agreement, where he remained with them apparently satisfied and contented until persuaded to leave his old home and them and induced to bring this suit by the jealous machinations of other relatives, who were seeking personal benefit;

and that defendants are ready and willing, as they always have been and have offered since he left, to receive and care for him according to their agreement at any and all times he will return and make his home with them.

Plaintiff is an old man about 77 years of age, somewhat hard of hearing, a veteran of the Civil War, and a retired farmer. Some years before this deed was given he bought this house and lot on Walnut street for $1,200, and had lived there with his old wife since leaving the farm. When this case was heard the varying testimony indicated a then value of the property from $2,000 to $2,500. When plaintiff deeded it to defendants, his wife had recently died. Prior to her death the old couple had been living in this home together for some time alone, their five living children being mature adults and away for themselves. Defendant Fred N., who was their youngest child, was then a married man about 30 years of age, and had acquired a home of his own in Albion where he was living with his family. After his wife's death, which left plaintiff alone with no one to stay with and care for him in his former home, he went to live with defendants, but was anxious to get back to the old home, where his wife died, and importuned defendants to leave their home and move to his, where he could yet live with them. He admits that he desired and proposed this, but claims that Fred refused to go unless the property was deeded to him. This they deny, and claim both were his proposals; that he was welcome and well cared for in their home, and they only consented to comply with his solicitations after he had the papers drawn up without their knowledge, and requested them to join him in executing them.

That the presumptions are against transactions of this nature and they are critically scrutinized by the courts, putting the burden of proof upon those seek-

ing to sustain them, requires no citation of authority. In view of plaintiff's age, their kinship, and the confidential relations shown to exist between them at the time, it was incumbent upon defendants to show that the agreement with their father was not to his disadvantage, was fair to him and of his own free will, that no advantage was taken by them of his age, mental condition, or confidence in them, that they have fulfilled the terms of their agreement, in letter and spirit, so far as permitted by him, and are ready and willing to continue so to do.

The testimony was heard in open court. After hearing and seeing the parties and their witnesses, the court dismissed plaintiff's bill, saying in part:

"But none the less the proof in this case satisfies me that the arrangement between the parties to this suit was entered into at the solicitation of the plaintiff and consummated by an attorney who took special pains to safeguard the rights of the plaintiff. The plaintiff is well advanced in years and is enfeebled to some extent both physically and mentally; but no other conclusion can be arrived at from the proof in this case but that the transaction into which he entered was carefully explained to him; that he entered into it knowingly and deliberately, and without any undue influence. And further than this the decided preponderance of the evidence fully satisfies me that the defendants in this case have performed the conditions in consequence of which the conveyance was given and still stand ready to."

Of the attorney's participation in the transaction, to which the court refers, it was shown that some days before these papers were drawn and executed plaintiff went, without defendants' knowledge, to the office of Levi S. Warren, of Albion, a reputable attorney of long experience whom he had known for many years, and who had been his legal adviser, telling him what he proposed to do with the property and requesting that a deed be prepared from him to his son, who was

the only child he could depend upon. The attorney discussed it with him, suggested that such a course often proved unsatisfactory, advising him to wait and think it over, and when he reached a decision he might come again and let him know. Warren testified that, having thus put him off, he took it upon himself to see two of plaintiff's old neighbors and make inquiry as to the character of Fred and his wife before anything further was done; that plaintiff came to his office again on March 18th, and said he had decided to have the papers made out; that witness then made out the deed and life lease, the latter being upon his own initiative, and read them over to plaintiff, who expressed himself as satisfied; that, while plaintiff was hard of hearing, witness had done quite a bit of business for him, and could make him hear, which he took pains to do; that witness had no previous talks with Fred about this matter, and when the parties came to his office to execute the papers he read them over, but there was little conversation at that time; that he did not represent defendants, and had never done any business for them.

When the execution of these papers became known to plaintiff's other children, a daughter, Mrs. Kimmel, began proceedings in the probate court for appointment of a guardian over her father, because of his mental incompetency, for the purpose of having this deed set aside. The matter was tried out upon its merits in probate court, and plaintiff's competency was vindicated, and the petition ordered dismissed. His testimony at that time as to how he liked it and was treated at defendants' home does not agree with that given by him in this case. Mrs. Kimmel appealed from the order of dismissal, but later harmonized the strained relations with plaintiff resulting from the resented attack on his mentality, and her appeal was dismissed. Her subsequent ardent manifestations of

affection for her father led him to "wonder what was in the wind," and it is urged with some supporting circumstances that this litigation is the answer.

Plaintiff resided with defendants, as they claim and others with some knowledge testify, well cared for, kindly treated, and apparently contented until about October 14, 1914, when he left, without any notice to, disagreement with, or demand upon defendants, going to the home of a daughter, Mrs. Callaghan, where he remained up to the time of the trial of this case. About two weeks after he left he called upon defendants, accompanied by Mrs. Callaghan, and notified them, with his daughter's assistance, that he had come over to settle and wanted them to get out of there. Defendants and a witness named Sears, who came in at Fred's request, testify that the latter replied there was nothing to settle, but his old home was open to plaintiff, and he was welcome to return and live with them at any time. Plaintiff and his daughter deny this invitation.

The only witness to any breach of the contract, or discourteous treatment, is plaintiff himself. He stated that he left because he was dissatisfied and thought it best and thought he had reason for doing so; that he did not talk with them about it; that Fred never spoke disrespectfully to him, but the wife did at times; that he did not know as he had any fault to find with her manner towards him, but she was crabbed at times, mostly about the baby which he was fond of, and she found fault with his manner of handling it. To this he added her objection to his smoking in the house and locking the place when she left the premises, which were the only definite matters of which he made complaint. Defendants deny any unkind treatment in these particulars, or occasion for affront on his part, testify that he smoked in the house as he pleased without any objection by either of them,

and that Fred sometimes furnished cigars and smoked with him; that when the rest were away and the wife left the house she would lock the door and put the key under a mat where the others could get it if they returned during her absence, of which he was fully advised (but which he denies), and that the matter of handling the baby when he played with it was only an ordinary caution, and request by the mother that he be careful about putting his hand on its head. A witness named Jennie Mulvaney, who lived in the family five weeks, during a period before and after the baby was born, testified that plaintiff smoked around the house when and where he pleased, and Mrs. Williams made no objection; that he was a quiet man and made no trouble; that defendants were very agreeable to him; they got along nicely and everything seemed pleasant.

While plaintiff generalized beyond the three matters mentioned, to the effect that it was not pleasant for him there, and he was dissatisfied, intimating that he got a "hunch," that "they didn't seem to appreciate my company," etc., after a careful examination of this record we discover no tangible facts which justify disturbing the conclusions reached by the trial court, finding plaintiff had not made out a case entitling him to cancellation of his deed, and that the contract between the parties is yet in force and binding. By it the obligation yet remains upon defendants to provide for and maintain plaintiff according to its letter and spirit.

If, as the result of unkind feeling developed between the parties in this controversy, the situation is such that plaintiff cannot agreeably and contentedly live with defendants in the friendly relations contemplated in their agreement, it is within the power of the chancery court to require other reasonable provisions be made for him in congenial surroundings elsewhere,

by them or at their expense. *Marsac* v. *DeFord,* 184 Mich. 389 (151 N. W. 582). The decree should leave that question open for supplemental proceedings if either party desires to be heard upon it.

With such modification the decree will stand affirmed, with costs to defendants.

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

ANGEL *v.* GRAND RAPIDS & INDIANA RAILWAY CO.

RAILROADS—CROSSING ACCIDENT—EVIDENCE—SUFFICIENCY.

In an action by a pedestrian against a railroad for damages for personal injuries sustained as the result of being struck by one of defendant's trains at a crossing while his foot was caught between a rail and a plank outside the rail, evidence *held,* to warrant a verdict for plaintiff. FELLOWS and BROOKE, JJ., dissenting.

Error to Kent; McDonald, J. Submitted April 17, 1917. (Docket No. 61.) Decided September 27, 1917. Rehearing denied December 28, 1917.

Case by Byron Angel against the Grand Rapids & Indiana Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

James H. Campbell (*Elvert M. Davis,* of counsel), for appellant.

Lombard, Hext & Washburn, for appellee.

BROOKE, J. (*dissenting in part*). The plaintiff, a young man 25 years of age, had been employed as a locomotive fireman by the Michigan Central Railroad from the year 1911 until May 14, 1914, when he received the injuries which constitute the basis of his claim against the defendant company. It is his claim that his child died on that day at about 6 o'clock in the afternoon, and was to have been buried two days later, on the 16th of May. He testified that in the evening he secured a burial permit from the Catholic Church, and did not reach his home until after 9 o'clock at night, and that about two hours later he, in company with his brother-in-law, Frank Charkowske, went out to find the sexton in order to make arrangements for the preparation of the child's grave. Arriving at the sexton's house, a considerable distance from plaintiff's home, they found him absent, but claimed to have been told by a passing stranger that the sexton was visiting a friend or relative near the Standard Paper Mills at "the third or fourth house on Patterson street west of the railroad tracks." Plaintiff testified that they knocked upon the door of the indicated house, but that nobody came. After some delay plaintiff testified that they started back home, walking on the north side of Patterson street. This street crosses at right angles the defendant railway tracks. While crossing the main track plaintiff claims to have had his right foot caught between the rail and the planking adjacent thereto and to have been held in that position until a passenger train struck him, causing the injuries for which this action is brought. His testimony upon direct examination with reference to the manner of the happening of the accident is in part as follows:

"*A.* Well, I got part way across—when I got part way across the track, why, between one of the tracks and the rail, why, my foot slipped in there.

"*Q.* Which foot?

"*A.* My right foot. And I could not get it out. When I pulled up on it, it was kind of wedged, and I could not get it out. When I pulled up on it, it was kind of wedged, and I could not get it out, and I went to untie my shoe, and I pulled the string the wrong way, and I tied it in a hard knot, and down so far down in there, in the hole there, that I couldn't pull my foot out, or no way to get it loose; in fact, I didn't have no knife, anyhow, and I don't know whether my brother-in-law had a knife or not; if he did, he didn't seem to get it out to cut anything, and we tried a while, and along came a man by the name of Olin, and he tried to help us to get the foot out. I did not know Olin at the time, and the train was coming and they couldn't get it out, so they just ran up the track a ways and hollered and swung their hats. I saw them do that. I saw them when they went. When they went up the track I was left alone. I was still trying to get out. I have seen the arrangement of the plank and track since that time, so that I could recognize it.

"*Q.* Why couldn't you get your foot out, what was the trouble?

"*A.* Well, one side of the bottom of the rail catched on my sole on one side, and the planking on the other and held it fast in there, and I couldn't get it out, and it was so far in I had no room to wiggle my foot like that, from the top of the rail to the bottom. * * * Taking this photograph, I can point out how I got caught. I was going east on this sidewalk here, and crossed over the plank that appears in between the rails and the point of the toe of my shoe—the hollow of my foot was right across that hole, or the ball, whatever you call it, and the heel was on the plank here, and as I went to step, like that, my toes were just on the edge of the rail, like that, and when the heft of my body was on my foot it slipped down in there, like that, kind of sideways, and I kind of lost my balance a little, and when I went to pull my foot out it was fastened down in there so's I couldn't get it out. I do not know anything about the thickness of the planking. I should think the rail was about seven inches high from the base to the top. The base of the rail, as I always called it, is the bottom of it, the bottom where it rests on the tie. * * *

"*Q.* I want you to tell it yourself just what happened to you when your foot went down in there.

"*A.* Well, when my foot went down in there, why, I gave kind of a quick jerk after I straightened up and tried to wiggle it like that (illustrating), and I couldn't wiggle it out, neither, and then I tried to unstring my shoe, and tied it in a knot, and I couldn't get it out.

"*Q.* Now, what I want to get at, Mr. Angel, if you can tell, you know as to whether the sole of your foot, shoe, went below the rail; I mean the base of the rail, and I mean the rail of the track, did your shoe go below that?

"*A.* It did.

"*Q.* And do you know whether you went below the lower edge of the planking?

"*A.* I did.

"*Q.* Then why couldn't you get your foot out?

"*A.* Because it wedged; the planking on one side of the sole and the rail on the other, couldn't pull it out. When I found my foot was wedged in that way I tried to jerk it out. My brother-in-law, Frank, was with me at the time. Someone else came along while I was in that condition. His name was Olin. I think the weather was good, but on that side of the street it was dark, but on the other side of the street it was quite light. At that time the leaves on some of the trees kept the light from shining down there from where the street light was located. It must have been the leaves that came out in the spring. There was quite a bunch of brush along there, I know.

"*Q.* When you found that your foot was caught, what effort did you make to get it out? You have told us part of that, but I want you to give us in detail now, if you will.

"*A.* Well, I tried to pull it out, and I tied it in a knot, and my brother-in-law, he tried to help get it out, and he couldn't, and they both took hold of my leg and tried to pull it out.

"*Q.* Who do you mean by 'both'?

"*A.* This man Olin came along. They couldn't get it out, and the train was coming, and they said, 'There comes the train; can't get it out; better go and see if we can't stop it'; and they started up the track on a run. I saw them go up the track. I didn't watch

them after they went up the track. They went quite a ways. I was trying to get my foot out all of the time. I don't believe the train stopped.

"*Q.* What happened? Just go on, tell the jury in your own way what happened to you.

"*A.* Well, the train come—

"*Q.* So far as you know.

"*A.* So far as I know, the train come along, and when it got close to me, that is the last I know about it.

"*Q.* Did you see the train coming yourself?

"*A.* I did.

"*Q.* When you saw it coming, what did you do to protect yourself?

"*A.* I tried to do as every switchman does when they try to protect themselves.

"*Q.* Louder; the jury can't hear that.

"*A.* I say I tried to do as the switchmen do to protect themselves; they lean back and try to get their foot up to the footboard and protect themselves. You couldn't protect very much.

"*Q.* You mean by that getting your body off the rail?

"*A.* Yes, sir.

"*Q.* Just tell the jury what happened when the train struck you.

"*A.* It struck me and knocked me across on the other side of the sidewalk, jerked my foot out of there, knocked me across on the other side of the street, pretty near to the other crosswalk.

"*Q.* Did the train stop?

"*A.* I didn't see no train after that. It could not have stopped. I didn't see them stop.

"*Q.* After you were struck what was the next thing that happened, so far as you know? I am speaking now what you can recollect yourself.

"*A.* My brother-in-law came over to me and kind of took hold of my arm and helped me up, and he asked me if I was hurt. I told him no. And then he asked me if I wanted a hack.

"*Q.* Speak up louder.

"*A.* He asked me if I wanted a hack to go home. I told him no. And he says, 'Are you hurt?' I says, 'I guess not.' And I got up, and this man Olin says,

'Do you think you can manage him all right?' My brother-in-law says, 'Yes.'

"*Q.* Speak up loud so we can all hear you.

"*A.* He says, 'Yes; I guess I can.' So he went away. That was the last I seen of him.

"*Q.* That is, this man Olin went away?

"*A.* Yes.

"*Q.* And he left you with your brother-in-law?

"*A.* Yes.

"*Q.* Then you stated at that time that you didn't think you were hurt?

"*A.* No, I didn't feel hurt at all, felt kind of numb; I couldn't even feel my feet when they touched the ground.

"*Q.* What did you do after that?

"*A.* Went home, I guess."

He further testified that he reached home with the aid of his brother-in-law and that a doctor was immediately called to give him attention. Another doctor, Dr. Lang, saw him on the morning after the accident, and ordered his removal to a hospital, where he remained for four days. Dr. Lang testified as follows:

"I found his condition at that time to be a lacerated large toe, and, I think, a fracture of the bone, I have forgotten particularly but the toe.

"*Q.* Do you recall now, do you remember, how many bones were involved in the injury?

"*A.* I think there were at least two; I have forgotten; the second toe, the toe next to the large toe, I believe, was also bruised, split, some injury, and probably the third one as well was injured.

"*Q.* State it in your own way, Doctor, what you found.

"*A.* It has been a long time ago since it has been brought to my mind. It seems to me he had bruises about his head and body, but I could not say definitely any more; I remember one particularly, bruise on the back of his head.

"*Q.* Will you point out where that was, Doctor?

"*A.* I think it was back in the occipital.

"*Q.* On which side was it on, do you recall now?

"*A.* I couldn't say.

"*Q.* Describe that bruise as best you can, as you now recall it, Doctor.

"*A.* There might have been a rupture of the scalp, but I am not sure of that; at any rate I remember of examining the head and cleansing it, recleansing it, rather, the doctor before me had done so, and that there was some swelling in the back of the head."

And on cross-examination:

"*Q.* Excepting the injuries to the toes on the right foot and the lump on the back of the head, did you find any injuries, cuts, bruises, or otherwise on any part of the body or the legs or arms?

"*A.* Not that I can recall now.

"*Q.* State whether or not you treated him for any such injuries.

"*A.* Not that I remember.

"*Q.* To the chest or to the body?

"*A.* No injury that I remember of."

After his release from the hospital plaintiff claims to have become subject to "seizures" of an epileptic character, whether true epilepsy or due to neurosis or hysteria the record fails definitely to disclose. He suffered from such a "seizure" during the progress of the trial in the court below, and was taken to an adjoining room for treatment.

On May 16th, two days after the accident, plaintiff, who held a policy in the Standard Accident Insurance Company of Detroit, furnished that company with the following claim:

"Standard Accident Insurance Company of Detroit, Michigan. Notice of Accident. 1. Name of insured, Byron Angel. Residence, 106 Lincoln Court, Kalamazoo, Mich. Occupation when injured, locomotive fireman. * * * What date were you injured? May 14, eleven p. m. At what place? Kalamazoo. Who saw the accident? Myself. How were you hurt and what are your injuries? Toes crushed and hurt in the chest. What marks appear on external surface of your body? A bruise on my left side.

[Signed] "BYRON ANGEL.

"Dated Kalamazoo, 16th of May, 1914."

Another claim was made on May 25, 1914, in which the following appears:

"The Standard Accident Insurance Company of Detroit, Mich. Notice of Accident. 1. Name of injured? Byron Angel. * * * 12. What date were you injured? May 14th, 2 a. m. At what place? Kalamazoo. 13. Who saw the accident? No one."

A third claim was made on May 26, 1914, the substance of which is as follows:

"1. My name is Byron Angel. 2. My age is twenty-five years. 3. My weight is 150 pounds. My height is 5 feet and 11 inches. My regular occupation, locomotive fireman."

And some other personal matters, and going right down to question 10:

"10. The eyewitnesses to said accident were S. Webster."

Stanley J. Webster, the man mentioned in the last above mentioned claim as having witnessed the accident, was called by the defendant and testified as follows:

"He passed the day and called me out and asked me if I wanted to make $100, and I said 'Yes,' and he said, 'Well I told my lawyers that you saw the accident; I want you to testify that you saw it.' I said, 'I won't do it.' I told him that because I didn't see it. I knew nothing of it. He went away then. I next saw him on Burdick street, Kalamazoo, a week or ten days after his visit to me at my sister's. He stopped me and said, 'I told my lawyers it was you; now, I want you to swear or say that it was you that saw it.' I said, 'I did not see it and I won't say it,' and he went on."

The record contains the evidence of at least ten persons who testified that the plaintiff told them severally that he was alone at the time of the happening of the accident and that he partly walked and partly crawled

home from the place of the accident. Many of these witnesses are clearly disinterested, and received their information from the plaintiff shortly after the happening of the accident, some of them having talked with him on the following morning.

Defendant placed upon the stand five reputable and disinterested physicians who testified as experts that, in their opinion, if the plaintiff had been held with his right foot between the inside of the rail and the planking until struck by an engine weighing 140,000 pounds, drawing a train of four passenger coaches, and running at a speed of 12 or 15 miles per hour, it was physically impossible that he should have received injuries of so slight a character as shown by the objective evidence in this case.

Many photographs of the place of the accident were introduced in evidence and have been returned to this court. The exact condition of the point in question seems to be, as shown by the exhibits, that the easterly plank of the walk, which was 5 feet wide, was distant from the east rail of the main track 3 inches, and that this 3-inch space was 3¼ inches deep.

Defendant introduced expert testimony tending to show that the sidewalk at the point of injury was constructed in the usual manner and in accordance with good railroading practice, and that it was reasonably safe for use by one exercising ordinary care. Defendant likewise called as a witness one Gordon Stewart, a practicing attorney of the city of Kalamazoo, who was retained by the plaintiff on the morning of May 15th, immediately after the accident. Stewart testified that plaintiff related to him the circumstances surrounding the happening of the accident on the morning he was retained, and that thereafter, and on the same day, he proceeded to Patterson street and examined the crossing with particular reference to the

point where the sidewalk crossed the east rail of the main track. He testified:

"Q. Do you recall specially that place there between that rail and the plank?

"A. Yes; I went over it pretty thoroughly.

"Q. I am calling attention to the north crosswalk and to the space there between the rail and the plank next to it, the east rail of the track.

"A. Yes; I recall the condition there.

"Q. State in what condition you found that opening between the rail, and as to whether it was filled up or not. * * *

"A. I found the crossing and the plank next to the rail in the ordinary condition as it was filled up with dirt, and there was no hole of any depth there, other than enough for the flange of the wheel.

"Q. That opening there, the whole length of it, was filled up, and especially between the ties?

"A. Yes, sir.

"Q. And whether or not it was fresh filling?

"A. No; it appeared to have been that way for some time.

"Q. And these spaces were at that time filled up?

"A. Yes, sir.

"Q. So that there was no hole left?

"A. No, sir.

"Q. State whether or not the bottoms of the flangeway—whether the way for the flange inside of the rail within the limits of that plank walk was covered by earth.

"A. It was. * * *

"Q. Was that true, Mr. Stewart, of the whole space from the north end to the south end of the walk?

"A. Yes; I went over it very carefully, and could not find any hole in there or place that looked like where a man's foot might have got in.

"Q. You found no place where a man's foot could get in?

"A. No, sir.

"Q. No place where it could?

"A. No; not at that time.

"Q. And that was the next morning?

"A. Yes, sir.

"*Q.* After the accident?
"*A.* Yes, sir."

Plaintiff's statement of the manner in which he received his injuries received some corroboration from his brother-in-law, Frank Charkowske, and the witness Olin. Both testified that they were with him after he got his foot caught and attempted to release him. They testified further that they had no knife with which to cut the shoe lace, and that they were unable to break it so as to release the foot, and that while engaged in their attempt to release plaintiff they observed the approach of the train; that thereupon they ran a considerable distance up the track waving their hands in an attempt to warn the on-coming train of plaintiff's unfortunate predicament. Neither one of these witnesses claimed to have actually seen the train strike plaintiff, but both testified that after the passage of the train they immediately returned to the point where plaintiff was caught, and found that he had been thrown a distance of about 50 feet, and that he was injured in the manner described.

At the conclusion of all of the evidence defendant preferred a number of requests to charge, several of them in effect amounting to requests for a directed verdict. These requests were denied, and the case went to the jury under instructions:

"(1) That plaintiff could not recover unless the jury found that the accident happened in the manner detailed by him.
"(2) That the defendant was guilty of negligence either: (*a*) In not maintaining the crosswalk in a condition reasonably safe for public travel; or (*b*) in the failure of the engineer or fireman to see and heed the efforts of Charkowske and Olin to stop the train.
"(3) That plaintiff must be found free from any negligence contributing to his injuries."

The jury returned a verdict in favor of the plaintiff for $8,000. Immediately thereafter a motion was

made for a new trial based upon the claim that the jury disregarded the instructions of the court and rendered a verdict against the great weight of the evidence. This motion the court denied, saying in part:

"It is difficult to understand how the accident could happen in the manner claimed by the plaintiff and his witnesses. Yet it is a matter of common experience of men that accidents do happen sometimes in unusual and unexplainable ways and with most singular results. Men have fallen from great heights, or have been hurled with great force for long distances, and escaped with slight injuries. It is quite probable that this common knowledge weighed against the opinion evidence and led the jurors to credit the testimony of the three men who claimed to be eyewitnesses. The credibility of these witnesses was for the jury, and in view of their positive testimony I am not able to say that the verdict was against the great weight of the evidence."

In this court defendant argues in support of three propositions:

"(1) That the court erred in refusing to direct a verdict for the defendant as requested in defendant's first request (first asignment of error).

"(2) That the court erred in submitting the case to the jury and therein in refusing to instruct them as requested by defendant in its fifth request and in the modification of the same as shown in the third and fourth assignments of error (Record, pp. 588, 589), and in the instructions set forth in the seventh assignment of error, thereby leaving the jury to find that plaintiff was struck by the engine drawing the train as he claimed that he was, in disregard of the undisputed and conclusive testimony of the surgeons that it was a physical impossibility that he could have been so injured.

"(3) That the court erred in overruling defendant's motion for a new trial and to set aside the verdict in favor of plaintiff on the ground that it was against the weight of the evidence and in disregard of the evidence."

1. We are of opinion that the court did not err in refusing a directed verdict. The positive testimony of the plaintiff supported in some measure by the testimony of Charkowske and Olin touching the manner of the happening of the accident raised a clear question of fact which could only be determined by a jury.

2. Defendant's fifth request to charge was as follows:

"You must decide this case upon the evidence given before you upon the trial, and not upon whimsical conjecture and speculation. The testimony of Drs. Young, Barth, Spencer, Du Bois, and Campbell that a man on a railroad track with his foot held fast down between the rail and plank could not be struck by the bumper beam, or step, or pilot band of the locomotive engine No. 27, drawing a passenger train of four cars and running at the speed of about 15 miles an hour, without receiving severe and serious visible physical injuries at the place of the impact by the engine against his person which would be apparent for some weeks and from which it would take weeks to recover, if he recovered at all.

"The testimony of these doctors is undisputed; no one has testified to the contrary.

"You must accept and give effect to the testimony of these doctors in deciding the question whether the plaintiff was struck by the engine as he claims that he was."

The first paragraph of this request was given by the court, but in lieu of the second and third paragraphs the court said:

"This testimony, if you find that it correctly states the physical possibilities, should be accepted by you; and if you do so accept it, it would be your duty to disregard the testimony of the plaintiff as to how he received his injury and render a verdict for the defendant, a verdict of no cause of action."

We are of opinion that the instruction as modified was correct.

3. It was and is the claim of defendant that plaintiff did not receive his injuries in the manner detailed by him, but that the entire case is tainted with gross fraud and perjury. In this connection defendant relies upon the case of *Baldwin* v. *Railway Co.*, 128 Mich. 417 (87 N. W. 380). In that case plaintiff claimed to have been injured through being jerked from the lower step of a passenger train while in the act of alighting. This court there said that the manner of the accident as described by the plaintiff was improbable; there having been introduced the evidence of five experienced men to the effect that it would be impossible to start that particular train with such a jerk as to throw the plaintiff in the manner claimed. In that case, as in this, there was no eyewitness who testified that the accident did not happen exactly as claimed by plaintiff. In argument much reliance is placed on the testimony of five physicians who swore to their belief in the physical impossibility of the plaintiff having received such injuries as he sustained in the manner he claimed to have received them. With reference to this testimony it would seem that the opinion of an expert physician would not be of much more value than that of an ordinary layman. Most adults of ordinary intelligence would, as the learned circuit judge said, find it "difficult to understand how the accident could happen in the manner claimed by the plaintiff and his witnesses," and it is presumed that defendant might easily have multiplied his five expert witnesses indefinitely upon this point.

The fact remains that plaintiff in some way received an injury on the night of the 14th of May, 1914, and that defendant is obviously unable to offer a jury any theory alternative to that of the plaintiff. Nevertheless we are of opinion that the judgment should be reversed upon the ground that the verdict is against the great weight of the evidence. We are moved to this course by the following considerations:

(1) The evidence of the plaintiff to the effect that he was held fast in the track and struck by an engine and train running at 12 to 15 miles an hour, the engine alone weighing 70 tons, receiving as a result thereof only the external injuries described, is so contrary to all human experience as to border upon the miraculous.

(2) The asserted inability of the plaintiff and his brother-in-law to break the shoe lace and so release plaintiff's foot.

(3) The fact that within a week after the happening of the accident plaintiff in his claim to the accident insurance company asserted that no one was present when the accident happened but himself.

(4) The fact that the lawyer retained by plaintiff made an examination of the place where plaintiff claimed to have received his injuries and testified that the space between the rail and the planking for the whole distance of the sidewalk was full of dirt.

After careful consideration and a perusal of this entire voluminous record, we conclude that the judgment should be reversed, and a new trial ordered, with costs to appellant.

FELLOWS, J., concurred with BROOKE, J.

OSTRANDER, J. My brother BROOKE concludes that the court was bound to submit the case to a jury, and committed no error in doing so. I agree with him. He concludes that the weight of the evidence demands that a different verdict be returned. With this I do not agree. Answering the argument he makes, it may be said: (1) That the weight of the engine is unimportant, and that, if an automobile weighing two tons had released plaintiff, it would have been no less a miraculous deliverance; but the weight of the engine may have caused such a vibration of the rail as to release the foot, (2) if the shoe lace had been

broken, it does not follow that the foot would have been released, and there is nothing remarkable in the fact that one cannot in an emergency, break, or untie, a shoe lace; (3) there was no one immediately present when plaintiff was hurt, both the others having gone up the track to meet the on-coming train; (4) the examination made of the track by the lawyer is not conclusive.

Really the evidence for plaintiff made out a very good case for him, and is not opposed, overwhelmingly or otherwise, by evidence. To set aside the verdict is to assume knowledge, to question evidence of unusual physical phenomena, and to infer, when two inferences may be drawn, that the one drawn by the jury is wrong.

It is not *probable* that upon the same record a different jury will return a verdict for defendant.

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

STEVENS *v.* GARLAND.

1. MORTGAGES—PRIORITY—MECHANICS' LIENS—STATUTES.

The drawing of plans for a building is not the commencement thereof so as to give liens priority over a mortgage given to the contractor under 3 Comp. Laws, § 10718 (3 Comp. Laws 1915, § 14804), providing that liens "shall be preferred to all other titles, liens or incumbrances which may attach to or upon such building, machinery, structure or improvement, or to or upon the land upon which they are situated, which shall either be given or recorded subsequent to the commencement of said building or build-

ings, erection, structure or improvement," especially where a bond is given by the contractor of even date and like amount as the mortgage.

2. MECHANICS' LIENS—MORTGAGES—PRIORITY—PAYMENTS—PROTECTION OF OWNER—SWORN STATEMENTS.

Lienors are not required by a decree making a mortgage to the contractor in the hands of an assignee a prior lien where the money represented by such mortgage, through the payment of the surety on the contractor's bond guaranteeing the construction of the building according to the plans and specifications, pursuant to an order of court, has been expended by the owner in liquidating the cost of construction of the building, and it is immaterial that the owner failed to secure a sworn statement from the contractor before delivering to him the mortgage, no money being due or to become due to any contractor or materialman at the time said mortgage was delivered.

3. SAME.

Under 3 Comp. Laws, § 10713 (3 Comp. Laws 1915, § 14799), making payment by the owner to the contractor at his own risk where he fails to require a sworn statement of the names of subcontractors, etc., before making payment, the owner is not protected in payments made to the principal contractor, in the absence of a statement on oath by the contractor showing the names of the subcontractors, etc., and such payments are made at the risk of the owner, and do not discharge liens, unless distributed by the contractor among the subcontractors, materialmen, and laborers, or, if distributed in part only, then to the extent of such distribution.

4. SAME.

A sworn statement by a contractor of the names of subcontractors, etc., is a sufficient protection to the owner in making a payment to the contractor under 3 Comp. Laws, § 10713 (3 Comp. Laws 1915, § 14799), where it states that the "amounts due or to become due to such subcontractors, laborers, and persons for work done and materials furnished at the date hereof is correctly and fully set forth opposite their names respectively," such statement being obviously false.

5. SAME—EVIDENCE—SUFFICIENCY—WAIVER.

Evidence *held*, sufficient to show a waiver by the owners

of their right to insist upon the completion of a building contract by the contractor at the fixed date.

6. SAME—ASSIGNMENTS—BONDS.

The owners of a building are not injured by having a mortgage given to the contractor, and assigned by him to another, made a prior lien on the premises, although the contractor defaults, and the building is completed by the owners at increased expense, where the owners were secured for the amount of the mortgage by a bond entered into as a part of the same transaction, and the surety paid the bond.

Appeal from Wayne; Withey, J., presiding. Submitted April 10, 1917. (Docket No. 119.) Decided September 27, 1917. Rehearing denied June 20, 1918.

Bill by Frederic B. Stevens against Richard M. Garland, Sarah A. Garland, and the Webster & McCausey Lumber Company to foreclose a mechanic's lien. Defendant lumber company filed a cross-bill to enforce a lien. Defendants Garland filed a cross-bill making James S. Galvin, mortgagee, and the Maryland Casualty Company, surety on the contractor's bond, parties. From the decree entered, plaintiff, and defendants Garland and Webster & McCausey Lumber Company appeal. Reversed in part.

Wilkinson, Routier & Hinkley (*Clyde I. Webster*, of counsel), for plaintiff and defendant lumber company.

Orla B. Taylor and *Charles F. Delbridge*, for defendants Garland.

Ralph L. Aldrich, for defendant Galvin.

Plaintiff filed a bill for the purpose of foreclosing a mechanic's lien upon a structure owned by the defendants Garland. Defendant and cross-plaintiff Webster & McCausey Lumber Company seek in the proceeding the foreclosure of their lien for lumber furnished in the construction of said building. The defendants

Garland, being the owners of a certain lot, on August 1, 1914, entered into a contract with the Greenwich Company for the erection of a duplex dwelling on said lot to cost $7,400, payable as follows:

First payment, on the execution of this contract a first mortgage upon the above described premises for three years, 6%.....	$4,400 00
Second payment, when the foundations are in	1,000 00
Third payment, when the building is ready for roof	1,000 00
Fourth payment, when the plumbing, steam and electric roughing are in and the building ready for lath and plaster	1,000 00
Total	$7,400 00

To protect the owners in the giving of the $4,400 mortgage, the Greenwich Company, according to the terms of the contract, was required to and did give to the owners a surety company bond in the sum of $4,400 for the purpose of guaranteeing the erection of said building by the Greenwich Company according to the plans and specifications which were made a part of the contract. By the terms of said contract the building was to be completed on the 15th day of November, 1914. On the same day the contract was executed the Greenwich Company caused to be delivered to the defendants Garland the bond of the Maryland Casualty Company in the sum of $4,400 in accordance with the terms of the contract, and on the 4th day of August, three days later, the defendants Garland executed and delivered to the Greenwich Company a mortgage on the premises for a like amount. This mortgage was recorded on the same day. On October 24, 1914, the Greenwich Company for a valuable consideration assigned this mortgage to James S. Galvin. Galvin in purchasing the mortgage knew of the outstanding contract between the defendants Garland and the Greenwich Company, and of the existence of the bond of the Maryland Casualty

Company guaranteeing to the extent of $4,400 the execution of said contract. On September 10th the defendants Garland paid to the Greenwich Company $1,000 without securing from said company the sworn statement required by the statute, and on November 11th they made a third payment to the Greenwich Company in the amount of $1,042, $42 representing certain extras. At that time a sworn statement was secured from the contractors in the following terms:

"Horace E. Hartwell, being duly sworn, deposes and says that he is the president of the Greenwich Company, the original contractor for the erection of the building situated on the following described property, viz.: Known as No. 89 Alexandrine avenue east, Detroit, Michigan. That the following is a statement of the number and names of every subcontractor and laborer in the employ of the Greenwich Company in connection with said building and of every person furnishing materials therefor; that the amounts due or to become due to such subcontractors, laborers, and persons for work done and materials furnished at the date hereof is correctly and fully set forth opposite their names, respectively, in said statement, to wit:

No.	Name.	Labor or Materials.	Amount.
1.	Frank Vettes	Excavations	Nothing due
2.	B. C. Hughes	Mason	"
3.	Webster, McCausey Co.	Materials	"
4.	Builders' & Pavers' Co.	"	"
5.	Amos & Co.	Iron	"
6.	Solomon & Birkowitz	Labor	"
7.	F. W. Stevens Co.	Material	"
8.	The Greenwich Co.	Carpenters	"
9.	"	Masons	"
10.	"	Laborers	"
11.	Detroit Cut Stone Co.	Limestone	"
12.	A. Rohns Co.	Steel	"

"Deponent further says that the Greenwich Company has not employed, or procured material from, or subcontracted with any person or persons other than

those above mentioned, and owes no moneys for labor upon or material for the building of said house other than the sums above set forth."

This last payment was made within four days of the date fixed by the original contract for the completion of the structure, which had then reached a point nowhere near completion. In the early part of December the Greenwich Company, contractors, became financially embarrassed, and abandoned the contract. The defendants Garland then took over the work and finished it, but the building was not finally completed until September 15, 1915. The expense of completion after it was taken over by the defendants Garland amounted to $5,175.50. The lien of plaintiff, Stevens, amounts to $398; that of defendant and cross-plaintiff Webster & McCausey Lumber Company to $831.48. By the cross-bill filed by defendants Garland the Maryland Casualty Company and James S. Galvin were made parties, both of whom filed answers. By the terms of the final decree entered in the court below the Maryland Casualty Company was condemned to pay the defendants Garland the sum of $4,400, with interest thereon in accordance with the terms of the bond given by it guaranteeing the performance of the Greenwich Company's contract. No appeal has been taken from that decree by the Maryland Casualty Company, and the $4,400 and interest has been paid. By the further terms of the decree entered it was adjudged that the defendants Garland were entitled to an allowance of $400 as rental for the failure of the Greenwich Company to complete the contract within the time limited therein. It was further decreed that the plaintiff and cross-plaintiff Webster & McCausey Lumber Company had properly prosecuted their claims of lien in the sums above set forth. The court in the decree stated the account as follows:

Debits.		
Amount of contract	$7,400 00	
Extras	179 00	
Total	$7,579 00	$7,579 00
Credits.		
August 4, 1914, by mortgage	$4,400 00	
September 10, 1914, by check	1,000 00	
November 11, 1914, by check	1,042 00	
Credit by omission of girder	16 00	
Credit by accrued interest on mortgage prior to time of fourth payment	264 00	
Damages for delay in completion	400 00	
Penalty for failure to furnish sworn statement	100 00	
Cost to complete the building	5,175 50	12,397 50
		$4,818 50

—and found that the mortgage in the hands of Galvin was a subsisting lien, that the two payments of September 10th, and November 11th, amounting to $2,042, were protected, and finally:

"(2) That there is no sum whatever due from the defendants and cross-complainants Richard M. Garland and Sarah A. Garland, the owners of said premises, to said the Greenwich Company, the original contractor, because of any sums that they contracted to pay such original contractor, and that all payments made by the defendants Richard M. Garland and Sarah A. Garland to the defendant the Greenwich Company on account of said contract were made in conformity to the statute, and said defendants Richard M. Garland and Sarah A. Garland are entitled to full credit therefor as against lien claimants and to full protection thereon under the statute.

"(*b*) Neither the complainants nor any of the defendants or cross-complainants have any lien or liens upon said premises, and each and every of the respective liens or claims of lien heretofore filed against said premises by said complainant and defendants, and each and every of them, are hereby discharged and decreed to be of no further force or effect, charge, or

incumbrance upon or against said premises, and said premises are hereby decreed to be free and clear of and from any such claim of lien. * * *

"(*e*) The following lien claimants have in all respects conformed with the requirements of the statute for the filing and proving of their claims, but the owners of the premises being in no way indebted to the original contractor for any amount which they contracted to pay the original contractor, including extras furnished or performed by the contractor pursuant to said contract, said claims of lien are hereby disallowed against said premises, to wit:

Frederick B. Stevens	$398.00
George Nunn	108.88
Park & McKay	46.80
Webster & McCausey Lumber Company	831.48"

From the decree so entered, plaintiff, and cross-plaintiff Webster & McCausey Lumber Company, as well as defendants Garland, appeal.

BROOKE, J. (*after stating the facts*). We will first consider the appeal taken on behalf of the plaintiff and defendant Webster & McCausey Lumber Company. Their contentions are grouped under the following heads:

"*First.* That the liens take priority over the mortgage given to the Greenwich Company, and later assigned to defendant James S. Galvin.

"*Second.* That the owners did not make such payments as entitled them to protection. The first payment is not protected, payment being made September 10th, without securing a sworn statement, and the second payment of November 11th, although made on the strength of Exhibit 40, is not protected, for the reason that the sworn statement secured does not comply with the statute. Section 13769, 5 How. Stat. (2d Ed.), 3 Comp. Laws 1915, § 14799.

"*Third.* That the plaintiff and defendant Webster & McCausey Lumber Company should be decreed to have a lien against the premises for the amount due, and

that the said liens should take priority over the mortgage.

"*Fourth.* That the defendants Garland are not entitled to damages reimbursing them for loss of rents, for the reason that the time limit was a physical impossibility, and, further, for the reason that no forfeiture was ever declared or insisted upon.

"*Fifth.* Commencement of the building is the first work done, viz., the drawing of the plans and specifications, which in the present case was confessedly prior to the execution of the mortgage."

The first and fifth propositions may be considered together. The claim stated in the fifth proposition that the liens should take priority of the mortgage, because before the mortgage had been given the plans and specifications had been drawn, is not tenable. Subdivision 3 of section 13774, 5 How. Stat. (2d Ed.), 3 Comp. Laws 1915, § 14804:

"They [liens] shall be preferred to all other titles, liens or incumbrances which may attach to or upon such building, machinery, structure or improvement, or to or upon the land upon which they are situated, which shall either be given or recorded subsequent to the commencement of said building or buildings, erection, structure or improvement."

It is, we think, clear, that the drawing of plans for a building is not "the commencement of said building or buildings." Under the first head the contention is made that the liens of appellants are superior to the mortgage lien because the mortgage was given to the contractor. Upon this point appellant cites 27 Cyc. p. 241, and *Bassett* v. *Menage*, 52 Minn. 121 (53 N. W. 1064), asserting that in the hands of the Greenwich Company, the mortgagee, the mortgage would be inferior as a lien to liens of appellants. They claim that it is likewise so inferior in the hands of James S. Galvin, to whom it was assigned on October 24th, something over two months after the commencement of the building.

We are of opinion that the whole question of the mortgage is disposed of by a consideration of the following matters: The defendants Garland, owners of the lot, would not have given the mortgage for $4,400 to the Greenwich Company without the protection of the Maryland Casualty Company bond of even date and like amount. The record conclusively shows that Galvin, as assignee of said mortgage, would not have purchased the same but for his knowledge of the existence of said bond. It further appears that the decree of the court below directing the payment by the casualty company to the defendants Garland of the said $4,400 and interest thereon has been satisfied, so that, so far as the appellant lienors are concerned, we are unable to see how in the final analysis they are injured by the decree of the court holding said mortgage a subsisting lien superior to their own. The mortgage was given by the owners, and eventually the money represented by said mortgage, through the payment by the bonding company of the penalty named in the bond, has reached the hands of the owners, and presumably has been expended by them in liquidating the cost of the building, the purpose to which the fund was to be devoted when placed in the hands of the original contractor; nor do we think that the failure of the owner to secure a sworn statement from the contractor before delivering to him said mortgage is a matter of consequence. At the time said mortgage was delivered no money was due or to become due to any contractor or materialman. For his own protection the contractor or materialman should have advised himself of the terms of the contract between the Greenwich Company and the defendants Garland, and, being so advised, he would have known that the Greenwich Company had become possessed of the $4,400 on account of the contract price. The mortgage was of record, and every contractor and materialman deal-

ing with the original contractor had constructive notice of its terms.

It is undisputed upon this record that the payment made by defendants Garland on September 10, 1914, was made without securing from the principal contractor the sworn statement required by section 13769, 5 How. Stat. (2d Ed.), 3 Comp. Laws 1915, § 14799, which provides in a note thereto:

"Payment by owner without requiring statement is at his own risk."

This section was under consideration by this court in the case of *Fairbairn* v. *Moody*, 116 Mich. 61 (74 N. W. 386, 75 N. W. 469), where it is said:

"It is claimed that, as the full contract price was paid, and all distributed for labor and materials, there can be no further lien; but under section 1 of the mechanic's lien law (Act No. 179, Pub. Acts 1891, as amended by Act No. 199, Pub. Acts 1893) the owner is not protected in payments made to the principal contractor, in the absence of a statement on oath by the contractor, showing the names of the subcontractors, etc., and such payments are made at the risk of such owner, and do not discharge the lien, unless distributed by the contractor among the subcontractors, materialmen, and laborers, 'or, if distributed in part only, then to the extent of such distribution.' "

Again in *Smalley* v. *Gearing*, 121 Mich. 190 (79 N. W. 1114, 80 N. W. 797), the court said:

"This provision points out the way in which the owner may safely make payments; that is, he need incur no risk: *First*, if he refuses payment until he is provided with a sworn statement of the contractor, and complies with it; *second*, if the money paid is distributed, in accordance with the statute, among those who might acquire liens, even though he makes payments without the sworn statement. The owner is not required to make payments beyond the amount called for in the contract."

It is, we think, clear, that as to the payment of

$1,000 made on September 10, 1914, defendants Garland are without protection. Touching the payment of November 11th, which was made upon the sworn statement of the principal contractor, of the same date, it is the contention of appellant lienors that it does not comply with the statute because it contains no reference to the amounts *to become* due the materialmen or laborers. The record discloses that plaintiff's first delivery was made on November 2d, and the last on November 17th, and that the Webster & McCausey Lumber Company's first delivery was made on September 2d, and the last on December 11th, so that on November 11th, when the sworn statement was given by the principal contractor, much material had been delivered at the premises, and at some time in the future compensation therefor would "become due." The sworn statement is obviously false, if it means, as defendants Garland contend that it does mean, that no amount was either due or to become due to any of the contractors or materialmen named in the statement. It is such a statement as should have aroused the suspicion of any owner who was conversant with the progress of the work as the defendants Garland were, but we are not prepared to say that it was not a sufficient protection under the statute, in view of the fact that it contains the following language:

"That the amounts due or to become due to such subcontractors, laborers, and persons for work done and materials furnished at the date hereof is correctly and fully set forth opposite their names, respectively, in said statement, to wit."

Defendants Garland claimed a large sum for loss of rent by reason of the failure of the Greenwich Company to complete the contract on November 15, 1914, and they were allowed by the court below the sum of $400 on this account. We are of opinion that this claim on behalf of said defendants is not well founded.

The defendants waived the right to insist upon the completion of the building within the contract time. This waiver is shown by the fact that four days before the time fixed for completion defendants paid to the Greenwich Company upwards of $1,000 upon the contract, at a time when the building was without roof, the partitions incomplete, and at a time when, according to defendant Garland's testimony, he was absolutely confident the building could not be completed by November 15th. He further testified that the Greenwich Company commenced the erection of the building upon August 20th, and continued until December 12th, nearly a month later than the date fixed by the contract, and when they abandoned it it was so far from completion that it cost defendants upwards of $5,000 to finish it. Under these circumstances we are disposed to the view that defendants Garland waived their right to insist upon the completion of the contract on the stipulated date. *Kotcher* v. *Perrin*, 149 Mich. 690 (113 N. W. 284).

We now come to a consideration of the claim of defendants and appellants Garland. The principal claim of these appellants is that the mortgage should be held void in the hands of Galvin. What we have said with reference to this mortgage heretofore in connection with the claims of the lienors is pertinent here, but to that may be added the following observation: Through their foresight the defendants Garland, when they gave the mortgage, secured the bond of the Maryland Casualty Company for an equal amount and of even date with the mortgage, conditioned upon the faithful performance of the contract by the Greenwich Company. The Greenwich Company failed to perform, and the bonding company has responded in the full penalty of the bond. The defendants Garland therefore are not injured so far as the mortgage is concerned. They gave the mortgage to the Greenwich Company, and through

the bonding company have received full consideration therefor, together with interest thereon. It is and should be a subsisting lien against the property; otherwise the money paid to them by the bonding company would be without consideration from them. The giving of the mortgage and bond were one transaction, and as the penalty of the bond has been exacted from the bonding company, it would be highly inequitable to permit them to avoid the payment of the mortgage. The decree of the court below upon this point is therefore affirmed.

The statute (3 Comp. Laws, § 10710, 3 Comp. Laws 1915, § 14796), provides:

"The owner * * * shall not be liable to the * * * materialmen * * * for any greater amount than he contracted to pay the original contractor, and shall be entitled to recoup any damages which he shall sustain by reason of any failure or omission in the performance of such contract."

The original contract price was $7,400. To this should be added the amount of the conceded extras, $179, so that we have a total contract price of $7,579. Let us see what the defendants Garland have paid, and in making this computation the $4,400 represented by the mortgage will be entirely disregarded because they have received that sum back with interest thereon from the bonding company. They have paid to complete the building, $5,175; they have paid on November 11th, $1,042; credit by omission of girder, $16—or a total of $6,233.

This sum deducted from the contract price, plus extras, $7,579, leaves a balance of $1,346. Referring to the statement of account contained in the decree and hereinbefore set forth, the first credit item of $4,400 is disallowed for the reasons stated. The second item of $1,000 is disallowed because not protected by the owners procuring a sworn statement before payment. The third item of $1,042 is allowed. The fourth

item of $16 is allowed. The fifth item of $264 is disallowed because defendants Garland received from the Greenwich Company not only the $4,400 represented by the mortgage, but interest thereon. The sixth item of $400 for lost rent is disallowed for the reason stated herein. The seventh item, the penalty of $100, is disallowed as between the owners and the lienors. The eighth item of $5,175.50 is allowed. The result of these conclusions is that the decree of the court below is reversed in part. Inasmuch as the sum now in the hands of the owners is in excess of the amount found to be due to the lienors, a decree will be entered in this court fixing said liens upon said property, subject, however, to the mortgage for $4,400.

Plaintiffs will recover costs against defendants Garland.

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

PEOPLE, *ex rel.* SIMMONS, *v.* ANDERSON.

1. OFFICERS—VACANCIES—STATUTES—FAILURE TO OBSERVE CONDITIONS—CONSTRUCTION OF STATUTES.

   A construction should not be placed upon any statute, enumerating the qualifications for office, which would require procedure not plainly set up in the statute, and which would operate to defeat the will of the electors by creating vacancies caused by a failure to observe conditions which the statute has not specifically imposed.

2. SCHOOLS AND SCHOOL DISTRICTS—OFFICERS—QUALIFICATION OF TRUSTEES—OATH OF OFFICE—ACCEPTANCE.

   Act No. 154, Pub. Acts 1903, § 1 (2 Comp. Laws 1915, § 5892), providing that a township school district shall be-

come a separate organization when the first trustees shall have been duly elected and shall have filed their acceptances with the township clerk, and section 2, providing that the officers elected April, 1903, shall hold until the trustees elected in July, 1903, shall have filed their acceptances and become duly qualified, and that subsequently elected trustees shall hold until their successors are duly qualified and file their "acceptances," and section 3, requiring the first trustees to take the constitutional oath of office within five days after notice of their election, and file it with the township clerk, must, in view of the fact that the evident purpose of the act was to conform the schools covered by it to the general school law then in existence, which did not require a constitutional oath of office as a qualification of an acceptance, be construed as not requiring a constitutional oath in addition to the writing accepting the office to constitution an "acceptance."

3. SAME.

Act No. 21, Pub. Acts 1903, § 5 (2 Comp. Laws 1915, § 5672), changed the qualifications of general school officers by requiring a property affidavit in addition to an acceptance of the office.

4. STATUTES—CONSTRUCTION BY DEPARTMENTAL STATE OFFICERS.

While not binding on the courts, the construction given laws by departmental State officers is entitled to serious consideration.

5. SCHOOLS AND SCHOOL DISTRICTS—OFFICERS—ACCEPTANCE—VACANCY.

Under 2 Comp. Laws, § 4667 (2 Comp. Laws 1915, § 5669), where a newly-elected township school trustee has filed his acceptance within the required time there is no vacancy.

6. SAME—OFFICERS—TERMINATION OF OFFICE—ACCEPTANCE.

Under Act No. 154, Pub. Acts 1903, § 2 (2 Comp. Laws 1915, § 5893), the right of an incumbent of the office of township school trustee to hold over expires when his successor files his acceptance.

7. SAME—CONSTITUTIONAL LAW—OFFICERS—OATH OF OFFICE.

Under the Constitution, Art. xvi, § 2, providing that all officers, executive and judicial, except those exempted by law, shall, before entering upon the duties of their offices, take the prescribed oath, school officers are executive officers.

Error to Alger; Fead, J. Submitted April 12, 1917. (Docket No. 153.) Decided September 27, 1917.

Quo warranto proceedings by the people of the State of Michigan, on the relation of David E. Simmons, prosecuting attorney, against August A. Anderson to try the title to the office of school trustee. Judgment of ouster. Defendant brings error. Affirmed.

W. S. Hill (*C. F. Button,* of counsel), for appellant.

R. R. Stewart, Prosecuting Attorney, for appellee.

PER CURIAM. The opinion and conclusions of the learned trial judge are adopted and approved, and the judgment affirmed.

"This is a quo warranto proceeding brought by the prosecuting attorney of Alger county, on his own relation, to test the right of respondent to the office of member of the board of education of the Rock River township school district in such county.

"Respondent, at the time of the school election on July 10, 1916, was a duly elected and qualified trustee of the district. He was a candidate for reelection at that time, but was defeated. Three new members were elected, two of whom have properly qualified, and the present controversy revolves around the status of the third member elected, Alec Chartier, in whose favor a judgment is asked herein. Within ten days after the election Chartier filed with the secretary of the board of education a written acceptance of the office accompanied by an affidavit of his property qualifications, in conformity with the provisions of 4 How. Stat. (2d Ed.), § 9891 (2 Comp. Laws 1915, § 5672). He neither then, nor has he since filed the oath of office provided for in article 16, § 2, of the Constitution of the State. On July 24th, the members of the board, old and new, including both Chartier and respondent, met to organize. The secretary reported that two vacancies existed in the board, caused by the failure of Chartier and one John Akkala to file their constitutional oaths of office. The board immediately declared such offices vacant, and elected re-

spondent and Akkala to fill them. Akkala took and subscribed the oath and filed same, claiming to act as an elective and not as an appointive officer. No exception seems to have been taken to this course. Respondent qualified. Chartier, apparently accepting the secretary's interpretation of the law, withdrew from the meeting, but not from the room, stating that he had made a mistake. No further business was done. One July 26th another meeting of the board was held, at which Chartier, having had legal advice from the prosecuting attorney, was present, seeking recognition as a member, but he was informed by the secretary before the meeting that he would not be recognized as a trustee. The board proceeded to business, respondent acting as a member (Chartier in the room, but not acting), and elected officers, two of the members voting 'No' on all elections. While the board was so acting, or immediately after the adjournment, the two dissenting members and Chartier, in the same room and in the presence of the other members, proceeded to organize a board, demanding that the secretary take minutes of their meeting and, upon his refusal, appointed a temporary secretary, Chartier, and elected a president and treasurer. This board, consisting of three of the four recognized members, Akkala, Zeno, and Tunteri, with Chartier, has held meetings since and has transacted business. Chartier has acted as the secretary of such board in the absence of the secretary *de jure,* who has attended none of the meetings. The secretary and respondent, not constituting a quorum, have held no meetings.

"The principal legal question involved is whether it was necessary for Chartier to file a constitutional oath of office in order to qualify as trustee under his election. The incidental question is also raised of what effect the failure to file such oath has upon respondent's title to the office, either as a hold-over official or as an appointee. The determination of these questions requires an examination both of the statutes and the Constitution of the State.

"I. The Statutes.

"Rock River school district is operating under the provisions of Act No. 154 of the Public Acts of 1903.

The act is amendatory to and supersedes the original upper peninsula township school district act, enacted in 1891, and found in 2 Comp. Laws, § 4823 *et seq.* (2 Comp. Laws 1915, § 5892 *et seq.*). Under the original act, elections were held at the time of the annual township election in April, and only constitutional electors could vote at them. The board of education consisted of the township clerk, two school inspectors, and two trustees. All trustees were required to take the constitutional oath of office. They held for the terms for which they were elected, and until their successors were 'elected and qualified.' The general school laws were applicable to such district except as they were inconsistent with the provisions of the act. The district became organized when a certified copy of the necessary petition, together with the determination of the proper officers, was filed with the county clerk and the secretary of the board of school inspectors of the county. The first election was to be held at the then next succeeding township election.

"Act No. 154 of the Public Acts of 1903 made sweeping changes in the law, evidently for the purpose of eliminating the schools from the vicissitudes of township politics and to make the law more conformable to the general school laws. It applied automatically to the township districts then in being. By this act, a new district becomes organized when the officers shall have been duly elected and file their 'acceptances' with the township clerk, the elections were held in July. 'The qualifications of voters and the conditions of eligibility shall be the same as provided in the general school laws.' The trustees hold office until their successors are duly elected 'and file their acceptances.' The officers elected at the April election in 1903 held office in those districts already formed until their successors chosen in July, 1903, had 'filed their acceptances and become duly qualified.' The first trustees elected under the act were required, within five days after notice of their election by the township clerk, to take and subscribe the constitutional oath and file it with the township clerk. Thereafter the elected trustees filed their 'acceptances' with the secretary of the board of education. Appointed trustees are re-

quired to take the constitutional oath within five days after appointment. The general school laws are in force in the district 'except such as shall be inconsistent with the provisions of this act.'

"It is urged by counsel for respondent that trustees elected after the first election are required to take the constitutional oath in order to qualify for office. Section 1 provides that the district shall become a separate organization when the first trustees 'shall have been duly elected and shall have filed their acceptance with the township clerk.' Section 3 requires the first trustees to take the constitutional oath of office within five days after notice of their election and to file it with the township clerk. The argument is that these two provisions, read together, define 'acceptance' as the constitutional oath of office, section 3 specifying the requirements of the 'acceptance.' It is also urged that, inasmuch as the first officers elected and those appointed by the board to fill vacancies must file the constitutional oath of office, it was the evident intent of the legislature that all trustees should file the oath. There is considerable force in this argument, and it would be very persuasive under the rule requiring the harmonizing of statutory provisions, were the act of 1903 an original act, independent of other laws and complete in itself. Instead of so being, it is an amendatory or revisory act, joined by its own terms to the general school laws and dependent upon them in a large measure for the execution of its provisions. In drafting the act, the framework of the 1891 law was used, some of its provisions were incorporated without material change, alterations made here and there in the body of sections to bring the whole scheme of the schools more in line with the general system, but preserving the township district organization, and the result is a somewhat inartificial act, not entirely harmonious, and certainly not complete.

"Viewing the act in itself, reasonable argument may be advanced both for and against the proposition that 'acceptance' means the constitutional oath of office. The argument of counsel for respondent in favor of the proposition is logical and reasonable. On the other hand, an examination of the statute discloses that the word 'acceptance' is used in connection with the quali-

fications only of the elected trustees, and is not applied to those appointed by the board. Section 2 provides that the officers elected in April, 1903, shall hold until the trustees elected in July, 1903, 'shall have filed their acceptances and become duly qualified.' The same section provides that subsequently elected trustees shall hold until their successors are elected and file their 'acceptances.' This difference in language used in the same section, but referring to different conditions, would seem to indicate an intention that officers elected in July were required to do something more than to file their acceptances in order to 'become duly qualified.' That something is set up in the next section, where they are specifically required to take the constitutional oath. Were the act complete in itself and an original statute, the construction that the trustees elected after the first election are required only to file an acceptance would not be unreasonable.

"Moreover, I do not think that a construction should be placed upon any statute, enumerating the qualifications for office, which would require procedure not plainly set up in the statute, and which would operate to defeat the will of the electors by creating vacancies caused by a failure to observe conditions which the statute has not specifically imposed. School officers especially, who are entirely subject to the control of the legislature, should not be required, on peril of forfeiture of their offices, to determine the intention which may be gathered from a statute in an attempt to harmonize its various provisions. They should be entitled to take office upon doing what the law says they shall do. While counsel say it is very plain from the law that all trustees must take the constitutional oath, it would appear the question is not entirely free from doubt from the fact that both the prosecuting attorney of the county and the attorney general of the State have rendered opinions that Chartier was properly qualified upon filing his written acceptance and affidavit, and that the constitutional oath was not necessary. It should be the purpose to sustain the right of an elected officer who has fulfilled the plain language of the statute in seeking to qualify rather than to require him to depart from the language and guess what the intention of the legislature was. Qualifica-

tion for office should be made easy rather than difficult, and words used by the legislature should be understood in their common rather than in a technical or a related sense not plainly apparent.

"The statute requires of Chartier merely an acceptance of the office. He filed that, together with the affidavit of property qualification required by the general school law. The statute of 1903 specifically points out nothing more for him to do. His title should be sustained unless the law plainly requires a different ruling.

"The act of 1903 was amendatory of the act of 1891. The word 'acceptance' is not found in the earlier statute, but all trustees were specifically required to take the oath of office. 'Acceptance' was introduced into the later act, always in connection with the qualification for office. Were it a new word as so used, its introduction by amendment into the statute, the term 'oath required by the Constitution' or its equivalent being also retained, would, of itself, indicate a difference. If there were no settled significance to the word, its meaning would have to be determined from the act. But in view of the evident purpose of the act to conform the schools covered by it to the general school system, it is especially significant that there is a departure from the original language of the act, and that a word is introduced to express the qualifications of trustees which has been employed in that connection in the general school laws, at least since 1846. Thus, in the general school laws, it has been uniformly provided, until the requirement for a property affidavit in 1903, that the school officers constituting the board of education should 'file a written acceptance of the offices to which they have been respectively elected'; and a new district was deemed organized when any two of the officers elected at the first meeting had filed their 'acceptance.' 1 Comp. Laws 1857, §§ 2248, 2249; 1 Comp. Laws 1871, §§ 3586, 3587; 2 How. Stat. §§ 5037, 5057; 2 Comp. Laws 1897, §§ 4650, 4670 (2 Comp. Laws 1915, §§ 5652, 5672). In none of the general school laws, applying either to primary or graded schools, so far as I have been able to find, is there any mention of the constitutional oath as a qualification for the office of trustee. In all such laws

up to 1903; the sole qualification was the acceptance of the office in writing. And in 1903, at the same session in which the act in question was passed, the legislature changed the qualifications of the general school officers only by requiring the property affidavit in addition to the acceptance. Act No. 21, Pub. Acts 1903 (2 Comp. Laws 1915, § 5669).

"While, from the act itself, different reasonable conclusions may be drawn as to the necessity for the constitutional oath, it appears to me that the proper rule of construction and the adoption of the word 'acceptance' from the general school laws render unnecessary the taking of the constitutional oath by Chartier as a qualification for the office.

"But, even if proper, it is not necessary to indulge in finely drawn speculations as to the intent of the legislature. The controversy at bar is confined to the status of a trustee elected long after the act of 1903 became effective in the district. The only provision directed to the requisites of the qualification of such an officer is the proviso in section 3 that he shall file his acceptance with the secretary of the board of education. The first part of the section obviously does not refer to such officer, as it applies specifically to the first officers elected under the act, requires notice of their election by the township clerk, who has no subsequent official connection with the district or its elections, and requires them to take the oath after such notice is given. None of those conditions would be present in subsequent elections. It can hardly be said that the provision relative to the oath of office applies to the subsequent trustees when none of the other provisions making necessary such oath is pertinent. The act, moreover, does not purport to state the time in which the subsequent trustees must qualify, nor define 'acceptance' as there used.

"The key to the whole situation may be found in that provision in section 1 which makes applicable to the district all the general school laws 'except, such as shall be inconsistent with the provisions of this act.' On account of the many necessary school matters which the act does not touch, the reasonable interpretation is that the inconsistency must appear in order to make the act of 1903 operative on any proposition.

And inasmuch as the act does not provide the time for qualification of the trustees elected after the first election, lays down no requisites of qualification, but rather employs a term used in the general school laws, which has always been employed in them as stating the qualifications of school officers, we are necessarily referred to the general laws for the determination of the essentials of qualification.

"I have found no statute or decisions which define an acceptance, but that it is different from the constitutional oath of office can hardly be questioned. While the case is not upon the subject before us, it is apparent from the facts stated that the Supreme Court has recognized an acceptance as being what its ordinary significance would indicate: *i. e.*, a writing in terms accepting the office. *Culver* v. *Armstrong*, 77 Mich. 194 (43 N. W. 776).

"While not binding on the courts, it is also the rule that the construction given laws by departmental State officers having duties to perform under such laws is entitled to serious consideration. In the pamphlets of school laws issued by the department of State and distributed by the educational department, the form of an acceptance is given as an unverified statement that the person accepts the office; the constitutional oath of office not appearing among the forms appended for the guidance of school officers.

"The statute itself disposes of the right of the respondent to hold the office. Chartier having filed his acceptance within the required time, there was no vacancy. 4 How. Stat. (2d Ed.) § 9888 (2 Comp. Laws 1915, § 5669). Consequently the appointment of respondent was ineffective to confer title to the office on him. Respondent's right to the office, as a hold-over official, expired when the acceptance was filed. Section 2, Act No. 154, Public Acts 1903 (2 Comp. Laws 1915, § 5893). A judgment of ouster must therefore run against the respondent.

"In the above discussion, no account has been taken of the constitutional provision, but the whole discussion has been directed to the provisions of the statute. The right of Chartier to a judgment declaring him to be a *de jure* officer must depend upon whether an oath is required in such cases under the Constitution.

"II. The Constitution.

"In article 16, § 2, it is provided: 'Members of the legislature and all officers, executive and judicial, except such officers as may by law be exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation,' etc. Relator urges that, as school officers are not constitutional officers, the requirements of the Constitution relative to the oath of office do not apply to them. It is true that schools are under the complete control of the legislature (*Belles* v. *Burr*, 76 Mich. 1 [43 N. W. 24]; *Burton* v. *Koch*, 184 Mich. 256 [151 N. W. 48]), but the Constitution does not confine the provision to the officers it recognizes. The language is broad, applying to all officers, executive and judicial. School officers are executive officers. *People* v. *Salsbury*, 134 Mich. 537, 549 (96 N. W. 936).

"The only authority I have been able to find upon the proposition of what constitutes a sufficient exemption from taking the oath is the statement in Mechem Pub. Off. § 257, upon the authority of *School Directors* v. *People*, 79 Ill. 511, that such exemption may not only be express, but may be gathered from the evident intention of the lawmakers. Neither the Illinois constitution nor the decision is available to me at this time for comparison. And in view of the sweeping character of the provision in our Constitution, together with the requirement that the exemption must be 'by law,' I do not feel justified in holding that a school trustee is exempted from taking the oath. Chartier, therefore, is not a fully qualified officer, and is not entitled to a judgment. Until he has taken the constitutional oath, he cannot enter upon the duties of his office.

"Since the within opinion was written, counsel for respondent has filed a request for findings of fact and conclusions of law. The facts as set out in the beginning of this opinion will stand as the findings of fact. The conclusions of law are stated as follows:

"1. Chartier filed a proper acceptance within the time prescribed by statute and prior to July 24, 1916.

"2. There was no legal vacancy in the office of trustee of the Rock River township school district on July 24, 1916.

"3. The assumed appointment of respondent to a vacancy in such office, on July 24, 1916, was void and of no legal force or effect.

"4. Respondent's right and title to the office of trustee, held by him under former election, ceased when Chartier filed his acceptance.

"5. Respondent has no right or title to such office, either as a hold-over or an appointed official.

"6. The relator is entitled to a judgment of ouster as against respondent, ousting him from the office of such trustee.

"7. As Chartier has not filed a constitutional oath of office, no judgment can be entered in his favor herein.

"Judgment of ouster will be entered against respondent, no judgment being entered as to Chartier."

RENNELLS *v.* POTTER.

1. FRAUDULENT CONVEYANCES—EVIDENCE—SUFFICIENCY—INSOLVENT PARTNERSHIP—CONSIDERATION—INADEQUACY.

The evidence was sufficient to show that the transfer by the members of a partnership, while it was insolvent, of horses used in delivering goods for a store and equipment and copies of route sheets bearing names of customers and orders and good will of the business to a father of one of the partners, an employee of the firm, was for an inadequate consideration, and invalid as against partnership creditors, and merely a cover for the starting of a new business under a new name in a new location.[1]

[1]On the question of participation by creditor in fraud of a debtor which will make a transfer to pay or secure his debt invalid as to other creditors, see note in 31 L. R. A. 609; 32 L. R. A. 71.

On the general doctrine of necessity of participation in fraudulent conveyance, see note in 32 L. R. A. 33.

2. BANKRUPTCY—FRAUDULENT CONVEYANCES—CLAIMS—TERMS OF DECREE.

In a suit by a trustee in bankruptcy, a decree setting aside a sale of a bankrupt partnership's property as fraudulent against creditors need not provide for the payment of the debts due the purchaser, as persons having claims should go into the bankruptcy court and have their rights determined.

3. SAME—INTERVENTION BY TRUSTEE—PARTIES.

A trustee in bankruptcy, who is granted the right to intervene in a suit involving the rights of the bankrupt, becomes a party for all the purposes of the suit, and thus carries with him his character as trustee in bankruptcy.

4. EQUITY—TRUSTEE IN BANKRUPTCY—AMENDMENTS.

A trustee in bankruptcy appointed since the commencement of a suit may be brought before the court by an amendment to the bill, and a supplemental bill is unnecessary, he being a new party claiming only such interest as is acquired by operation of law.

5. SAME.

Facts which existed at the time an original bill of complaint was filed, but which were not known to plaintiff because they were concealed by the defendants themselves, may be presented to the court by way of amendment instead of a supplemental bill.

Appeal from Kent; Perkins, J. Submitted April 16, 1917. (Docket No. 17.) Decided September 27, 1917.

Bill by John E. Rennells and Richard J. Prendergast, trustee in bankruptcy of the De Witt-Potter Company, against William H. Potter and others to set aside a fraudulent transfer of the assets of said company. From a decree for plaintiffs, defendants appeal. Affirmed.

Thornton, Fuller & Starr (*Ganson Taggart* and *Benn M. Corwin,* of counsel), for plaintiff Prendergast.

Rodgers & Rodgers, for defendants Potter.

After hearing the evidence with reference to this controversy, the trial judge made findings of fact, and granted relief, as follows:

"That some time prior to October 20, 1914, E. Bert Potter, John E. Rennells, and William (Wilbur) H. Potter entered into a fraudulent conspiracy to hinder, delay, and defraud the creditors of the De Witt-Potter Company, a copartnership composed of the said E. Bert Potter and John E. Rennells, and to convert certain of the assets of said copartnership to their use and benefit; that in the furtherance of this conspiracy the said E. Bert Potter, William (Wilbur) H. Potter, and John E. Rennells, on or about October 1, 1914, started a new tea and coffee store at 609 Lyon street, in the said city of Grand Rapids, under the name of Furniture City Tea Company; that on or about October 20, 1914, the said E. Bert Potter and John E. Rennells abandoned the business of De Witt-Potter Company, then located at 211 Division avenue south, in said city, and transferred therefrom to the Furniture City Tea Company, and without consideration, six horses, six delivery wagons, several sets of harnesses, several sleighs, and the other paraphernalia used in the delivery of goods, together with copies of certain route sheets bearing the names of customers of the De Witt-Potter Company and bearing orders for goods to be delivered, and including the good will of the said business, all of which property and assets have since been used by said parties in conducting the business of the Furniture City Tea Company; that the reasonable worth and value of the said horses, wagons, harnesses, etc., was on the said 20th day of October, 1914, the sum of $1,000; that the reasonable worth and value of the said copies of the route sheets was, on said day, the sum of $2,500; that the De Witt-Potter Company on said October 20, 1914, was, and for some time prior thereto had been, insolvent; that the business of the De Witt-Potter Company was completely wrecked, appropriated, and converted by and through the fraud of the said parties; that the unpaid debts of the said De Witt-Potter Company amount to some $12,000, and that the total remaining assets amount to only about $1,500; that the said De Witt-

Potter Company, said E. Bert Potter, and John E. Rennells have all been declared bankrupt by the district court of the United States, western district of Michigan, southern division; and that complainant, Richard J. Prendergast, trustee, is the duly elected and qualified trustee in bankruptcy of the said De Witt-Potter Company.

"The court further finds that the business of the said Furniture City Tea Company is a continuation of the business of the said De Witt-Potter Company; that it is the same business conducted under the new name as a disguise; that the real proprietors of the said Furniture City Tea Company are the said E. Bert Potter and John E. Rennells; that the pretended ownership of Furniture City Tea Company by William (Wilbur) H. Potter is merely a sham and a part of the fraud and conspiracy against the creditors of the said De Witt-Potter Company; that the business and stock of merchandise which preceded the said Furniture City Tea Company at 609 Lyon street were purchased by E. Bert Potter and John E. Rennells in the name of Wilbur H. Potter, and were paid for with money which should have been applied to the payment of the debts of said De Witt-Potter Company, and that William (Wilbur) H. Potter has no financial interest therein; that the pretended sale and transfer of the said horses, wagons, harnesses, and other paraphernalia to said William (Wilbur) H. Potter was and is without consideration, and was and is another part of the said fraud and conspiracy, and that said pretended transfer was and is fraudulent and void; that all the property, assets, money, and business of said Furniture City Tea Company, as the successor of said De Witt-Potter Company, bankrupt, including all additions, accumulations, and profits to said property, assets, money, and business, or derived therefrom, are legally and equitably the property, assets, money, and business of the estate of the said bankrupt; that the said E. Bert Potter, William (Wilbur) H. Potter, and John E. Rennells and all others claiming any right, title, or interest through or under them now hold and have possession of the said property, assets, money, and business in trust for the said estate, and that since the said 20th day of October, 1914, they have so held and

have been conducting the said business wrongfully and without authority; that the title to the said property, assets, money, and business is now vested in said Richard J. Prendergast, trustee.

"In short, it is quite impossible to conceive of a bolder attempt to dispose of the assets and business of an insolvent concern in the interests of those manipulating its affairs and against the interests of the creditors than is disclosed by the testimony in this case. To permit this attempt to be consummated would be a reproach upon the law and a perversion of justice.

"Now, therefore, it is hereby ordered, adjudged, and decreed, and the court now here doth hereby order, adjudge, and decree, as follows: 'That the pretended sale and transfer of the said horses, wagons, harnesses, and other paraphernalia to William (Wilbur) H. Potter was and is fraudulent and void, and is hereby set aside; that the attempted transfer of the said route sheets was and is fraudulent and void and is hereby set aside; that said Richard J. Prendergast, as trustee for and under the said court in bankruptcy, holds in trust all right, title, and interest in and to all the said property, assets, money, and business now claimed, used, or conducted by, through, or under the name of Furniture City Tea Company; that said E. Bert Potter, William (Wilbur) H. Potter, and John E. Rennells are now, and have been since October 20, 1914, in possession of said property, assets, money, and business, wrongfully and without authority; that the said E. Bert Potter, William (Wilbur) H. Potter, and John E. Rennells, and all others claiming any right, title, or interest through or under them in and to the said property, assets, money, and business, now hold and have possession of said property, assets, money, and business, and exercise said claim, right, title, and interest, in trust for the said estate in bankruptcy; that the said Richard J. Prendergast, trustee, is entitled to immediate possession of said property, assets, money, and business.

" 'Further ordered, adjudged, and decreed that said Richard J. Prendergast, trustee, shall take, and he is hereby fully authorized and empowered to take, immediate possession of all of the said property, assets,

money, and business, of whatsoever kind and nature and wheresoever found or located, including all the horses, wagons, harnesses, sleighs, and other paraphernalia formerly used in the business of the De Witt-Potter Company, including also all horses, wagons, and other property taken in exchange therefor or in replacement thereof, and the said E. Bert Potter, William (Wilbur) H. Potter, and John E. Rennells, and each and all their employees, agents, attorneys, and representatives, and all others claiming through or under them, are hereby ordered to surrender possession and to turn the same over to the said Richard J. Prendergast, trustee, immediately upon demand and upon exhibiting a certified copy of this decree. The said Richard J. Prendergast, trustee, is further hereby fully authorized and empowered to hold the said property, assets, moneys, and business as a part of the assets of the said De Witt-Potter Company, bankrupt, and to dispose of said property, assets, money, and business according to the orders, rules, and regulations of the said court in bankruptcy and according to the law in such case made and provided, and until said business is so disposed of, or until said trustee is otherwise ordered and directed by the said court in bankruptcy, said Richard J. Prendergast, as trustee, is hereby authorized and empowered to conduct and maintain the said business of said Furniture City Tea Company as a going concern, with full authority and power in the premises.

" 'It is further ordered, adjudged, and decreed that the said E. Bert Potter, William (Wilbur) H. Potter, and John E. Rennells and each and all of their employees, agents, attorneys, and representatives, and any one claiming any right, title, or interest through or under them, shall be, and they are hereby, permanently restrained and enjoined from interfering in any manner with the possession of the said trustee, with his conducting of the said business, or with his disposal of the said property, assets, money, and business, under the terms of this order and decree or under the direction of the said court of bankruptcy; to this end, the above-named parties and all of them are hereby permanently restrained and enjoined from taking, converting, appropriating, or disposing of any

of the said property, assets, money, and business, and from otherwise diverting, destroying, depreciating or depleting the said property, assets, money, and business, or the value thereof in the hands of the said trustee.

" 'Further ordered, adjudged, and decreed that said E. Bert Potter, William (Wilbur) H. Potter, and John E. Rennells, and their and each of their servants, employees, representatives, and attorneys, shall, and they are hereby ordered to, disclose and account to said Richard J. Prendergast, trustee, and in such manner as may be directed and required by said court in bankruptcy, for any and all assets of De Witt-Potter Company or of its successor, the Furniture City Tea Company, that may have come to their knowledge or possession, and that any such assets so accounted for or acquired after disclosure are, and shall be administered as, a part of said estate in bankruptcy; that said Richard J. Prendergast, trustee and intervening complainant aforesaid, recover his costs in this suit sustained of and from the said E. Bert Potter, William (Wilbur) H. Potter, and John E. Rennells, the same to be taxed, and that he have execution therefor.

" 'It appearing that the defendants John Ripstra, William Dennison, Nicholas Voss, Albert Remelts, and Shirley Teachout were not knowingly or intentionally parties to the aforesaid conspiracy and fraud of E. Bert Potter, William (Wilbur) H. Potter, and John E. Rennells, no costs shall be taxed against them, but they are hereby held subject to the provisions and requirements of this decree as to disclosure, accounting, and injunction.' "

From this decree, defendants William H. Potter and E. Bert Potter have appealed.

KUHN, C. J. (*after stating the facts*). By elaborate argument at the hearing and in well-prepared briefs counsel for the appealing defendants earnestly contend that these findings of the trial judge and the relief granted were without justification, and that there was no testimony to warrant the conclusion that these parties were engaged in a conspiracy to defraud creditors, but that rather the parties acted honestly in their

dealings and established the new business, to wit, the Furniture City Tea Company, not with the idea of taking over the business of the De Witt-Potter Company, but for the legitimate purpose of establishing a new business and getting their customers wherever they could. With these contentions we cannot agree. This record cannot be read, in our opinion, without irresistibly coming to the conclusion that the alleged sale and transfer of the horses, wagons, and harnesses in July, 1914, was fraudulent in fact. Clearly the sale was made when the De Witt-Potter Company was insolvent; it was made to the father of one of the partners and an employee of the firm, who knew, or ought to have known, of its financial condition. It also appears that the sale was made for an inadequate consideration. It appears that property worth $1,155 was sold for $700. It is claimed that the defendant William H. Potter had loaned the De Witt-Potter Company the sum of $700, that this loan was made in two installments of $300 and $400, respectively, in the months of February and March, 1914, and that the De Witt-Potter Company gave William H. Potter its note or notes to cover that amount. It appears that on March 1, 1914, the De Witt-Potter Company gave the Musselman Grocer Company a financial statement for the purpose of securing credit, and, according to this statement, William H. Potter was not a creditor of the firm. Furthermore, the books of the company fail to show that William H. Potter was a creditor to any amount, although the alleged transfer of property was carefully recorded. The horses and wagons did not change possession after the sale, and no creditor was given any notice of them, and the bill of sale was never recorded, and did not make its appearance until after the bankruptcy, and Mr. Voss, one of the drivers, testified that Mr. Rennells told him that it was dated back.

Late in September following the sale of the horses, etc., we find negotiations pending for the purchase of the little grocery stock at 609 Lyon street, in which negotiations John E. Rennells, Bert Potter, and William H. Potter are active. The circumstances, which the record discloses took place at the old store and at the new place of business, in our opinion clearly indicate that this whole move was carefully planned and premeditated. On the evening of October 19th, when the drivers came to the office, they were paid for one day's work, and were told by Mr. Rennells that the De Witt-Potter Company was going to close up, that they would not be needed any longer, and that they could get a job at the Furniture City Tea Company if they would report at 609 Lyon street the next morning. In the meantime this little grocery business had been transformed into a tea and coffee store, prize tickets had been printed, and other preparations had been made to start the business full fledged as a tea and coffee store on the 20th. It is unnecessary for the purposes of this opinion to attempt to review all the circumstances and facts which sustain the theory that the change was not sudden, unexpected, or unpremeditated. It is sufficient to say that, as a result of these acts, the De Witt-Potter Company was forced into bankruptcy, and what assets were left to the estate had to be sold for about $1,300, and there was thus left less than $1,500 to pay debts amounting to more than $12,000.

We think it is clear that fraud permeated this entire transaction and every detail of it, that the findings and conclusions of the circuit judge are fully justified, and agree with his conclusion that "to permit this attempt to be consummated would be a reproach upon the law and a perversion of justice."

Considerable complaint is made because the decree did not provide for the payment of the debts and obli-

gations of the Furniture City Tea Company and the claims of Mr. William H. Potter. The lower court found and decreed that the Furniture City Tea Company is the De Witt-Potter Company under a new name, which, as we have already said, we believe the evidence fully justified. William H. Potter and all others who had dealings with this bankrupt, if they have any claim, should go into the bankruptcy court and have their rights there determined.

It is also contended by the appellant that the bankruptcy act was not properly in issue in this case, because it appears that the bill of complaint was filed in October, 1914, and the petition for bankruptcy was not filed until in November, 1914, and that the trustee in bankruptcy should have been brought before the court by way of supplemental bill, and not by way of amendment to the original bill. In the case at bar the trustee, after having been authorized to do so by the bankruptcy court, petitioned the lower court for the right to intervene, and this right was granted by an order of the court. See *Stone* v. *Ingham Circuit Judge,* 105 Mich. 234 (63 N. W. 79); *Earl* v. *Jacobs,* 177 Mich. 163 (142 N. W. 1079). The intervener having by leave of the court become a party, he becomes such for all purposes of the suit, and thus carries with him his character as trustee in bankruptcy. 16 Cyc. p. 203.

The rule with reference to a supplemental bill is thus stated by Mr. Jennison in his work on Chancery Practice, p. 359:

"A supplemental bill is used for the purpose of supplying some irregularity or defect discovered in the frame of the original bill, or in some proceedings under it, or where by an event subsequent to the commencement of the suit a new interest in the matter in litigation is claimed by an existing party to the suit, or a new party claims, but not by mere operation of law, the interest which was claimed by an existing party."

The trustee in bankruptcy was a new party claiming only such interest as acquired by mere operation of law, in which case, in our opinion, it is not necessary that a supplemental bill be filed, it appearing that, aside from the adjudication in bankruptcy and the trustee's election and qualification as such, the facts set up by the complainant's second pleading are facts which existed at the time the original bill of complaint was filed, but which were not then known to the complainant, for the reason that they were concealed by the debtors themselves. Under these circumstances it is entirely proper to present them to the court by way of amendment instead of by supplemental bill.

We are of the opinion that the trial judge has reached an equitable and just conclusion, and therefore affirm his decree, with costs to the appellee.

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

BISCHOFF v. HARRIS.

1. BREACH OF PROMISE OF MARRIAGE—EVIDENCE—ADMISSIBILITY.
   In actions to recover damages for breach of promise of marriage, aggravated by seduction, a wide range of inquiry as to the conduct of the parties during the existence of the claimed contract, as well as the causes attending the breaking of the engagement, is permissible.

2. SAME—SEDUCTION—DAMAGES—INSTRUCTIONS.
   In an action to recover damages for breach of a marriage promise, aggravated by seduction, where the theories of

the parties are simple and are stated in their essentials by the court in its charge, it is the duty of a party desiring a more explicit statement of his claims to present requests therefor to the court.

3. SAME—DAMAGES—EXCESSIVE VERDICT.

In an action to recover damages for breach of marriage promise, aggravated by seduction, a verdict for $5,000 *held*, excessive to the extent of $2,500.[1]

Error to Wayne; Hally, J. Submitted April 17, 1917. (Docket No. 57.) Decided September 27, 1917.

Case by Ellen R. Bischoff against Frank R. Harris for breach of promise of marriage. Judgment for plaintiff. Defendant brings error. Affirmed, conditionally.

James H. Pound, for appellant.

William Henry Gallagher and *Francis T. McGann,* for appellee.

KUHN, C. J. This is an action to recover damages for breach of promise of marriage, aggravated by claimed seduction of the plaintiff by the defendant. The trial resulted in a verdict for the plaintiff in the sum of $5,000, upon which judgment was duly entered.

At the time of the trial plaintiff was a widow about 41 years of age and the mother of two children. The defendant, a brother of plaintiff's sister's deceased husband, was a man of about 37 years of age. While they were relatives, they had seldom been together, and knew little of each other until in November, 1911, a year and a half after the death of plaintiff's husband, when the events which led up to this litigation commenced. At this time they met by chance in the office of the township treasurer, and the defendant called upon the plaintiff a short time later as the re-

[1] On measure of damages for breach of promise to marry, see comprehensive note in 41 L. R. A. (N. S.) 840. Particularly as to excessiveness of damages, see page 853 of above note.

sult of an invitation extended to him by her. From this time on until the last of the following April they continued to go together, at which time all relationship of an affectionate nature ceased, and the defendant discontinued his calls upon her. That he asked her to marry him soon after he called upon her is not disputed, nor is the fact that in the latter part of November intercourse commenced between the parties. The essential matters in dispute are whether or not the plaintiff accepted the offer of marriage made by the defendant, whether or not the defendant later repudiated the offer and refused to marry the plaintiff, and whether or not intercourse was indulged in as a result of the promise of marriage.

The plaintiff's claim was, and proof was offered tending to show, that the courtship began in November, and in a few weeks culminated in an engagement to marry, the marriage to occur about New Year's following; that shortly after the engagement the defendant sought the help of plaintiff in procuring a strip of property necessary for ready access to his own; that she readily consented to help him, and advanced her own money to purchase the property in question, procured a deed for the same, and then executed and delivered a deed to the defendant; that he failed to reimburse her, and that she complained to him concerning it, whereupon he rebuked her for distrusting him, which, it is her claim, was their first disagreement; at Christmas time the parties came to Detroit to buy presents, and the plaintiff, desiring to purchase defendant a present, left him, agreeing to meet him later; she did meet him, and found him sullen and angry and suspicious of her absence, which resulted in another misunderstanding, which was smoothed over on Christmas Day, when the presents were exchanged; that between Christmas and New Year's the defendant suggested that the plaintiff

lighten her household duties in preparation for the marriage by obtaining hired help; that they went to her aunt's home, where they announced that they were going to get married, and through this aunt obtained a hired girl, who came to her house soon after New Year's; that on Sunday following New Year's, 1912, the defendant came to the plaintiff's house unexpectedly and discovered there a Mr. Smiley, who had bought the plaintiff's husband's business; that after Smiley left the defendant became suspicious, and the plaintiff explained to him that Smiley had been there to look over some papers in connection with the business, and that defendant charged her with having had improper relations with Smiley, and, after a long and bitter quarrel, demanded of her that she submit her person to him in order to prove her fidelity to him, to which demand she finally yielded; that when the hired girl came the plaintiff announced her readiness to marry, but the defendant demurred, saying that he understood that the plaintiff had no dower in her husband's estate, and suggesting that she give him $6,000 in cash, of which she was custodian as administrator of her husband's estate; this she refused, and the defendant thereupon asked her for a copy of her husband's will to have his attorney see if she could get her dower interest; that the defendant said that he would not marry her unless the $6,000 was forthcoming; several times thereafter they had quarrels of more or less serious nature, and that during one of them the defendant threatened to kill the plaintiff, and tried to get a revolver that she kept in her house; that she took the revolver and gave it to her little boy, who ran from the house with it, and she followed him to a neighbor's; that finally plaintiff offered to sign off all rights in his property if he would marry her for 24 hours and she allow him to divorce her then, which he also refused to do.

The defendant's claim of what occurred during the interval of time from November, 1911, to the last of April, 1912, differs materially from the claims of the plaintiff. It was his claim that he tendered marriage to the plaintiff, but was flatly rejected for the reason that, by marrying, the plaintiff would lose all rights in her husband's estate in accordance with the terms of the will of her husband. He denies that he demanded $6,000 from her as a condition of the marriage to be entered into by him and that the intercourse had between them was preceded by a promise of marriage; that soon after he commenced going with her she invited him to her house to a party by a note delivered by her little boy, in which she asked him to tell his people that he would not be back that night; that after the party he did spend the night with the plaintiff, and they had intercourse; and that thereafter he spent a large portion of his nights with the plaintiff.

The issues of fact were presented to the jury in a clear charge, with the result as above indicated. The case is brought to this court, and 103 assignments of error are urged by the learned counsel in support of his claim that the judgment should be reversed. In the discussion of this large number of assignments of error counsel, for convenience, has grouped them as follows: (1) Errors during the course of the trial in the admission and rejection of testimony and the ruling of the court thereon; (2) refusal of the requests to charge of defendant, were refused, and their modification, where so treated; (3) errors in the charge itself; (4) error in the proceedings after the verdict in the motion for a new trial and the decision thereupon; (5) error in not reducing the amount of the verdict.

In the consideration of the first group of assignments of error it should be stated that a number of the assignments are based upon no objection in the record. A wide range of inquiry was permitted by the

circuit judge as to the conduct of the parties during the existence of the claimed contract as well as the causes or circumstances attending the breaking of the engagement. This we think is proper in cases of this kind. *Simmons* v. *Simmons,* 8 Mich. 318; *Vanderpool* v. *Richardson,* 52 Mich. 336 (17 N. W. 936); *Rutter* v. *Collins,* 96 Mich. 510 (56 N. W. 93).

With reference to those assignments of error as to the admission and rejection of testimony where proper objection was made, it would not be profitable to enter upon the discussion of the various claims made by counsel, but it is sufficient to say that we have examined these various assignments, and do not believe that it can be said that prejudicial error was committed by the court in his rulings with reference thereto.

The learned trial judge, in a clear and comprehensive charge, submitted the questions of fact to the jury. Counsel for defendant strongly urges that the court did not set forth the theory of the defendant with the same clearness that characterized his exposition of the theory of the plaintiff. A reading of this charge does not impress us that the charge is fairly subject to this criticism. The theories of the parties were simple and are stated in their essentials. If defendant's counsel desired to have a more explicit statement of his claims presented, it is his duty to present requests to the court.

In the denial of the motion for a new trial the trial judge said:

"Defendant denied the existence of a promise to marry, and said that the seducing was as much upon her part as it was upon his. The testimony disclosed that he is worth in the neighborhood of $40,000. This consists entirely or almost entirely of land.

"A motion was made for a new trial, and at first I was impressed with the idea that the verdict was excessive, because in this case with a mature woman

it was my notion that little respect should be given to the story of seduction.

"I have desired, if it was legally possible to do it, to cut the verdict in two. I have concluded, however, that I have no such power. I have examined cases in Connecticut, Illinois, Indiana, Iowa, Minnesota, Nebraska, New York, Tennessee, Texas, and Wisconsin, and the overwhelming weight of authority is that in this class of cases the amount of the verdict, unless it clearly is the result of passion, prejudice, or a reckless disregard of the evidence, rests in the sound discretion of the jury."

In discussing the question of damages, the trial judge in his charge said:

"Now, you have not any right, as you have already been told, if you get to the question of damages, to consider that this man can afford to pay a certain amount, looking at the thing entirely from this point of view. The testimony that was offered respecting his financial position and his financial standing, the testimony that was offered respecting the conduct and the habits and the life history of these two people, is all offered and given and permitted to come into court so that you may have before you such testimony as will permit you to judge rightfully. A woman who is about to marry, or who has a promise to marry a man that is worth $100,000, and is deprived of consummating that marriage by something that that man has done, or by his refusal to do it, has been deprived of more, in a worldly way, than the woman who is engaged to marry a man who is worth $10."

We are of the opinion that this illustration referring to the man who is worth $100,000, under the circumstances of this case, was unfortunate, for the reason that defendant's pecuniary responsibility was one of the questions in dispute. As the learned trial judge stated in his reasons for denying the motion for a new trial, the testimony fairly indicated that he was worth approximately $40,000 in real estate.

A careful studying of this record leaves the impression upon us, as it seems to have upon the trial judge,

that something other than the mere testimony in the case must have actuated the jury in giving the amount of the verdict that they did. It is true that a verdict should not be lightly disturbed in cases of this kind, but we cannot escape the conclusion that to allow this verdict to stand in its present amount would be a palpable miscarriage of justice. We are inclined to the view, as was the trial judge, that the verdict should be reduced at least one-half, and unless counsel for plaintiff within 30 days elect to accept a reduction of the verdict to the sum of $2,500, a new trial will be granted, with costs to the appellant. In case counsel elect to accept the reduction of the verdict, the judgment will stand affirmed at that amount, with costs to the appellant.

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

POLLOCK *v.* McCARTY.

1. DEEDS—LIFE ESTATES—ESCROWS—INTENT.

Where a contract for a lease for the lifetime of the lessor, containing a provision for a deed thereafter, was made, and a warranty deed was delivered in escrow to a third person, to take effect at the death of the lessor, *held*, that it was the lessor's intention, that if the lessees performed the contract and survived her, they should, upon her death, have the fee of the land, she, in the meanwhile, to own and control the property herself and retain all interest therein except a determinable leasehold.

2. SAME—DELIVERY—TIME OF TAKING EFFECT.

The test of a conveyance is whether it can be said that

the delivery of the deed is such as to convey a present interest in land.

3. SAME.

One of the essential requisites to the validity of a deed, so as to pass title, is delivery.

4. SAME.

The act of delivery of a deed is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him, but it is that act of the grantor, indicated either by acts or words, or both, which shows an intention on his part to perfect the transaction, by a surrender of the instrument to the grantee, or to some third person for his use and benefit.[1]

Appeal from Barry; Smith, J. Submitted April 10, 1917. (Docket No. 114.) Decided September 27, 1917.

Bill by James W. Pollock and others against Alonzo McCarty and others to set aside a deed. From a decree dismissing the bill, plaintiffs appeal. Reversed, and decree entered for plaintiffs.

Colgrove & Potter, for plaintiffs.

Thomas Sullivan, for defendants.

OSTRANDER, J. The opinion of the learned trial judge so completely and briefly states the facts that I adopt it:

"The plaintiffs in this case are the nephews of Catherine Rouse, and file this bill as her sole and only heirs at law to set aside a deed made on the 27th day of November, 1901, to Alonzo McCarty, conveying to him the east half of the northeast quarter of the southwest quarter, and the east 30 acres of the southwest quarter of the northwest quarter, all on section 33, township 3 north, range 9 west, Barry county, Mich.,

[1]For a discussion of the question as to whether delivery of deed to third person or for record by grantor, is a delivery to the grantee, see notes in 54 L. R. A. 865; 9 L. R. A. (N. S.) 224; 38 L. R. A. (N. S.) 941.

As to delivery of deed to third persons to be delivered to grantee after grantor's death upon performance of conditions by grantor, see note in 9 L. R. A. (N. S.) 317.

containing 50 acres of land, more or less, according to the United States survey.

"The bill alleges that the said Catherine Rouse at the date of said conveyance was aged, infirm, and mentally incompetent to transact business, and that she was easily influenced, and that the defendant practiced upon her fraud and deceit and procured the said deed by unduly influencing her to make the same, and that it was without consideration, was never delivered, and was testamentary in its character, and should be set aside. The answer denies that she was incompetent or that she was unduly influenced to make said deed, and claims that it was an honest transaction, and that the deed should stand.

"Proofs were taken in the case on the part of the plaintiffs, but there was no evidence offered to show the mental incompetency of Catherine Rouse, or that she had been influenced to make such a deed by fraudulent practices and deceit. Plaintiffs rest their case wholly on proof of the contract which accompanied the said deed and the proof that she had later been by the probate court of Barry county adjudged incompetent, and a guardian had been appointed for her, and that later she had been adjudged insane by the said court and committed to the asylum for the insane at Kalamazoo, Mich.

"I think it will be well here to state first that the deed was made November 27, 1901; that a guardian was appointed for said Catherine Rouse October 15, 1910; that she was admitted to the asylum for the insane at Kalamazoo, July 25, 1911, and that she died at the asylum January 27, 1915.

"After the plaintiffs introduced the contract and the probate files showing the appointment of a guardian and her commitment to the asylum and her death, they rested their case, and the defense also rested, so that the foregoing is substantially all the proof that was introduced at the hearing.

"It is the plaintiffs' contention that the deed in question was without consideration, or at least without adequate consideration; that it was testamentary in its character; and that it was never delivered; and that no title passed to the defendants in the case, the deed being wholly inoperative.

"The contract in this case is as follows:

"'It is hereby agreed, between Catherine Rouse, of the city of Hastings, county of Barry, and State of Michigan, party of the first part, and Alonzo McCarty and Loammi McCarty, of the township of Rutland, in said county and state, parties of the second part, as follows: The said party of the first part, in consideration of the rents and covenants herein specified, does hereby let and lease to the said parties of the second part the following described premises, situated and being in the township of Rutland, county of Barry, and State of Michigan, to wit: The east half of the northwest quarter of the southwest quarter, and the east 30 acres of the southwest quarter of the northwest quarter, all in section 33, town 3 north, range 9 west, containing 50 acres of land, more or less, according to the United States survey thereof, for the term of the life of the said first party from and after the 27th day of November, 1901, on the terms and conditions hereinafter mentioned, to be occupied for farming purposes: *Provided*, that in case any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part, her certain attorneys, heirs, representatives, and assigns, to re-enter into, repossess the said premises, and the said parties of the second part, and each and every other occupant, to remove and put out.

"'And the said parties of the second part do hereby hire the said premises for the term of * * * as above mentioned, and does covenant and promise to pay to the said party of the first part, her representatives and assigns, for rent of said premises for said term, the sum of fifty dollars each year, payable as follows: Twenty-five dollars on April 1st and twenty-five dollars on November 1st of each year. It is agreed that this contract expires with the death of first party, and the second party, Alonzo McCarty, receives a deed of said premises; that said deed is made and executed and is now held by A. E. Kenaston, and the same is to be delivered to said Alonzo McCarty upon the termination of this lease in case the terms of the contract have not been violated. It is agreed that said second parties must pay fifty dollars and furnish first party three bushels of potatoes and one bushel of sweet apples on each and every year, and shall also pay the taxes, and said contract shall not be considered violated if said payments shall be made within thirty days after they become due. If said contract shall not be fulfilled, said premises shall revert back to said first party and said A. E. Kenaston is hereby directed to deliver up said deed to first party; it being understood and

agreed that if this contract is complied with said property shall become the property of said Alonzo McCarty.

"'Said parties of the second part further covenant that they will not assign nor transfer this lease, or any part thereof, without the written assent of said party of the first part; and also that said parties of the second part will at their own expense, during the continuance of this lease, keep the said premises and every part thereof in as good repair, and at the expiration of the term the same shall be fulfilled as before set forth.

"'And the said party of the first part does covenant that the said parties of the second part, on paying the aforesaid installments and performing all the covenants aforesaid, shall and may peacefully and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

"'The covenants, conditions, and agreements made and entered into by the several parties hereto are declared binding on their respective heirs, representatives, and assigns.

"'Witness our hands and seals this 27th day of November, 1901.

"'CATHERINE ROUSE. [L. S.]
"'ALONZO MCCARTY. [L. S.]
"'LOAMMI MCCARTY. [L. S.]

"'Signed, sealed, and delivered in presence of:

"'_____.
"'_____.'

"This contract has the following indorsements:

"'Paid	$25	March 25, 1902
Paid	25	Nov. 30, 1904, in full to date
Paid	25	Apr. , 1905
Paid	25	Nov. 2, 1905
Paid	25	Apr. 6, 1906
Paid	25	Nov. 17, 1906
Paid	25	Apr. , 1907
Paid	25	Nov. 15, 1907
Paid	25	Apr. 21, 1908
Paid	25	Dec. 5, 1908
Paid	25	Mar. 24, 1909
Paid	25	Dec. 13, 1909
Paid	25	Apr. 8, 1910
Paid	25	Nov. 7, 1910
Paid	25	Apr. 7, 1911
Paid	25	Nov. 28, 1911

Paid	$25	Apr. 12, 1912
Paid	25	Dec. 19, 1912
Paid	25	Mar. 24, 1913
Paid	25	Nov. 19, 1913
Paid	25	Apr. 18, 1914
Paid	25	Nov. 23, 1914'

"The deed in the case is an ordinary warranty deed, duly executed before Alonzo E. Kenaston, notary public, properly witnessed, and need not be set forth. This deed and the lease were left with Mr. Kenaston, who placed them in an envelope and indorsed on said envelope the following:

"'Deed from Catharine Rouse to Alonzo McCarty to be delivered at death of Mrs. Rouse. Also lease deposited herein containing conditions upon which deed is made. 11—27—01.'

"The proofs show that Alonzo E. Kenaston died several years ago and preceding the death of Catherine Rouse, and that these papers, the deed and contract and envelope in which they were deposited were turned over to A. A. Anderson, who was appointed administrator of his estate.

"The proof shows that the terms of the contract were fully carried out by said Alonzo McCarty.

"The proof also shows that Loammi McCarty died on the 10th day of January, 1909."

The court was of opinion that the only question in the case is whether the deed was delivered, answering the question in this way:

"I have given this case very careful consideration, have made personal investigation of the cases cited by counsel for the respective parties in their very exhaustive briefs, and I am of the opinion that there was a legal delivery of the deed to the defendants by the delivery of the same to Mr. Kenaston to be held until the death of Catherine Rouse.

"It is my judgment that, the contract having been performed on the part of the defendant, that he is entitled to have this deed delivered to him."

A decree dismissing the bill was entered, and plaintiffs have appealed.

I am of opinion that the decree should be reversed, and one entered for plaintiffs in conformity with the prayer of the bill. I have no doubt that Catherine Rouse intended that the McCartys, if they performed their contract and survived her, should, upon her death, have the fee of the land. She intended meanwhile to own and control the property herself, to retain all interest therein except the determinable leasehold interest which she created. Her provision was for her purpose inadequate, because her intention could be given effect only by a devise of the land. There is no idea here of a sale and purchase of land, nor any of the transfer of a present interest in the land, with deferred enjoyment thereof. The lease is itself conclusive evidence of this intention. It is inconsistent with the idea that any interest in the land passed presently from the grantor to the grantee, except the leasehold interest. The lease, the deed, and the delivery of the deed are to be considered in arriving at the owner's intention.

The test is whether it can be said that delivery of the deed was such as to convey a present interest in the land. *Culy* v. *Upham,* 135 Mich. 131 (97 N. W. 405, 106 Am. St. Rep. 388); *Felt* v. *Felt,* 155 Mich. 237 (118 N. W. 953); *Cooper* v. *Cooper,* 162 Mich. 304 (127 N. W. 266); *Taft* v. *Taft,* 59 Mich. 185 (26 N. W. 426, 60 Am. St. Rep. 291); *Loomis* v. *Loomis,* 178 Mich. 221 (144 N. W. 552); *Reed* v. *Brown,* 184 Mich. 515 (151 N. W. 592).

"One of the essential requisites to the validity of a deed, so as to pass the title, is delivery. Even although in all other respects it has been properly executed, yet it does not follow that the title to the property passes; the grantor yet retains control of the instrument, and may deliver it, absolutely, conditionally, or not at all. The act of delivery is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him, but it is

that act of the grantor, indicated either by acts or words or both, which shows an intention on his part to perfect the transaction, by a surrender of the instrument to the grantee, or to some third person for his use and benefit. The whole object of a delivery is to indicate an intent upon the part of the grantor to give effect to the instrument." *Thatcher* v. *St. Andrew's Church*, 37 Mich. 264, 268, 269.

Decree reversed, and decree here for plaintiffs.

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

JACOBS v. HAGENBECK-WALLACE SHOWS.

1. APPEAL AND ERROR—PRESUMPTIONS—CHANGE OF VENUE—DISCRETION OF COURT.

   In an action to recover damages for personal injuries sustained by a patron of defendant's show, as a result of a windstorm upon the show tent, while plaintiff was attending the show, where a jury was secured without difficulty, and the damages awarded were not claimed to be excessive, *held*, that there was no inevitable legal inference from undisputed facts that local prejudice existed or that the court below abused judicial discretion in denying motion for a change of venue.

2. THEATRES AND SHOWS—DAMAGES—NEGLIGENCE—BASIS OF ACTION.

   Negligence is the gravamen of an action to recover damages for personal injuries sustained by one attending a show in a tent by the effect upon the tent of a windstorm, although the declaration alleges as inducements to plaintiff to enter the tent an advertisement circulated by the defendant to the effect that the tent was storm-proof and wind-proof and also that plaintiff paid the price of admission asked by the defendant.

3. SAME—DUTY OF PROPRIETORS.
Proprietors of public entertainments are not insurers of the safety of patrons, but must exercise, to prevent disaster, care commensurate to the situation.

4. SAME.
That in the latitude where defendant erected its show tent summer storms with wind and rain were common, that the wind often attained considerable velocity and did considerable injury, and that such storms often arrived or broke suddenly and were as soon gone, were circumstances to be considered by defendant in erecting the tent and by the patrons of the show in attending.

5. SAME—DAMAGES—EVIDENCE—QUESTION FOR JURY.
Whether the facts upon which the defendant's liability depends were established, *held*, to be for the jury.

6. TRIAL—INSTRUCTIONS—CONSTRUCTION OF CHARGE TO JURY.
The charge of the court must be read as a whole and with regard to the contentions of the parties.

7. THEATRES AND SHOWS—DUTY OF PROPRIETORS—RIGHTS OF PATRONS.
The proprietor of a show tent is bound to anticipate, in selecting and erecting the tent, the ordinary and usual storm of the season and latitude and its probable consequences, reference being had to the character of the structure to which the public was invited, and, in view of such storm arising and such consequences, to use ordinary care in such selection and erection as to prevent injury to patrons.

8. SAME.
In an action by a patron of a tent show to recover for personal injuries sustained as the result of a sudden windstorm while plaintiff was attending defendant's show, if, as claimed by plaintiff, the storm was an ordinary one, and, as claimed by defendant, the tent was selected and erected with ordinary care, in view of probable storms arising and their consequences, there was no duty on the part of defendant to warn its audience of the approach of the storm.

9. SAME.
The proprietor of a show tent who does not use ordinary care in the selection and erection of the tent, as the result of which a patron is injured in a storm, is liable

unless the storm was so violent in character that whether defendant was or was not negligent in such selection and erection the result would have been the same.

10. SAME—"ACT OF GOD"—INSTRUCTIONS.

An instruction that, "as applied to this case, an act of God may be defined as a natural cause, such as a storm of wind, whatever its characteristics may be, which cannot be prevented by the exercise of ordinary care and the use of those appliances which the situation of the party renders it reasonable that he should employ," was not erroneous.

11. SAME.

An instruction that defendant was not required to contemplate or provide against unusual or extraordinary storms, was proper as preferred without the addition that the storm was of such a character that human care and foresight could not anticipate or guard against it.

12. SAME—INSTRUCTIONS—BURDEN OF PROOF.

An instruction that the burden was upon defendant to show that the storm was so violent that it was the sole proximate cause of plaintiff's injuries was erroneous, as plaintiff had the burden upon the whole case to prove defendant's negligence was the proximate cause of such injuries.

13. SAME.

An instruction that as defendant presumably knew the actual condition of the tent it was its duty to warn its audience of the approach of the storm, was not erroneous.

14. EVIDENCE—MATERIALITY—MORTALITY TABLES—INSTRUCTIONS—HARMLESS ERROR.

The admission in evidence of tables of mortality showing plaintiff's expectancy of life, was harmless error, where there was evidence tending to show that such injuries were permanent and his physical condition, and the jury were instructed not to consider the tables unless they were convinced to a moral certainty that a permanent injury was received.

15. SAME—OPINION EVIDENCE—ADMISSIBILITY—EXPERT WITNESSES.

The admission, in an action for personal injuries received by a patron of a show in a tent, of opinion evidence tending to show that the stakes of the show tent should not have been driven vertically, at right angles with the

earth, and should have been driven at another angle, given by witnesses not shown to have had any experience in securing such tents to the earth, was erroneous.

16. SAME—ADMISSIONS—APPEAL AND ERROR.

The admission of testimony tending to prove that either before or after a certain storm from the effects of which upon defendant's tent in which plaintiff was attending defendant's show plaintiff was injured, certain employees of defendant admitted that the tent was not properly erected or made statements from which the inference of defendant's negligence would arise, was erroneous; otherwise, if at any time responsible officers and agents of defendant made such admissions.[1]

Error to St. Joseph; Knowlen, J. Submitted April 20, 1917. (Docket No. 145.) Decided September 27, 1917.

Case by Alpha Jacobs, administrator of the estate of Crebillion Jacobs, deceased, against the Hagenbeck-Wallace Shows for personal injuries to plaintiff's decedent. Judgment for plaintiff. Defendant brings error. Reversed.

Roy H. Hagerman, George L. Yaple, Henry R. Wair, and *Victor M. Gore,* for appellant.

Theo. T. Jacobs and *Harry C. Howard,* for appellee.

Defendant's circus exhibited at Sturgis, Mich., August 13, 1914. There was a storm during the afternoon performance. It was of short duration, and was accompanied by a high wind. Testimony tends to prove that the wind, getting under the top of the large tent, inflated and deflated it, caused it to rise and fall, the action of the canvas pulled from the ground stakes to which the circumference of the tent was fastened,

[1] On liability of one maintaining place of amusement to which the public is invited, for the safety of patrons visiting the premises, see notes in 1 L. R. A. (N. S.) 427; 3 L. R. A. (N. S.) 1132; 14 L. R. A. (N. S.) 284; 19 L. R. A. (N. S.) 772; 32 L. R. A. (N. S.) 713; 42 L. R. A. (N. S.) 1070; L. R. A. 1915F, 690.

and some of these stakes, attached to ropes, came into the tent over the side walls, and were whipped about, over and among a portion of the audience. Poles inside the tent supporting the top were some of them lifted from the earth, and they performed evolutions dangerous to persons in their vicinity. Several persons, including Crebillion Jacobs, were injured; one was killed.

The plaintiff, seeking to recover damages for his injuries, charges defendant with negligent conduct—action and want of action—which he contends was the proximate cause thereof. His position is fairly denoted in the second count of the declaration where, in negativing the due performance by defendant of duties alleged, it is averred:

"Defendant failed to observe for his protection such care and diligence as the circumstances justly demanded, and contends that the tent in which he was, its supports and fastenings were defective in construction, and was not capable, and did not stand the strain and tension that might reasonably be expected. That the top of the tent was not of such material as was capable of sustaining the strain and tension that plaintiff had reason to believe that defendant would have constructed the same. That the stakes to which the supports and ropes of the tent were fastened, were not of the proper size, kind, and dimensions; and that said stakes were not properly driven, and were not driven the proper depth or the angle that a reasonable man would drive them for the purpose of properly securing or anchoring the fastenings and supports for the tent which plaintiff occupied; that said tent was not wind and rain proof according to the statement in defendant's magazines or circulars, as plaintiff had a right to believe after reading said circular or magazine; and that said defendant through its agents, officers, and directors, did not warn plaintiff that a storm was approaching, which might affect the safety of the tent occupied by plaintiff; but said defendant, well knowing the manner in which said tent had been erected and well knowing the depth and

angle that the stakes were driven, to which the supports or fastenings were anchored, failed to advise plaintiff of the approaching storm. That, well knowing this and the condition of said tent, it became the duty and was the duty to warn plaintiff of the approach of the storm so that he might retire from said tent and go to a place of safety. That instead of warning plaintiff of the approach of the storm, well knowing that plaintiff on account of said tent being entirely inclosed could not see the approach of the storm, said defendant through its officers, agents, and employees, told plaintiff, after the tent had become loosened by its pulling up the stakes, and the poles and stakes inside of the tent were being lifted from the ground, that plaintiff should remain seated, and that there was no danger, and he was entirely safe in remaining in his seat and commanded him to do so."

With the plea of the general issue defendant gave notice that it would prove that the injuries claimed to have been suffered by plaintiff were caused by an act of God. As stated by the trial court in his charge to the jury, the specifications of negligence set out in the declaration and concerning which testimony was offered were:

"(1) That the canvas material of the tent was defective and unfit and unsuitable for the purpose in that it was old, worn, and rotten; that it had holes in it, and was not capable of sustaining the strain to which it might reasonably be subjected; (2) that some of the stakes to which supporting ropes were fastened or attached were not driven to a proper depth; (3) that the stakes to which supporting ropes were attached or fastened were not properly driven, in that they were driven straight rather than on a slant; (4) that said stakes were not properly pointed, in that they were too blunt in point; (5) that some of the alternate ropes were not fastened, or properly fastened, to the alternate stakes provided therefor.

"These particulars, gentlemen, are the only particulars in respect to defendant's negligence in failing to provide a reasonably fit, suitable, and safe tent charged by the plaintiff, and you will consider no others."

In addition, plaintiff charged, as has been indicated, negligent failure to warn the audience of the approach and apparent character of the storm. In his brief, plaintiff says:

"The contention in behalf of the plaintiff was that he was entitled to recover because of defendant's negligence: (*a*) In failing to tie every alternate rope; (*b*) in failing to drive the stakes deep enough; (*c*) in failing to warn him of the approach of the storm."

The cause being at issue, the defendant moved for a change of venue, upon the ground of local prejudice, asserting inability to obtain a fair trial in St. Joseph county, supporting the motion by numerous affidavits. This motion being overruled, there was a trial, a verdict and judgment for plaintiff, and denial of defendant's motion for a new trial. The assignment of error No. 126 and the questions involved are stated by defendant to be:

"I. The refusal of the court to direct a verdict for defendant when the plaintiff rested, because: (*a*) That the declaration fails to state a cause of action; (*b*) no negligence was proven on the part of the defendant which was the efficient or proximate cause of plaintiff's injury; (*c*) that it appeared from the undisputed evidence that the proximate cause of plaintiff's injury was an act of God; (*d*) there is no proof as to how or in what manner or by what means the plaintiff was injured.

"II. The refusal of the court to direct a verdict as requested by defendant when both parties had rested.

"III. The court erred in refusing to charge the jury as the defendant requested in its written requests Nos. 21 to 31, inclusive.

"IV. The refusal of the court to charge the jury as requested in defendant's requests Nos. 32, 36*a*, and 37*a*.

"V. The ruling of the court in refusing to charge the jury as requested by the defendant in its requests Nos. 40 to 45, inclusive.

"VI. The ruling of the court in denying the defendant's motion to change the venue.

"VII. The refusal of the court to set the verdict aside and grant a new trial.

"VIII. The instructions of the court in his voluntary charge to the jury.

"IX. The rulings of the court upon the admissibility of testimony.

"X. The prejudicial language of plaintiff's counsel in his closing arguments to the jury seasonably objected to."

One, and perhaps the principal, ground set up as a reason for granting a new trial was that the verdict was against the weight of evidence.

If there was a question for the jury, then, it is claimed, it was error to instruct them, as they were instructed:

"The burden is upon the plaintiff to prove, and in order to recover he must prove by a preponderance of the evidence, either that defendant's alleged negligence was the proximate cause of the injury, or that the injury was in part the result of the act of God and in part the alleged negligence of the defendant, and that such injury was a reasonable direct consequence of such negligence. If plaintiff has not so proved he cannot recover, and your verdict must be for defendant.

"The burden is upon the defendant, gentlemen, to prove by a preponderance of the evidence its claim that the act of God was the sole and only proximate cause of the injury."

In immediate connection with, and preceding the foregoing, the court said:

"The principle of law, gentlemen, is well-settled that in order for a negligent defendant to escape liability the act of God must be the sole and only cause of the injury, and this, too, unmixed with the negligence of such defendant, for, if a defendant's negligence commingles with the act of God in the injury as an active and co-operative element, and the injury is a reasonable consequence of the negligence, such injury is regarded as the act of such defendant rather than as an act of God; and the rule of law is equally well settled that a defendant can be excused for failure to exercise

ordinary care only when the superior force of an act of God would have produced the same injury whether such defendant had been negligent or not. And I therefore charge you, gentlemen, that if you find by a preponderance of the evidence that this storm was in fact so unusual and extraordinary in character and power that by the exercise by defendant of ordinary care, prudence, and foresight such storm could not have been reasonably anticipated or guarded against, and if, by a preponderance of evidence, you further find that such storm was the sole, exclusively proximate cause of the injury, and that such injury would have occurred without regard to and notwithstanding defendant's alleged negligence, then I charge you that this would be a complete defense to plaintiff's action, and the defendant would be entitled to your verdict.

"If you find, gentlemen, by a preponderance of the evidence, that the storm was in fact so unusual and extraordinary in character and destructiveness that by the exercise by defendant of ordinary care, prudence, and foresight it could not have been reasonably anticipated or provided for, and if you further find by a preponderance of the evidence that the injury was in part the result of plaintiff's negligence and in part the result of the storm, and that the injury was a reasonable consequence of such negligence as an acting, cooperative, contributing cause of such injury, then I charge you that the defendant cannot be heard to say that such injury was an act of God, and cannot escape liability for its alleged negligence."

Error is assigned upon the last paragraph here quoted.

As the record is understood, the defendant's main tent or "big top" was 360 feet in length and 150 feet wide, and was set up at Sturgis so that its longer dimension was north and south. The canvas was carried in 16 sections, each weighing about 1,000 pounds. In erecting the tent, the ground was first measured, pins being used to designate the positions of the center and other poles, and the position of the stakes around the outside of the canvas. There were

two, perhaps three, center poles, a number of poles between them, and the circumference of the tent called quarter poles, side poles around which the side walls of the tent were carried, and the stakes, numbering 180 or 190, driven about 17 feet beyond the edges, or sides, of the canvas. The canvas in the top was secured to ropes by being sewed, the ropes running from the bail pieces or collars fitting around the poles and from the peaks of the tent and so to the edge of the canvas and the ground, ropes also passing transversely around the canvas. These ropes, when the tent is in position, are under the canvas, supporting it. The canvas was made of 6-ounce duck, and was bought, new, in April, 1914, and was in use until the day of the occurrences here considered. The seats in the tent were wholly disconnected from the tent itself. The stakes were driven, after measurements were made, by a mechanical stake driver, operated by an engine on a truck or wagon. The men engaged in this work have no other duty to perform; at least not until that duty is fully performed. Stakes were from 4 to 4½ feet long, and from 3 to 4½ inches in diameter, sharpened, or smaller, at the end which entered the earth. Properly driven, they should go into the earth from 30 to 36 inches. They were driven vertically into the earth. A stake in the outer row having been driven, the platform of the mechanical stake driver was moved in a rotary way so as to bring the hammer over the position of the stakes in the inner row, some 2 to 2½ feet inside those on the outer row. It required two hours and more to drive the double row of stakes, the truck completing a circuit of the ground. The tops of driven stakes should stand above the earth not high enough to interfere with the driving of wagons over them in other operations. The top being laid upon the ground, the sections laced together, the center poles erected and stayed by guys, the circum-

ference of the canvas fixed by the guy ropes to the stakes, the tent was raised, first high enough to admit the placing of the quarter poles and side poles, then completely. Thereafter, it was "guyed out," several men pulling upon each guy rope, which is fastened by a hitch to one and then another of the two rows of stakes. This left some 6 or 7 feet of the guy ropes—1-inch manila rope—unused. In an emergency, as a storm, other stakes are driven by men with hammers, and the ends of the guy ropes used to make an additional fastening to the ground. So, in an emergency, ropes are thrown over the tops of the side poles, at the eaves of the canvas, and carried to stakes, or the wheels of wagons, or to any other available and sufficiently heavy object, and fastened.

The storm upon the occasion here in question came from the northwest—some witnesses say from the west—with a general direction of from northwest to southeast. It exhibited some of the phenomena peculiar to winds, being variable, harmless in places, destructive in others, described by some observers as rolling, by others as having a rotary movement, by all as making a rather narrow lane in the air and upon the earth. Defendant's tents were not blown down. The interrupted performance proceeded. None of the small tents and refreshment stands was blown down or much, if any, disturbed. Automobiles standing about the grounds, some with tops up and curtains drawn, were not blown about or injured. Few outhouses, or trees, in the immediate vicinity, were blown down. The history of the storm shows, however, that at some distance, several miles away, a large building, some 90 by 16 feet, open on one side, was turned over, carrying cement piers to which it was fastened, a scaffold nearby was blown away, some boards being carried a distance of 80 feet, and in various ways considerable damage was done by the wind. The record

shows a great lack of uniformity in what different persons observed. Some describe the morning as promising a storm, others say it was a hot day with sunshine. Some who attended the show noticed no warning in the sky or air, others, shortly before the storm broke, were apprehensive, and a few took their families out of the tent. The defendant's agents seem to have been observing. Several gangs of men were set to driving emergency stakes, and efforts were made otherwise to strengthen the hold of the tent upon the earth.

When the grand entry or cavalcade, with which the performance began, was concluded, just as the storm broke, the elephants, a part of the parade, were taken out through the dressing room to a distance from the tent, instead of being returned to the menagerie. Defendant's testimony tended to prove that this was a precaution adopted in the interests of safety, on account of the danger that the animals, restless during a storm, may stampede. When the storm broke and the canvas began to heave and the poles to dance, there was a panic, or near panic, people arising and leaving their seats and crowding to the entrance, others finding a way out under the tent, many dropping from the seats in efforts to escape. Employees of defendant advised the people to remain seated, so also did others, not employees, who evidently thought to allay fears and prevent a stampede.

It was on the side opposite to that from which the wind came that the considerable mischief was done. The lifting movement of the canvas, which drew the stakes to which guy ropes were fastened and lifted the quarter poles, was destructive on the easterly side of the tent. There was testimony tending to prove that there were holes, small ones, and a few of them, in the top when it was erected and that the canvas was split or torn by the wind or by its action; that the canvas

was discolored and appeared to be mildewed. There was testimony of the opinions of various witnesses that the vertical driving of the stakes was improper driving and that if they had been driven at an angle they would better have resisted the lifting power of the guy ropes and the top. So, too, witnesses were permitted to express the opinion that some of the stakes were too blunt—not properly pointed.

Various witnesses testified about the depth to which the stakes were driven, to the measurement of stake holes after the show had left the city, to measurements of stake holes in another city, where an exhibition was given. Two witnesses, whose testimony seems more or less incredible, testified that, immediately after some stakes had been driven, and while the stake driver was at its work, they tried stakes by pulling on them and found them loose in the earth, yielding by sideways movements to such force as they applied. One, at least, of these witnesses expressed the opinion that he could have pulled the stakes, or some of them he handled, with his hands. On the other hand, the undisputed testimony is, in substance and effect, that defendant used stakes of the size and kind, and drove them in the same way, that all other large circuses employ; that the method of making and erecting the tent is the result of experience and is that employed by all large tent shows.

Plaintiff introduced testimony of statements made by men connected with the circus after the storm tending to prove, by admission, the improper driving of the stakes. To go no further into details, what is here stated seems to be sufficient to explain, generally, the situation laid before the jury.

OSTRANDER, J. (*after stating the facts*). Not all of the questions which the defendant says are involved are pressed upon the attention of the court, and not all of those denoted require discussion.

1. The suit at bar and nine other similar suits were begun on the day the alleged injuries were received. Defendant is a foreign corporation. A large number of people attended the circus. The circumstances invited public interest and discussion, and the charges that the defendant's agents did not properly secure the tent and safeguard the patrons of the show, and the respects in which they were charged with being derelict, were known in and about Sturgis and were discussed there and elsewhere in the county. There were not lacking those who expressed opinions upon the subject, unfavorable to defendant. This appears from the affidavits filed in support of the motion for a change of venue, the affidavits in most instances expressing the belief that an impartial trial of this case could not be had in St. Joseph county. So far as opinions are to be considered, affiants who made affidavits opposed to the motion expressed a contrary opinion. In the original declaration, the damages were laid at the sum of $1,950, it was later amended so as to claim damages in the sum of $2,990, and the inference is drawn, not unreasonably, that a removal of the cause to the Federal court was something counsel for plaintiff desired to prevent.

It is assumed, nothing to the contrary appearing, that no difficulty was encountered in securing a jury, and there is no claim made that the damages awarded, $1,000, were excessive, there being testimony to support the conclusion that injuries received by the plaintiff were permanent. Assuming that questions of fact were properly submitted to the jury upon competent and material testimony, the result of the trial is not indicative of a hostile public sentiment or of prejudice on the part of the jury. There is no inevitable legal inference from undisputed facts that local prejudice existed, and none that the court below abused judicial discretion in denying the motion for a change of venue.

People v. *Gage*, 188 Mich. 635, 643 (155 N. W. 464).

2. While the declaration alleges as inducements to plaintiff to enter the tent an advertisement, circulated by defendant, to the effect that the tent was storm proof and wind proof, and it is duly alleged that plaintiff paid the price asked by defendant for a seat in the tent, the gravamen of the action is negligence.

Whether defendant was negligent in all or any of the respects alleged, and whether the negligence proved was the proximate cause of the injury received by plaintiff, were questions fairly raised by testimony produced by plaintiff, and questions which could not and cannot now be properly answered by the court. The testimony for plaintiff tends to prove that the storm was an ordinary summer storm; that stakes which it was usual to drive into the ground from 30 to 36 inches were driven only from 18 to 24 inches, or a less distance. The inference is not unreasonable that, if the stakes on the easterly side of the tent had held, no mischief would have resulted. Defendant contended, and contends, that it used ordinary care in providing and in erecting the tent, that the storm was extraordinary, was, indeed, so violent that such acts of negligence on its part as are alleged were, as to the consequences, negligible.

In an opinion delivered in the case of *Cole* v. *Loan Society*, 124 Fed. 113 (59 C. C. A. 593, 63 L. R. A. 416), relied upon by counsel for defendant, it was said:

"An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence, but that could not have been foreseen or rea-

sonably anticipated as its probable consequence, and that would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate, cause of the injury. A natural consequence of an act is the consequence which ordinarily follows it—the result which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it. * * *

"The test of liability, therefore, in cases of concurring negligence is the same that it is in all other actions for negligence. It is the true answer to the questions: Was the injury the natural and probable consequence of the act on which the action is based? Was it reasonably to be anticipated from that act? If it was, the action may be maintained, although the negligence of another concurred to produce the untoward result. If it was not, the act of negligence will not sustain an action, whether the act of another concurred or failed to concur to produce it. A negligent act from which an injury could not have been foreseen or reasonably anticipated is too remote in the line of causation to sustain an action for an injury in every case, and the concurring negligence of another cannot make it less remote, nor charge him who committed it with responsibility for it to which he would not have been liable to answer in the absence of the negligence of the third party."

It is lawful that public entertainments shall be given in tents. Proprietors are not insurers of the safety of patrons, but they must exercise, to prevent disaster, care commensurate to the situation. See *Scott* v. *Athletic Ass'n,* 152 Mich. 684 (116 N. W. 624, 17 L. R. A. [N. S.] 234, 125 Am. St. Rep. 423); *Logan* v. *Agricultural Society,* 156 Mich. 537 (121 N. W. 485); *King* v. *Ringling,* 145 Mo. App. 285 (130 S. W. 482). In the latitude of Michigan, summer storms with wind and rain are common, the wind often attaining considerable velocity and doing considerable

injury. Such storms often arrive, break suddenly, and are as soon gone. These were circumstances to be considered by the defendant in erecting the tent. They were to be considered, also, by patrons, who could not expect that tents, however well constructed and erected, would be as substantial as houses and afford the same protection from the elements. The doctrine of the case just referred to, applied here, required that the jury, upon the whole case, determine whether the facts upon which defendant's liability depends, were established.

3. It is urged, and is true, that the testimony for the plaintiff fails to show what object struck him, except as the cause of injury may be inferred. It is a reasonable, if not necessary, inference, that he was struck by some of the paraphernalia of the tent, a stake, or pole. There is no testimony to support an inference that objects not connected with the tent, and set in motion by the action of the canvas, entered the tent and inflicted the injury. *Scott* v. *Railroad* Co., 182 Mich. 514, 522 (148 N. W. 719), and cases cited in opinion. Considering that the testimony required the case to be submitted to the jury, and the court having submitted it, it remains to be seen whether reversible error was committed in the charge, in admitting or rejecting testimony, or otherwise in the conduct of the trial.

4. The charge of the court must be read as a whole and with regard to the contentions of the parties. The jury was instructed that the plaintiff must establish, by a preponderance of the evidence, that defendant was guilty of negligence, and that its negligence was the proximate cause of plaintiff's injury;

"that circus tents are not erected with a view to resist storms of such an unusual or extraordinary character as may not by the exercise of ordinary care and foresight be reasonably anticipated or provided for or

guarded against. * * * Ordinary care * * * is the measure of duty of defendant, and the jury have no right to hold defendant to a higher degree of duty;"

if the evidence left it as probable that the injury was the result of the storm as the sole and proximate cause as it did that it was the result of defendant's alleged negligence as the sole proximate cause, plaintiff could not recover. Other portions of the charge have been set out. One request to charge, No. 41, was:

"The defendant was not required to contemplate or provide against unusual or extraordinary storms."

And another, No. 43, was:

"As applied to this case, an act of God may be defined as a natural cause, such as a storm of wind, whatever its characteristics may be, which cannot be prevented by the exercise of ordinary care and the use of those appliances which the situation of the party renders it reasonable that he should employ."

Neither was given as preferred. As to No. 41, it was said, in refusing a new trial, that it "lacked this additional language: 'Of such a character that human care and foresight could not anticipate or guard against.' It was covered by general charge."

Defendant was bound to anticipate the ordinary usual storm of the season and latitude and its probable consequences, reference being had to the character of the structure to which the public was invited, and in view of such a storm arising, and in view of its probable consequences, it was bound to use ordinary care in the selection and erection of the tent. If it did this upon the occasion here in question, it is not liable in this action. If it did not, then it may be liable unless the storm was so violent in character that, whether defendant was or was not negligent, in the respects indicated, the result would have been the same; unless to the storm may be charged whatever occurred.

This, in substance and effect, is the rule given to the jury, and is the correct rule; but as applying the rule, and as affecting its possible liability, I am impressed that defendant was entitled to have its requests 41 and 43 given as preferred. The court went further. The jury was told that the burden rested upon defendant to prove that the storm was so violent that it was the sole proximate cause of plaintiff's injury. In this the court was in error, because plaintiff, upon the whole case, was bound to prove that defendant's negligence was the proximate cause of the injury.

The rule stated by the court has been applied where goods intrusted to a common carrier were lost or destroyed. In the absence of contract, the common law imposed upon common carriers the extraordinary liability of insurers against all loss unless occasioned by the act of God or the public enemy, and the carrier was not permitted to throw upon his employer the burden of proving, or inferring, negligence or defective means until the carrier had shown the intervention of such an extraordinary, violent, and destructive agent as by its very nature raised the presumption that no human means could resist its effects. See, generally, *McArthur* v. *Sears,* 21 Wend. (N. Y.) 190; *Coggs* v. *Bernard,* Lord Raymond, 909, and note, 1 Smith's Lead. Cas. (8th Ed.) 369, 422; *Tobin* v. *Railway Co.,* 192 Mich. 549 (159 N. W. 389). No such extraordinary liability is imposed by the law upon the defendant.

The court was not in error in advising the jury upon the subject of the duty of defendant to warn the audience of the approach of the storm, correctly stating that as affecting this duty was the actual condition of the tent, presumably known to defendant. It might well have added to the instruction that if the storm was an ordinary one, as plaintiff claimed it

was, and the tent was put up as defendant asserted it was, there could arise no duty to warn. It is not difficult, after a critical reading of the charge, to suggest additions to and variations of the language calculated to enlighten the jury. None was made by defendant, whose requests to charge, except as given in the general charge, as indicated herein, it was not error to refuse.

5. In view of the testimony tending to prove the physical condition of plaintiff and permanent injuries, it was not reversible error to admit in evidence the tables of mortality showing his expectancy of life. It is true that Dr. Kane, the only witness upon the precise subject of a continuing injury, testified only that his condition *might* continue during life. But plaintiff was 82 years old when he gave his testimony. (He has since died.) He was hit on the head, and a bad wound resulted. He was thought by some to be dead. Effects of the injury were that he was dizzy, walked with difficulty, using a cane. He lost his balance when standing and fell. Pain continued. He testified at length to his condition. He had enjoyed excellent health, never had been sick. The court instructed the jury not to regard the tables unless they were convinced to a *moral certainty* that a permanent injury was received.

6. It was error to admit opinion evidence tending to prove that the stakes should not have been driven vertically, at right angles with the earth, and should have been driven at another angle. No witness who expressed such an opinion was shown to have had any experience in securing large tents to the earth. It has been pointed out that the method of driving stakes employed by defendant is, according to the undisputed testimony, the method employed in securing all large circus tents; is the method which experience has demonstrated to be best.

It was error to admit testimony tending to prove that, either before or after the storm, employees of defendant admitted that the tent was not properly erected, or made statements from which the inference of negligence would arise. Otherwise, if, at any time, responsible officers and agents of defendant made such admissions.

The witness Simpson was asked, and over objection and exception he answered, this question:

"*Q.* I wish you would state whether in your opinion if those stakes had had proper points on them and were driven to a depth of 30 to 36 inches whether or not in your opinion they would have held and not pulled out in that storm as you observed it, with the tent as you observed it, sitting up there?"

He answered:

"*A.* Why, I should think they would have held."

This witness had not qualified as an expert in this behalf, nor does it appear upon what premises his conclusion was based.

7. It is complained that plaintiff's attorney used in argument intemperate language. As reported, it was most intemperate. As it was immediately disclaimed, it may or may not have prejudiced defendant. It will not be assumed that upon a new trial it will be repeated.

8. A careful examination of the large record presented in this case has not convinced me that the verdict is opposed to the great weight of evidence.

For errors pointed out, the judgment must be reversed, and a new trial granted, with costs to appellant.

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

HOPKINS *v.* TRIPP.

AUTOMOBILES—DAMAGES—EVIDENCE—QUESTION FOR JURY.

In an action by an occupant of an automobile against the owner of another automobile to recover damages for injuries sustained in a collision, the evidence *held*, to present a question for the jury as to whether defendant was negligent or plaintiff was guilty of contributory negligence.

Error to Oakland; Smith, J. Submitted April 9, 1917. (Docket No. 27.) Decided September 27, 1917.

Case by Minnie Hopkins against Arthur R. Tripp for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Patterson & Patterson, for appellant.

Andrew L. Moore, for appellee.

OSTRANDER, J. It is complained by defendant, appellant, that the court erred in refusing to direct a verdict for him, erred in amending certain preferred requests to charge the jury upon the subject of plaintiff's contributory negligence, and erred in refusing to set aside the verdict and enter judgment for defendant because of plaintiff's negligence, or grant a new trial because the verdict is contrary to the great weight of evidence.

In deciding adversely to defendant the motion for a judgment or a new trial, the trial judge stated that he was satisfied that the verdict was against the clear weight of evidence, and that, technically, the defendant was entitled to a new trial. The verdict (which was for $200) is accounted for, he says, by the following reasons:

"(1) My experience long ago taught me that the ordinary jury in most litigation between a layman and a lawyer is somewhat prejudiced against the lawyer. I could cite instances.

"(2) It was made to appear to the jury that Mrs. Hopkins and her husband were in rather straitened circumstances financially, working people in fact, and that Mr. Tripp is not. I make no assertion as to whether that is true or not, but the jurors believed so.

"(3) Mrs. Hopkins was injured. In hurrying across the street a few moments after the accident for aid for his wife, Mr. Hopkins was struck by an automobile and also injured. Mr. Tripp escaped any personal injury. This appealed to the sympathy of the jurors.

"In theory the jurors do not disclose their deliberations and reasons for their verdict. In fact, they very often do. I am entirely certain that the verdict was a compromised one. That nearly all of the jurors were for a verdict against the defendant, and a majority of them for a large verdict against him; also that it was because of the above reasons, especially No. 3. Their view was that it should be decided upon what they considered as equitable grounds, that because Mr. Tripp was not injured and able to pay, therefore he ought to contribute."

He finds that, *technically*, the defendant is entitled to a new trial, but says:

"This is an expensive case both to the litigants and the county. It will require nearly a week's time. A new jury will be made up of men of like bias and sympathies as the other one. The same three reasons above stated will exist. It is my sincere belief that a new trial is very much more likely to result in a larger verdict against the defendant than of one in his favor. If it is granted, it should be by the Supreme Court. It is for consideration by that court that the above general statement is made."

Plaintiff is wife of George Hopkins, who was owner of a Ford touring car. They have a daughter, Lillian. Defendant was owner of a large four-cylinder Buick touring car. All live in Pontiac. The main north

and south street in Pontiac is Saginaw street. In the business section, a street called Auburn avenue enters Saginaw street from the east, but does not cross it, there being stores, etc., on the west side of Saginaw directly across from Auburn avenue. From Saginaw street Auburn avenue runs a little south of east. Saginaw street is 65 feet wide from curb to curb, and in it are three street car tracks. From curb to curb Auburn avenue is 35 feet wide. On the north side of Auburn, and east of Saginaw, is a block of stores extending east to an alley. On the southeast corner of Saginaw and Auburn is a barber shop, and south of that, on Saginaw, stores, one of which, a few doors from the corner, housed the sales agency and garage of the Buick Motor Car Company. With the garage as his objective, defendant was driving his car, carrying several persons, on Auburn avenue, towards Saginaw street, at the moment when the Hopkins car, driven by Lillian, and carrying her mother, father, and another, was going south on Saginaw and intending to enter Auburn, on which street was the Hopkins home. By the law of the road, defendant should have proceeded on the north side of Auburn into and across Saginaw, going south on the west side of Saginaw. So plaintiff's car should have been driven south on the west side of Saginaw, turning east and entering Auburn avenue on its south side. In fact, the cars were in collision at the southeast corner of the intersection of these streets, on the crosswalk over Auburn, on the east side of Saginaw. The inference is that one or both of the drivers was in fault. The jury returned a negative answer to the special question, "Did the Hopkins car approach the northeast corner of Auburn avenue on the easterly side of Saginaw street?" thus rejecting defendant's contention, supported by his own and other testimony:

That Lillian was cutting the corner, turning into

Auburn avenue from the north at the moment when defendant was entering Saginaw street from the north side of Auburn; "that by reason of buildings and a delivery wagon and another vehicle or two intervening and the Hopkins machine approaching diagonally from the northwest, the automobiles were concealed from each other, and came into view and were observed when not more than 15 or 20 feet apart; that the speed, direction, and nearness together of the two automobiles threatened an immediate and violent collision unless some means were instantly found and employed to avoid the same, and avert the danger thereof; that because of the conditions confronting him, which the defendant believed rendered any other course extremely perilous, if not absolutely impossible, he at once realized that the safety of all in both machines required him to, and he accordingly did, immediately turn his automobile to the left, release the clutch, and put on the service brake, upon the assumption that the driver of the Hopkins automobile would sheer to the right, proceed a little way south on Saginaw street, and thus avoid any collision, which she could easily have done, but only did in part; and that because she did not continue going south a little way further, after having started to do so, nor seasonably attempt any other means calculated to prevent a collision, but, instead of doing either, after veering sufficiently to the right and proceeding southward on Saginaw street, passing defendant's automobile, did suddenly, without warning and unexpectedly to defendant, turn her machine to the left in an attempt to proceed up Auburn avenue, by dashing past in front of defendant's automobile before it was fully stopped, which she very nearly succeeded in doing, the collision took place."

With this contention rejected, there was nothing except the plaintiff's theory to explain how the cars reached the positions they were in when movement ceased. Defendant testified that the impact was slight; his own car having practically come to a standstill when it struck plaintiff's car. The position of the cars unexplained, or explained only by knowledge

of the places to which, and general directions in which, they were respectively being driven, indicated that defendant was the misbehaving driver. There was positive testimony of his misbehavior, and of plaintiff's care. The record makes a case for a jury. There was conflicting testimony affecting every material issue, for which reason the court could not properly determine any of them. From the record it seems there is more, and better, testimony opposed to than there is in support of plaintiff's theory, but it is not so conclusive as to require this court to overrule the trial court in refusing a new trial.

What has been said answers the contention presented in appellant's brief and requires an affirmance of the judgment. I have not considered, because appellant does not, the reasons stated by the trial court for granting, and for refusing, a new trial, nor considered why, if defendant, in the opinion of the trial court, is *entitled* to a new trial, this court and not the trial court, should grant it.

Plaintiff claims to have received considerable injuries. The verdict, if defendant was at fault, does not indicate prejudice. Counsel for appellee asserts that certain purported facts set forth by the court in denying the motion rest wholly in the mind of the court, and are not supported by the record; that, for example, there is nothing about George Hopkins' financial condition, or whether defendant is rich or poor.

The judgment is affirmed, with costs to appellee.

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

SANDSTROM *v.* MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO.

1. APPEAL AND ERROR—DEFINITENESS OF ASSIGNMENT.
   An assignment of error that there is no evidence in the case to support a verdict for plaintiff is definite.

2. NEGLIGENCE—EVIDENCE—SUFFICIENCY.
   Evidence *held*, insufficient to show that children habitually played on logs along a railroad track or that any officers or agents of the company knew of children playing on logs prior to the death of a child which was killed by being run over by a log while playing on the logs.

3. SAME—ACQUIESCENCE—LICENSE—CUSTOM.
   Acquiescence in the use of premises—license to use them—must depend upon some known customary use.

4. SAME—DEATH—CHILDREN—DIRECTED VERDICT.
   In an action to recover for the death of a child which was run over by a log on which it was playing alongside of a railroad track, at a point on the bank, three feet above a tract of land owned by defendant on which children were accustomed to playing, where there was no evidence of a license to use the property of defendant, or that the depositing of the logs was a new use of the property, or that the depositing of the logs created a peril affecting any customary use of the premises, *held*, that a verdict for defendant should have been directed.[1]

Error to Delta; Flannigan, J. Submitted April 18, 1917. (Docket No. 85.) Decided September 27, 1917.

Case by John Sandstrom, administrator of the estate of John Morris Sandstrom, deceased, against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company for the negligent killing of plaintiff's de-

[1]On origin of doctrine of attractive nuisance, generally, see note in 19 L. R. A. (N. S.) 1094; 47 L. R. A. (N. S.) 1101.
Authorities discussing duty of property owner to trespassing child, see notes in 32 L. R. A. (N. S.) 559; 41 L. R. A. (N. S.) 274.

cedent. Judgment for plaintiff. Defendant brings error. Reversed.

G. R. Empson, for appellant.

A. H. Ryall and *James Frost,* for appellee.

In and about its business at Gladstone defendant occupies (and owns) a certain tract of land, having an average width of 1,000 feet and a length of three-fourths of a mile. People live on land which surrounds it, and there are in its vicinity warehouses and manufacturing plants. The land is not inclosed; the most of it is not in fact used for any purpose. People have habitually crossed and recrossed it at convenience or pleasure. There are numerous paths—worn footpaths—crossing it in various directions. Upon one portion of it there was a baseball ground, where games of ball were played. The general condition had existed for years. Children entered there and played. There are still some stumps in the field, which, while generally level, has an irregular, uneven surface. Across it is a "fill" leading down to the docks, and upon this fill, or elevated land, are two railroad tracks. One of the tracks was formerly used for cars traveling to an ore dock, which defendant once maintained. Since 1904 it has been used as a storage track, and material piled alongside of it. Sometimes logs were unloaded along the tracks. In the winter of 1913-14 logs were so stored along the track; one of them a log 16 feet long and some 2 feet in diameter. It did not lie exactly parallel with the rails, but did lie upon the upper face of the elevation, or fill, and that part of it farthest from the rails was very near the shoulder of the fill, from which the ground sloped away to the level of the field. March 14, 1914, was Saturday, and a warm day. Such snow and ice as remained was melting. Children, among them plaintiff's decedent, a boy 6

years and 10 months old, were upon defendant's premises, in the immediate vicinity of which his parents lived. A girl, 12 years old at the time of the trial, testified that she was on the log when it began to roll, and stepped off. Plaintiff's decedent was astride the log, and did not get off. Unfortunately it rolled upon and killed him. The children had been jumping from one to another of the logs. Another child, a little girl, was also on the particular log, felt it move, and jumped from it.

Indicating the theory of plaintiff's case is the following, taken from the declaration:

"It * * * became and was the duty of the defendant not to place on said property anything of a dangerous character which would be attractive to children, or which would tend to entice them to go upon said property, and it became and was the duty of the defendant not to place upon said property, and especially near the paths running across said property, anything of a dangerous character, so as to change the condition thereof without placing signs of notification and warning thereon, or in some way giving notice to those using said premises of the change of condition, or without guarding it, so that children and other persons who were in the habit of using said property would be protected from any change in the condition of said premises, and from any dangerous thing or device thereon. And it became and was the duty of the defendant to inform and warn all persons, and especially children of any new or unseen danger on said premises, and of any danger arising from anything placed by defendant on said premises. Yet the said defendant, disregarding its said duties toward persons in the habit of using said premises, * * * did carelessly and negligently fail and neglect to observe its duties in that it did place thereon things and devices of a dangerous character, to wit, the logs hereinafter referred to, and which were attractive to children, and did maintain on said premises an attractive nuisance near the paths running across said premises, and did place on said premises things of a dangerous

character, to wit, the logs hereinafter referred to, without placing signs of warning thereon, and did fail to guard said logs, so that children and other persons who were in the habit of using said property were not protected from said dangers, and from the danger arising from playing on said logs, and did not give notice of the change in the condition of said premises, and did not warn said children of the dangers arising from playing on said logs, so that by reason of the premises the said John Morris Sandstrom, without any carelessness on his part, but through the carelessness and negligence of the said defendant, was injured and killed in the following manner, viz.: That said tracks ran on a grade, to wit, three feet higher than the adjoining ground; but that said grade and embankment and also the surrounding ground was rough and irregular, so that the place where the logs hereinafter mentioned were dumped was uneven, irregular, and unstable, and at the time said logs were placed on said premises there was snow and ice on the ground, which snow and ice melted from day to day, thereby changing the condition of the matter on which said logs rested, and rendered them unstable and unsafe, and a short time before the 14th day of March, 1914, the said defendant caused certain logs to be dumped and unloaded from one of its cars onto said vacant premises, and alongside its tracks running through said premises, and near to one of the paths crossing said premises, and upon the uneven ground and embankment and snow herein referred to. That said logs were not piled in an orderly manner, but were thrown off of said cars loosely, and permitted to remain as they fell from said cars, and were so placed that, because of snow and ice on which they rested, and because of the insecure manner in which said logs rested on the ground, and on the slope of the embankment near said track, said logs were likely to roll and fall upon any person touching or moving or being upon said logs, and that the said John Morris Sandstrom, together with other children, on the said 14th day of March, 1914, went upon said premises, and being attracted by said logs, which had recently been placed thereon, went upon said logs, and played thereon, and that thereupon, while said children and said John

Morris Sandstrom were playing on one of said logs. one of said logs rolled and fell from the position in which it was then, and rolled and fell upon the said John Morris Sandstrom, and injured him, so that he died instantly."

Plaintiff says:

"This case is based on the right of a licensee to protection against active changes in the premises, through which an injury is inflicted."

And again:

"As previously stated, this case is based on a theory which has always been recognized by this court, but which was elucidated and reaffirmed in *Morrison* v. *Carpenter*, 179 Mich. 207 (146 N. W. 106, Am. & Eng. Ann. Cas. 1915D, 319), where Justice STONE went thoroughly into all of these questions, and drew the clear distinction between a situation of this sort, and such as was presented by *Ryan* v. *Towar*, 128 Mich. 463 (87 N. W. 644, 55 L. R. A. 614, 92 Am. St. Rep. 560), or any of the more recent cases cited by defendant."

And the question submitted to the jury was finally put to them in this way:

"I have endeavored to make it clear to the jury that if the railway company had been accustomed to store these logs in the manner in which the logs were found there on the right of way, if that was their practice, and that was their practice at the time the license was granted, and they continued along depositing logs there, and the children continued along playing there, then if the child was injured by playing on one of those logs there would be no liability, because you see in that case the railway company gave them permission to play on the logs—to play on the ground and play on the logs—and, if they got hurt there, there would be no liability.

"But if the railway company had not been accustomed to deposit logs on the roadbed at that place, and had granted a license for the children to play there, and, after having granted the license, deposited

logs there, that would be a change in the condition of the place to which the license attached. They would have a right to change the condition of that place; but they would not have a right to so change it so as to put it in a condition dangerous to these children whom they had permitted and consented might play there.

"Now, I have already said to you, quite fully I think, that it means this: That they would have a right to change the conditions in any manner they saw fit, unless the change was of a nature which would advise an ordinarily prudent person that an accident such as this was likely to follow from it."

The jury had been instructed:

"It is not claimed in this case that any officer, or agent, or employee of the Soo railway company ever told these children that they might play there. There is no claim in the case that the defendant railway company expressly, by word of mouth, consented that these children might play at that place, or upon any part of the tract of land. From the absence of that testimony to that effect it does not follow that the jury may not find the defendant consented to their playing there. The consent of the defendant railway company to the use of the ground by the children as a playground may be inferred, provided you are able to say from the testimony in the case that the children used this part of the ground where the logs were—remember, I am always referring to that particular place—provided you are able to say from the testimony in the case that the children used that part of the ground so openly, and for such a long time, and so continuously as a playground that it is reasonable to suppose that the defendant company knew they were using it, and that it is reasonable to suppose that the defendant company consented thereto. The use, however, of the ground by the children, if it was used by them, is to be considered by you in connection with all the other evidence in the case, and you are then to say whether or not you find that the defendant railway company consented to the use of that ground by the children.

"Now, gentlemen, bear in mind this distinction, which the court is seeking to make here: The mere use of the ground by the children as a playground, the fact

that they went there and played, would not be enough to charge the railway company with responsibility. You must go further than that, and you must be able to say from the testimony that the use which the children made of the place was of that character, and was for such length of time, that it is reasonable to suppose the defendant company consented to it. In other words, you must find by inference, as I said, from the testimony in the case, that the defendant company did actually consent that these children might occupy that particular place as a playground."

At the close of the proofs, defendant, assigning reasons, moved for a directed verdict in its favor. The court reserved the determination of legal questions, took the verdict of the jury, and later overruled the motion and entered judgment on the verdict. A separate opinion, which was filed, recited that at the close of the proofs defendant moved for a directed verdict in its favor, on the ground that there was no evidence in the case which would support a verdict in favor of the plaintiff, and that the question presented was reserved for decision. The judgment entry confirms this.

Error is assigned upon the ruling. Plaintiff says the assignment is too general, and upon authority of *Gold* v. *Railway*, 169 Mich. 178 (134 N. W. 1118), cannot be considered, and declined to discuss it. Defendant argues two principal propositions, which are: *First*, that it violated no duty which it owed to plaintiff's decedent; *second*, that the court erred in submitting to the jury the question whether defendant had knowledge, actual or constructive, that children were in the habit of playing upon the logs stored upon its premises.

OSTRANDER, J. (*after stating the facts*). The ruling in *Gold* v. *Railway, supra*, is based upon *Jackson Bridge & Iron Co.* v. *Insurance Co.*, 122 Mich. 433 (81

N. W. 265); *Wolfe* v. *Stack*, 153 Mich. 445 (116 N. W. 1010), and *Canerdy* v. *Railway Co.*, 156 Mich. 211 (120 N. W. 582). See, also, *Nelson* v. *Extract Co.*, 184 Mich. 111 (150 N. W. 317). The point that the assignment of error here is too general—not specific—is decided against appellee by the record. Clearly, it is specific.

It is admitted by plaintiff that his decedent was not invited upon the defendant's premises. He disclaims any aid from the doctrine of the *Turntable Cases*, so called. Those cases, recognizing the rule that one whose entry is simply not opposed and prevented is not invited upon premises, found an invitation to children to enter premises in the attractive thing erected or maintained thereon. Plaintiff's contention rests upon three assumed facts: (1) That plaintiff's decedent was a licensee; (2) a change made by the owner in premises which plaintiff's decedent was licensed or permitted to use, creating a peril; (3) an injury growing out of the customary use of the premises by the licensee and the peril actively created by the owner —a wilful act of injury.

I find no testimony tending to prove that children habitually played on the logs, or on the ground where they were deposited. There is testimony tending to prove that, two days before the occurrence here in question, some children were playing on the logs; but there is no testimony tending to prove that any officer or agent of defendant knew about it. This answers precisely a question which the court submitted to the jury, namely, whether the defendant "did actually consent that these children might occupy that particular place as a playground"—a question which the court made a vital one and should have answered favorably to defendant. There is no need, perhaps, to here comment upon the use by the court, in the part of the charge referred to, of the expressions "consented

thereto" and "consented to the use of that ground," expressions which seem to be confusing. The testimony supports no idea, or theory, of *consent* by the defendant to any use by the public of its premises. At the most, defendant did not exclude the public, and, while its knowledge that the public was customarily making a certain use of a part of its premises might raise a duty not by its acts to make such customary use perilous, such an idea of its duty depends not at all upon any idea of its consent to such use.

As, at the best, acquiescence in a use of the premises —license to use them—must depend upon some known customary use, if we assume that plaintiff's decedent was a licensee, no testimony tends to prove a license to use the roadbed of defendant's tracks for any purpose. There is no testimony tending to prove that the depositing of logs along the track was a new use of the property, and none tending to prove that the depositing of the logs created a peril affecting any customary use of any part of the premises by any of the public.

It follows that the court, upon the evidence, ought to have determined the case favorably to defendant, and that the judgment must be reversed, with costs to appellant.

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

MCNEAL *v.* DETROIT UNITED RAILWAY.

1. STREET RAILWAYS—AUTOMOBILES—NEGLIGENCE QUESTION FOR JURY.

In an action by the owner of an automobile against a street railroad company for damages for personal injuries and for injury to his automobile caused by the automobile being struck in the rear as plaintiff was proceeding on the track but was slowing up to speak to a man on the sidewalk, *held*, that it was a jury question whether defendant was guilty of negligence and plaintiff of contributory negligence.

2. SAME—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.

The refusal of instructions on the preponderance of evidence on behalf of defendant in an action for personal injuries, is not error where the court instructs that before one can recover under a claim of negligence, he must show and establish by proofs in the case the negligence of the person charged, and that it is left for the jury to determine whether or not plaintiff has shown by the "fair preponderance" of evidence that in what he did at the time of the accident he exercised that degree of care and caution that an ordinarily prudent person would exercise under like circumstances.

Error to Wayne; Mandell, J. Submitted April 20, 1917. (Docket No. 144.) Decided September 27, 1917.

Case by John S. McNeal against the Detroit United Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Corliss, Leete & Moody (*Benjamin S. Pagel,* of counsel), for appellant.

Harold McIntyre, for appellee.

OSTRANDER, J. Plaintiff was driving his motor car on defendant's track. One reason for doing so was

that between the tracks and the curb the presence of snow affected ease and comfort of travel. Defendant's street car, following plaintiff's car, struck it, injuring the car, and injuring the plaintiff. Plaintiff says defendant's servant negligently drove the street car upon him. It is defendant's claim that plaintiff's negligence alone caused the injury, that no negligence on the part of defendant's agent is made out, and therefore a verdict for defendant should have been directed. Error is also assigned upon the refusal of the court to give certain preferred instructions to the jury.

In any view, the issue is a narrow one. Defendant's agent saw the plaintiff's car, and claims to have directed the movement of the street car in conformity with the visible and probable movements of plaintiff's car, at the same time clamoring with the gong for the right of way. Plaintiff, he says, without apparent reason or excuse, diminished the speed of his car, bringing it almost to a stop, when he was justified in assuming that the speed of the car would be increased. The street car was a few feet in the rear and could not be stopped, although proper efforts were made to stop it. Add to this the claim that plaintiff, if he did not know, ought to have known, that a street car was behind him, and defendant's case is, in substance, presented.

It is well enough to more carefully detail plaintiff's actions as he himself described them. He was calling upon customers. He called on one at the southwest corner of Pallister and Hamilton, driving his car to the curb on Hamilton and stopping the motor. His call occupied 10 or 15 minutes of time. He looked for a car, about half a square, about 175 feet, and saw none, cranked his car, and drove it out obliquely upon the street car track—the west or south-bound track.

"*Q.* I wonder how you limited your vision to half a block?

"*A.* I may have glanced a mile and a half up that street.

"*Q.* You did not see any street car?

"*A.* I did not say that, but there was no street car in my immediate vicinity. * * *

"*Q.* How many miles an hour were you driving as you drove down the car track?

"*A.* Going very slowly.

"*Q.* How many miles an hour were you going from the time you got on the track until you commenced to slow up—what rate of speed were you going?

"*A.* Five or six miles an hour. * * * When I got to the corner of Bethune, the man I wanted to stop for was on the sidewalk between Pallister and Bethune, the same block that I was passing. I should say he was two-thirds of the way from Bethune street to Pallister. I passed him, and turned up into where the snow was out of Bethune in the section.

"*Q.* What part of Bethune were you on when you were hit? In the middle or the north or south side of it?

"*A.* A little bit to the south of the center.

"*Q.* So your automobile was still running at the time it was hit?

"*A.* Yes, sir.

"*Q.* Still moving forward?

"*A.* Yes, sir.

"*Q.* What rate of speed—how many miles per hour was it going when it was struck?

"*A.* Very slowly.

"*Q.* Three or four miles an hour?

"*A.* I should approximate about that.

"*Q.* Were you struck near the center of Bethune?

"*A.* Just below the center.

"*Q.* Where was it, with reference to Bethune avenue, that you attempted to slow your car down first?

"*A.* Right at Bethune avenue.

"*Q.* The north side of Bethune, or the center of the street?

"*A.* About the center of the street.

"*Q.* You had only traveled a distance of five or six or seven feet from the time you commenced to slow down until you were struck?

"*A.* A little more than that. To make it slow you

shut off the gas. I did not leave my engine running. It would not stop it. I would not put so much effort on; that is all. It was a two-speed car; there was only two speeds to it.

"*Q.* How many feet did you run from the time you shut off the gas until you were struck? Was it five or six or more?

"*A.* Well, my gas was not shut off entirely.

"*Q.* From the time you did whatever you did—I do not care what it was—from the time you started to stop until you were struck, did you run five or six feet, or more?

"*A.* I would approximate it eight or ten feet.

"*Q.* You were running during that time, in the process of slowing up, at the rate of three or four miles an hour?

"*A.* I had not got under headway from where I started up on Pallister street. I think I must have been running seven; it may have been five on the street. When I started to stop, I was going four or five miles. When I got struck, I was running at that rate of speed. My car went 17 feet from the point where it was struck until it came to a standstill; that is, including the length of my own car. My automobile, when it came to a standstill, was off the track entirely. The street car had not entirely passed it; the head or front of the street car was ahead of my automobile; the back of the automobile behind it.

"*Q.* Your automobile would be about midway between the front end and the back end of the street car when you came to a standstill?

"*A.* It was nearer the front end.

"*Q.* The motorman said the rail was slippery?

"*A.* Icy.

"*Q.* And the brakes would not hold?

"*A.* That is just what he said. There was no other reason for me to stop at the corner of Bethune, except to pick up that man. If he had not been there, I would have gone down the track.

"*Q.* At an increased rate of speed?

"*A.* Undoubtedly."

This testimony was given upon his cross-examination. He did not look for a car after he entered his

own car; did not hear the approach of the car, nor any warning signal of its approach. Somewhat similar situations have before this arisen. *Ablard* v. *Railway*, 139 Mich. 248 (102 N. W. 741); *Clark* v. *Traction Co.*, 167 Mich. 694 (133 N. W. 927); *King* v. *Railway Co.*, 176 Mich. 645 (143 N. W. 36); *Wingert* v. *Railway*, 177 Mich. 199 (142 N. W. 1063); *Hibbler* v. *Railway*, 172 Mich. 368 (137 N. W. 719); *Manor* v. *Railway Co.*, 118 Mich. 1 (76 N. W. 139); *Rouse* v. *Railway*, 128 Mich. 149 (87 N. W. 68); *Westphal* v. *Railway Co.*, 134 Mich. 239 (76 N. W. 19). There can be, and in fact is, no particular dispute about the relative rights and duties of the parties. Plaintiff alleges the failure of defendant to give him timely notice of the approach of the street car, failed to propel its car at a reasonable and proper rate of speed, and failure to avoid collision with vehicles traveling upon the highway. The question is whether it can be said as matter of law that the failure of either to perform admitted duty, unaffected by a like failure by the other, caused the trouble. There is no testimony tending to prove the rate of the speed of the street car, except that of the motorman, who says it moved behind plaintiff's car from Pallister to Bethune, before it became necessary to apply the brakes and stop the car, at a rate of four or five miles an hour. Inferentially, plaintiff, in estimating the speed at which his car was moving, was also estimating the speed of the street car. The street car did overtake and injure plaintiff's car. Tracks were black, wet, and slippery. Whether plaintiff heard the warnings given, the motorman could not certainly know. He drove the street car at a distance of from ten to fifteen feet behind plaintiff's car. As conditions were, it could not have been stopped in that distance. I am impressed that the case was for a jury, and that it was not error to refuse a directed verdict for defendant.

The charge of the court was fair. Counsel for appellant, having framed requests in which the term "preponderance of evidence" is employed, finds fault because they were not given. The court advised the jury that, before one can recover under a claim of negligence, he must show and establish by the proofs in the case the negligence of the person charged. The jury was instructed, also, that it was left to it to determine:

"Whether or not the plaintiff has shown by a fair preponderance of the proofs that in and about what he did on that occasion he did exercise that degree of care and caution that an ordinarily prudent person would under like circumstances."

No reversible error is made to appear, and the judgment is therefore affirmed.

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

BENORE *v.* BENORE.

1. DIVORCE—EXTREME CRUELTY—EVIDENCE—SUFFICIENCY.
   On a bill for divorce by a husband against his wife, evidence *held*, sufficient to show extreme cruelty on the part of the wife.

2. SAME—FRAUD—EVIDENCE—SUFFICIENCY.
   Evidence *held*, insufficient to show such fraud upon the part of the wife in procuring a deed to all of plaintiff's property as would support a decree canceling and setting aside the conveyance, and to not justify a decree for divorce, where the bill for divorce would not have been filed, but for the purpose of canceling the conveyance.

Appeal from Monroe; Gilday, J. Submitted April 5, 1917. (Docket No. 46.) Decided September 27, 1917.

Bill by George N. Benore against Annie Benore for a divorce and to set aside a deed and bill of sale. From a decree dismissing the bill, plaintiff appeals. Affirmed.

John O. Zabel and *J. N. Sampson,* for plaintiff.

Clayton C. Golden (*Oliver J. Golden,* of counsel), for defendant.

OSTRANDER, J. Several incidents, occasions and circumstances, are referred to in the bill of complaint with considerable detail and charged as examples of extreme cruelty of which defendant has been guilty. When the testimony introduced to support these charges is analyzed, they seem trivial and unworthy of the serious attention of the court. The only charge which seems to merit serious attention is the one based upon the transfer by the plaintiff to his wife of all of his very considerable property and her treatment of him thereafter. With respect to this charge the testimony overlaps, outruns, the complaint, but does not sustain it in the very important allegation that the defendant by her conduct *forced,* or *procured,* the said transfer of property, and that plaintiff was not entirely conscious of the act he was performing when he conveyed his effects to his wife. It is not proved that by oppression, by nagging, she had advantage of a man so mentally and physically unbalanced that he did not comprehend what he did. The truth appears to be that plaintiff became anxious about his financial situation, and transferred his property to his wife, with the purpose to avoid one or more of his obligations, and perhaps to gain time

as to others. The situation was one about which they were mutually concerned. It is true that he testifies to conduct on her part calculated to destroy his peace of mind, but in the face of other testimony his claims appear extravagant, and evidence of coercion of the husband by the wife is not found.

He did, however, transfer to her all of his property. They had been married 30 years, nine children they had had, all living, the youngest some 14 years of age. They had made their fortune on the farm, and the principal part of their property was land. The testimony is convincing, so much so that no real issue of fact is made upon the point, that having become owner, in form, of all of the family estate, defendant thereafter treated her husband much as she would treat any stranger. Stripped of income and means of support, except by his own labor, she made it plain that it was by his own labor, and labor for others, that he must survive, if he survived at all. Before his children and the neighbors, this man, who had worked hard to acquire a competence, had been rated a man of property and consequence in the community, who had turned $30,000 worth of property over to his wife, was denied all control of the property, refused money except in little sums for which he had to ask, and finally driven out of his home to seek and perform menial services for others for a livelihood. Giving to defendant the credit she deserves, and treating the property he owned as community property, which she, equally with her husband, helped to accumulate, and assuming, too, that his transfer of the property to her was voluntary, the very relation of husband and wife required that some consideration be given her husband in the premises. She testified to facts which, if true, entitled her to a divorce, if she cared to ask for one. She did not ask for one. She maintained in form, but not in fact,

the marital relation. Out of the effort made by both, in which both were deeply concerned, to retain a competence, to save their fortune, she found herself owner of all of his property. She used the situation to humiliate her husband and outrage his feelings. He charges that, after obtaining his signature "to said deed and bill of sale," she took possession of the property and control of the same and continued her oppression and nagging—

"and finally ordered him to leave and get a job and take care of himself; she collected all of the income and kept charge of the same, and even refused to furnish your orator with money for the necessaries of life, and this condition became so oppressive and so overpowered your orator that he finally left and sought work and since that time has been obliged to do manual labor for his support."

This charge, in view of the relations of the parties, is a charge of extreme cruelty, and, in the main, is amply sustained by evidence. The learned trial judge who entered a decree dismissing the bill was of opinion that, if the trouble in relation to the land had not arisen, plaintiff would not have asked for a divorce from his wife, and of the transfer of property he said:

"Now, with that testimony, I can't see how a court could possibly say that, or set aside a solemn deed. If under such testimony the deed is to be set aside, why, the title to land would be rather uncertain. I am sorry that he did it. I am sorry he didn't retain something for himself."

I think it is true that plaintiff's treatment in respect to the property accounted for the filing of the bill in this cause. There is no evidence which would support a decree canceling and setting aside the transfer of property to the wife. *Wipfler* v. *Wipfler,* 153 Mich. 18 (116 N. W. 544, 16 L. R. A. [N. S.] 941); *Judd* v. *Judd,* 192 Mich. 198 (158 N. W. 948; 160 N. W. 548).

The conduct of defendant, after securing the property, has led to a careful examination of the circumstances attending the transfer thereof, without discovering, what indeed is not charged, such fraud on the part of the wife in securing such transfer as to bring the case within the principle of *Judd* v. *Judd*, *supra*.

Under the circumstances, an affirmance of the decree below is ordered, but without costs to appellee.

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

SIBERT *v.* DETROIT UNITED RAILWAY.

1. WITNESSES—CREDIBILITY—QUESTION FOR JURY.
   The credibility of witnesses is a question for the jury.

2. EVIDENCE—ADMISSIBILITY.
   In an action by a passenger against a street railway company to recover for personal injuries, evidence as to whether a witness for defendant in his search of the reports on file found any report of the accident is inadmissible.

3. TRIAL—REMARKS BY COUNSEL—EVIDENCE—ADMISSIBILITY.
   In an action by a passenger against a street railroad company for personal injuries, it is improper for counsel for the defendant to tell the jury that no report was made of any such accident to defendant by the crew, as evidence to such effect would be inadmissible if offered.

4. SAME—CONDUCT OF COURT—EXPERT WITNESSES.
   Where the cross-examination of a medical witness for plaintiff, in an action against a street railway company

for personal injuries was, in some respects, of very doubtful propriety, the trial court committed error in expressing impatience at objections to the cross-examination of the witness and informing the jury that the mere fact that the physician possessed special knowledge did not warrant giving credence to his testimony, and emphasizing the right of cross-examination and credibility of witnesses.

5. STREET RAILWAYS—PERSONAL INJURIES—NEGLIGENCE—INSTRUCTIONS.

In an action by a prospective passenger against a street railway company for personal injuries alleged to be due to her hold upon the car and her clothing catching in the door of a folding step car, upon its being closed as she attempted to board the car, and her being dragged some distance, the contributory negligence of the plaintiff was involved warranting an instruction on the subject, where plaintiff testified that the conductor shut the door in her face, while she had one foot on the step, and rang the bell for the car to move, and then described what immediately occurred, involving her position, her actions, as well as the movement of the car, and the result.[1]

Error to Wayne; Brown, J., presiding. Submitted April 11, 1917. (Docket No. 147.) Decided September 27, 1917.

Case by Catherine Sibert against the Detroit United Railway for personal injuries. Judgment for defendant. Plaintiff brings error. Reversed.

Clarence P. Milligan, for appellant.

Corliss, Leete & Moody and *A. B. Hall,* for appellee.

OSTRANDER, J. Plaintiff claims, and offered testimony to support the claim, that, accompanied by her

[1]For authorities discussing the question of duty to, and negligence of, passenger who attempts to board car when door or gate is closed, see note in 7 L. R. A. (N. S.) 603.

On the question of negligence of passenger in getting on or off a moving street car, see notes in 38 L. R. A. 786; 30 L. R. A. (N. S.) 270.

daughter, she attempted to board one of defendant's cars, as a passenger, had placed one foot upon the step of a folding step car, when the doors were closed, the step folded, and by reason of some of her clothing catching in the door, or on the car, and her hold upon the car, she was dragged a distance, thrown to the pavement, and injured. No one precisely disputed her testimony. The defense, which was good enough to secure a verdict of the jury for defendant, may be described as based: (1) Upon the improbability of the story told by plaintiff and her daughter; (2) lack of corroborating testimony; (3) the conduct of the counsel for defendant; and (4) the aid unconsciously given the defendant by the court.

The improbability of the story told by plaintiff and her daughter, and the lack of corroborating testimony, were, of course, matters for the jury to consider. It is not, I think, impossible that plaintiff may have been injured in the way described by her and her daughter. But counsel for the defendant, by his own statements and otherwise, sought to and did acquaint the jury with the fact that no report of any such accident was made to defendant by the crew of the car. In his opening statement to the jury, and by other statements made in the presence of the jury, over repeated objections, he placed before the jury, not by the testimony of any witness, but by assertion, the fact that no report of the alleged injury had been made to the defendant. In *Winnett* v. *Railway*, 171 Mich. 629 (137 N. W. 539, Am. & Eng. Ann. Cas. 1914B, 1254), it was held that the books of this defendant are not admissible in evidence to prove that no accident was reported and no record of any appeared for the purpose of proving that an injury was not received as plaintiff claimed. This rule was not only disregarded in the repeated assertions made by counsel for defendant, but he asked a witness the question:

"Did you in your search of the report which you keep on file find any report of any accident of car No. 915 on the crosstown line at Forest and Hastings, or any other place?"

Upon objection being made, counsel stated:

"If counsel will object to it, I will not insist."

The plaintiff produced as a witness a physician, who testified that he attended her on the day in question, and thereafter, and found evidence of certain injuries to her person. Connected with the testimony of plaintiff, his testimony tended to prove that on the occasion in question plaintiff did suffer considerable injury. This witness was not offered as an expert, but as one having knowledge of material facts. Upon his cross-examination, questions were asked him which involved the insinuation, if not the charge, that he and the attorney for plaintiff were engaged, one as lawyer and one as physician, in bringing and in trying cases like the one at bar. Some of his cross-examination was of very doubtful propriety. It tendered no distinct issue and placed the witness at disadvantage. For some reason the trial judge apparently became impatient of objections made by counsel for plaintiff to questions asked this witness on the cross-examination, and, stopping counsel, he delivered a discourse which, in my opinion, was calculated in the time it was delivered, and in the matter of it, to prejudice the plaintiff. The point can be understood by repeating here the statement made by the court:

"Wait a minute! Simply because he asks questions is no reason why you should interpose an objection. That is more an interruption. This is a proper examination. If this witness has had relations with the attorney here in any other case, and if the testimony given in this case bears upon his testimony and extent of his recollection, it is proper, perfectly proper that this jury should know it, and take it into consideration —his testimony. This witness comes here as a doc-

tor, as an expert, and as an expert his testimony is weighed just like the jury weighs the testimony of the most humble witness, and there is no truth or credence to be given to his testimony simply and solely because he comes as a doctor or professional man. That of itself is not considered by you in weighing the testimony. Just because a man says, 'I am a doctor,' that in itself ought not to overawe you. Use your common sense and say, 'Is that fellow telling the truth?' Just the same as if he said he was shoveling coal into a furnace. You say, 'Was he telling the truth,' and you consider his testimony in the same manner as the testimony of any other witness. If he has falsified; if he shows he has interest in the case; is prejudiced or biased in his testimony—those things may be found in the testimony of witnesses, and if you find them you have a right to reject the witness' testimony, and counsel has a right to show you, not only a right, but it is his duty to do it in any case. When a witness comes into court, counsel, in accordance with the rules of evidence if they are doing their duty by their client on either side, are bound to show you where the testimony is that is reliable, and where the testimony is, if any, that is not reliable as you view it, it is for you to say if you find anything in it at all that is entitled to any consideration. I want to say that now so you will understand. You are taking testimony, and in no case just because a man claims to have special knowledge, does his claim alone add truth. Special knowledge as a matter of common knowledge may add truth; it may aid in getting at the truth. I am saying that quite emphatically because I want to be understood. I want you to understand the situation in this and all cases where you are jurymen. That is the rule in determining the evidence and its truthfulness, evidence that weighs in your minds, and it is the evidence that weighs and rings with truthfulness that carries conviction, and the other kind of evidence, if any, does not carry conviction. The evidence must be weighed by you to determine the value."

I am impressed, for the reasons stated, that the plaintiff did not have a fair trial, and that a new trial ought to be awarded.

It is insisted by plaintiff that the question of her contributory negligence was not involved, for which reason it was error for the court to instruct the jury upon that subject. Upon the whole case, and especially upon the testimony for the plaintiff, the question was involved. A person offering herself as a passenger upon a street car is not usually relieved from all duties in the premises. Plaintiff says the conductor shut the door of the car in her face, while she had one foot upon the step, and rang the bell for the car to move. She describes what then immediately occurred, involving her position, her actions, as well as the movement of the car, and the result. It cannot be said, as matter of law, that the duty to save herself injury did not at once arise, a duty measured by conditions as they appeared to her to be.

The judgment is reversed, and a new trial ordered.

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

ALLEN *v.* HOOK.

1. BILLS AND NOTES—PLEDGE OF STOCK—EVIDENCE.
   In an action on a note, as collateral to which a certificate for shares of stock was indorsed in blank and delivered to plaintiff at the time of making the loan, evidence *held*, insufficient to show that there was any understanding at the time the note was given that if it was not paid the plaintiff would sell the stock or would hold same as payment.

2. SAME—PLEDGE OF STOCK—COLLATERAL SECURITY.
   One who holds corporate stock as collateral security for a note has the right to retain it until the note is paid, and he is under no obligation to sell the collateral before

bringing suit, nor can he be charged with negligence in failing to do so, nor can he be charged with the loss, even though the stock depreciates in value after maturity.

3. SAME—CORPORATE STOCK—CONVERSION.

There is no conversion of a stock certificate which is indorsed in blank at the time it is delivered as collateral security for a note to the pledgee where the latter does not cause it to be transferred to himself upon the books of the company, but still has possession of it at the time of trial of the action on the note and at no time refuses to deliver it upon tender of payment of the note.

Error to Wayne; Van Zile, J. Submitted April 4, 1917. (Docket No. 37.) Decided September 27, 1917.

Assumpsit in justice's court by William S. Allen against Frank E. Hook on a promissory note. There was judgment for plaintiff, and defendant appealed to the circuit court. Judgment for plaintiff on a directed verdict. Defendant brings error. Affirmed.

E. A. Frink, for appellant.

Selling & Brand, for appellee.

FELLOWS, J. Plaintiff sued defendant upon a promissory note for $150, dated February 13, 1909, due in 60 days thereafter. As collateral thereto a certificate for 150 shares of the stock of the International Machine Company was indorsed in blank and delivered to plaintiff at the time the money was loaned. Under the general issue defendant gave the following notice:

(1) That it was the understanding between the parties at the time of the giving of the note and security that if the note was not paid plaintiff would sell the stock or would hold the same as and for payment of the note.

(2) That defendant was led to believe, because of the silence of the plaintiff, that the note had been fully paid by reason of the plaintiff continuing to hold the stock.

(3) That plaintiff had fully intended to hold and convert the stock, and that he would have done so had the enterprise been successful, and that his failure to realize on the collateral was negligence, and that defendant was led to believe that plaintiff had either sold the stock or had converted the stock to his own use.

At the conclusion of the proofs the trial court directed a verdict for the plaintiff for the face of the note and the accrued interest, amounting in all to $216. The question to be determined is whether the trial court was in error in so doing.

1. The first defense stated by defendant in his plea may be disposed of by saying that it was not proven. There was no testimony showing or tending to show that there was any understanding at the time the note was given that if it was not paid plaintiff would sell the stock or would hold the same as payment. The nearest approach to it was testimony of defendant that some time after the maturity of the note he met plaintiff on the street and requested him to take the stock as payment, and later on the same day wrote him the following letter:

"February 14, 1910.

"Mr. W. S. ALLEN,
"City.

"*Dear Will:* Confirming my talk with you this morning if you wish to cancel my $150 note and hold the stock you have in the above company it will be satisfactory; but I would like to have you decide definitely at once, as I think I can arrange to place the stock elsewhere."

Defendant admits that plaintiff made no reply to his request that he take the stock in payment of the note, and he states that no reply was received to his letter. Defendant rather seeks to give the impression that at the time he wrote the letter the stock had some value, but that later it depreciated and became worthless, and that had he not understood that plaintiff

was to retain it in payment of the note he would have disposed of it to others. Plaintiff was the holder of the collateral, and as such he had a right to retain it until the note was paid. He was under no obligation to sell the collateral before bringing suit, nor can he be charged with negligence in failing to do so. *Rice* v. *Benedict,* 19 Mich. 132; *Smith* v. *Nixon,* 145 Mich. 597 (108 N. W. 971). And the mere fact that the stock depreciated in value after maturity would not charge plaintiff with the loss. *Richardson* v. *Insurance Co.,* 27 Grat. (68 Va.) 749. Defendant was at liberty at all times to redeem the collateral by making payment of the note; this he concedes he did not do, and the reason he did not do it was because he did not have the funds.

2. An attempt is made under the third paragraph of defendant's plea to claim that plaintiff converted the stock to his own use. Testimony of this fact is wholly wanting in the record. The record shows that the stock certificate was indorsed in blank at the time it was delivered to plaintiff. The plaintiff never caused it to be transferred to himself upon the books of the company. It stood in the name of the defendant during all this time. He neither sold it nor refused to deliver it upon tender of payment of the note. There was no proof that plaintiff held the stock in any other or different manner on the day he began suit than he did on the day it was delivered to him. He still had possession of it on the day of trial. Under these circumstances he could not be charged with conversion. *Feige* v. *Burt,* 118 Mich. 243 (77 N. W. 928, 74 Am. St. Rep. 390).

The testimony raised no issues of fact, and the trial court was right in disposing of it himself. The judgment is affirmed.

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

KAURI *v.* MESSNER.

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—SCOPE OF EMPLOYMENT.

The written acceptance by an employer who is engaged in logging and lumbering business, and also owns a farm, of the terms of the workmen's compensation act, describing the occupation as logging, and the employer's indemnity insurance policy describing the nature of business as "logging and lumbering operations with transportation of logs to mills" do not cover the work of raising and repairing a foundation wall under the dwelling on the farm.[1]

Certiorari to Industrial Accident Board. Submitted June 8, 1917. (Docket No. 22.) Decided September 27, 1917. Rehearing denied June 20, 1918.

Martha Kauri presented her claim for compensation against John Messner for the accidental death of her husband in defendant's employ. From an order awarding compensation, defendant and the Fidelity & Deposit Company, insurer, bring certiorari. Reversed, and order vacated.

Guy W. Moore and *Hal P. Wilson*, for appellants.

Galbraith & McCormack (*Warner & Raudabaugh*, of counsel), for appellee.

BIRD, J. Defendant, John Messner, is engaged in the business of lumbering in the counties of Houghton and Ontonagon. He is also the owner of a farm. Being desirous of raising and repairing a foundation wall under the dwelling on the farm, he engaged several men to do the work. None of these men were

[1] On construction and effect of workmen's compensation acts generally, see comprehensive notes in L. R. A. 1916A, 23; L. R. A. 1917D, 80.

engaged in his lumbering operations. Among them was Aboudi Kauri, a common laborer. While engaged in this work he received injuries from which he later died. His widow presented a claim to the industrial accident board. The claim took the usual course, and a death award was made by the arbitration committee and later affirmed by the board. The question raised is lack of jurisdiction in the board to allow any claim. It appears that Messner filed his written acceptance of the terms of Act No. 10 of the Extra Session 1912 (2 Comp. Laws 1915, § 5423 *et seq.*), on November 12, 1913. This acceptance gave the number of employees as 35, the location of place of employment, Houghton and Ontonagon counties, and the nature of the employment as "logging." The policy described the nature of the business as:

"logging and lumbering operations with transportation of logs to mill (no railroad). Clerical force—office duties only. Drivers and helpers—wherever engaged. Chauffeurs and helpers—wherever engaged."

It is contended by defendant that the acceptance of the act and Messner's contract of indemnity cover only the men engaged in his lumbering business, and not the men to whom he gives casual employment in some other business. In other words that he had the right to accept the compensation act as a lumberman without doing so as a farmer. This point appears to be well taken. It has already been decided by this court that a man may be engaged in more than one enterprise and may accept the terms of the compensation act as to one and not as to another. *Bayer* v. *Bayer*, 191 Mich. 423 (158 N. W. 109, Mich. Comp. Cases, 435). Our attention is challenged by counsel to the following language contained in the policy:

"(*a*) This policy also covers all work done by the assured in the State of Michigan, not specifically described under statement numbered 6 of the schedule

of statements, for which the assured agrees to pay a premium based on the company's rates at the time such work was done."

Counsel argue from this that:

"Nothing can be plainer than that they have guaranteed John Messner indemnity against all claims that might arise by reason of accident or injury to any of his employees while discharging any work in this State," etc.

We do not think counsels' conclusions are justified by the text. The portion above quoted by them has reference to the location in which the work is done. The Statement No. 6, to which it refers, shows in unmistakable language what business was intended to be covered by this statement, namely, "logging and lumbering operations with transportation of logs to mill." We think a fair construction of the language of the policy, read in connection with the acceptance of the compensation act by Messner, excludes the idea that it covered the work in which the deceased was engaged at the time of his death.

There is further claim that the case is ruled by *Shafer* v. *Parke, Davis & Co.*, 192 Mich. 577 (159 N. W. 304, Mich. Comp. Cases, 7), inasmuch as it was shown that certain provisions were raised on the farm which presumably went to feed the men and horses employed in logging. There was no such connection shown between his lumbering operations and farming as to bring the case within the one referred to.

The industrial accident board being without jurisdiction in the premises, its order will be set aside and vacated.

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

COOK *v.* CHARLES HOERTZ & SON.

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—SUBSEQUENT INJURIES—PAYMENTS.

A continuance of weekly compensation to an employee under an agreement approved by the industrial accident board is justifiable, although he twice sustains injuries to one of his legs by falling, where the injuries are simply mishaps due to the fact that he is obliged to use crutches, and he is still suffering otherwise from the original injury.[1]

Certiorari to Industrial Accident Board. Submitted June 21, 1917. (Docket No. 108.) Decided September 27, 1917.

Floyd Cook presented his claim for compensation against Charles Hoertz & Son for injuries received in defendants' employ: On petition of defendants for an order discontinuing weekly payments. From an order denying the petition, defendants bring certiorari. Affirmed.

Lombard, Hext & Washburn, for appellants.

BIRD, J. While plaintiff was in the employ of defendant contractors he was injured. His injuries were received October 19, 1914, and are described by his physician as:

"A compound, comminuted fracture of the femur of the right leg, about the junction of the upper and middle third; a fracture of the tibia of the right leg below the knee; a fracture of the tibia of the left leg below the knee; both ankles badly bruised; patient in extreme shock."

[1]On constitutionality and effect of workmen's compensation acts, generally, see comprehensive notes in L. R. A. 1916A, 23; L. R. A. 1917D, 80.

The fractures were reduced, the bones placed in position, and splints put on. The parties agreed upon the amount of compensation which plaintiff was entitled to, which agreement was subsequently approved by the board, and the amounts were paid directly to him by the defendants. Matters progressed favorably with plaintiff until about March 1, 1915, when he slipped and fell on the floor of a meat market at Mt. Pleasant and loosened the bone at the point of fracture in the right femur. This was subsequently adjusted and the splints put on again. Later, in July, 1915, just after alighting from a wagon, and while his crutches were being handed to him, he lost his balance, fell over, and loosened the callous from the right femur, which required that the splints be put on again for about a week. On June 24, 1916, defendants filed their petition with the board, praying that they be relieved from making any further payments to plaintiff on account of his injuries. The hearing resulted in a denial of the prayer of the petition.

It is defendants' contention that had it not been for plaintiff's subsequent injuries he would be fully recovered and able to work, and as the subsequent injuries were the result of his own carelessness and negligence, no further payments ought to be demanded of them. Furthermore, that the testimony does not justify a continuance of them. The board made the following findings of fact:

"(3) After a careful consideration of all of the evidence in this case, the board finds as a fact that the original injuries of October 19, 1914, described and set forth in the agreement for compensation between the parties heretofore referred to was the proximate and direct cause of the second injury to his right leg, which occurred during the month of March following, and likewise the proximate and direct cause of the injury to his said right leg occurring in July following.

"(4) We further find as a fact that at the date of the hearing before this board the applicant was still suffering from and under disability because of and as a direct result of said original injuries set forth and described in said agreement in regard to compensation, and that the said applicant has not been guilty of wilful and intentional misconduct.

"(5) That the applicant is still suffering from the injury to his back and is under disability at the time of this hearing because thereof. That said injury to applicant's back was not effected by the second fall which he sustained in the month of March, and was not effected by the third fall which he sustained during the month of July, following his original injuries."

It is quite evident that had it not been for the initial injury plaintiff received he would not be obliged to go about on crutches. It does not appear that he was violating the order of his physician in doing so, nor does it appear that there was anything negligent, intentional, or wilful about the incurring of the subsequent injuries, but it does appear that they were simply mishaps, due to the fact that he was obliged to depend upon his crutches. But even if we concede that counsels' position be the proper one as to the subsequent injuries, the testimony shows and the board finds that plaintiff is still suffering otherwise from the original injury. This proof alone would justify the determination of the board in continuing weekly payments.

The conclusions of the board must be affirmed.

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

DOVE *v.* ALPENA HIDE & LEATHER CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—INFECTION—EVIDENCE.

In proceedings for compensation under the workmen's compensation act for the death of a tannery workman, employed in unloading hides, alleged to be due to septic infection from dust from the hides, the evidence of a physician that hides are dead animal matter; that, as a general rule, all dead animal matter contains infection and that hides are no exception, tends to prove that dust arising from the hides contained infection.

2. SAME.

If it was established to the satisfaction of the commission that hides are animal matter, that all dead animal matter contains infection and that hides are no exception, such facts would justify an inference that deceased became infected by handling the hides—that the septic germ entered his body through the respiratory organs and first found lodgment in the throat.

3. SAME.

A tannery workman employed in unloading hides suffers an accident causing his death where by chance septic germs in the dust from the hides are taken into his respiratory organs and carried into his system, an unusual occurrence in work at which he is employed, and death follows.[1]

BROOKE and STEERE, dissenting.

Certiorari to Industrial Accident Board. Submitted June 6, 1917. (Docket No. 3.) Decided September 27, 1917.

Louise A. Dove presented her claim for compensation against the Alpena Hide & Leather Company for the accidental death of her husband in defendant's employ. From an order awarding compensation, de-

[1]On constitutionality and effect of workmen's compensation acts, generally, see comprehensive note in L. R. A. 1916A, 23; L. R. A. 1917D, 80.

fendant and the Ætna Life Insurance Company, insurer, bring certiorari. Affirmed.

C. W. & W. S. Foster, for appellants.

Joseph H. Cobb, for appellee.

BIRD, J. Plaintiff is the widow of Leonard Dove, who was employed in and around the tannery of the first-named defendant. On March 30, 1915, he, with other employees, was engaged in unloading a car of hides, which had been received from South America. They were sun-dried and folded with the hair inside. They were thrown into the hide house from the car, and the deceased assisted in carrying and piling them. On April 1st he noticed a swelling on his neck under the right jaw. On April 2d, when he came to work, it was observed by the foreman, Mr. Good. After questioning him concerning it, Mr. Good advised him to see a physician. From that time on he grew worse rapidly, and on the morning of April 4th he died. The cause of death was given by the attending physician as "septic infection and heart trouble." A death award was made by an arbitration committee, and subsequently approved by the board, on the theory that the deceased became infected from the dust arising from the hides.

The defendants insist that the finding of the board is not sustained by the testimony. The testimony has been carefully examined, and we think it tends to establish the following facts:

(*a*) That the cause of death was "septic infection." (*b*) That dust arose from the handling of the hides and that the ventilation in the hide house was very poor. (*c*) That septic infection could be taken into the body by means of inhalation. (*d*) That the throat of deceased was badly inflamed. (*e*) That the infection which caused death was contracted from without. (*f*) That if the dust contained infection the deceased could have contracted it by working on the hides in

the poorly ventilated room. (*g*) That the dust arising from the hides contained infection.

It is strenuously insisted by defendants' counsel that there is no proof that the dust contained infection. We think the testimony of Dr. Dunlop tends to support the claim that it did. He testified in part as follows:

"*Q.* Do you know, Doctor, of your own knowledge, whether or not they (hides) contain germ diseases?

"*A.* Hides are dead animal matter, and they are the same as other dead animal matter. Because they are hides makes no difference.

"*Q.* Then, as I understand it, all dead animal matter contains infection as a general proposition?

"*A.* Yes.

"*Q.* And these hides are no exception?

"*A.* No."

These propositions, if established in the minds of the commission, would justify an inference that the deceased became infected by handling the hides—that the septic germ entered his body through the respiratory organs and first found lodgment in his throat. *Blaess* v. *Dolph,* 195 Mich. 137 (161 N. W. 885).

Counsel inquire where the accident is which led to his death. The accidental feature of the case is that by chance the septic germ or germs were taken up by his respiratory organs and carried into his system, an occurrence which the testimony shows probably did happen, but which was unusual in the work at which he was engaged.

The conclusions of the board are affirmed.

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

BROOKE, J. (*dissenting*). In my opinion there is no evidence of an accident.

STEERE, J., concurred with BROOKE, J. OSTRANDER, J., did not sit.

DINGEMAN *v.* STATE BOARD OF CANVASSERS.

1. ELECTION—DUTY OF STATE BOARD OF CANVASSERS.
   In the absence of a contest over the election of a circuit judge, it is the ministerial duty of the State board of canvassers to canvass the returns and issue to the officer elected a certificate of election.

2. SAME—CIRCUIT JUDGES—RECOUNTS—POWER OF LEGISLATURE.
   The legislature, sitting in joint convention, has exclusive jurisdiction of a recount contest on the election of a circuit judge.

Mandamus by Harry J. Dingeman to compel the State board of canvassers to refrain from recounting the ballots in an election of circuit judges. Submitted June 12, 1917. (Calendar No. 27,941.) Writ granted September 27, 1917.

William L. Carpenter, James O. Murfin, John D. Mackay, and *George F. Monaghan,* for plaintiff.

Alex. J. Groesbeck, Attorney General, *Leland W. Carr,* and *Thomas G. Baillie,* Assistants Attorney General, for defendant.

H. E. Spalding, Fred G. Dewey, Henry M. Butzel, and *Clarence A. Lightner,* for contestant Ira W. Jayne.

FELLOWS, J. Upon the face of the returns as canvassed by the county board of canvassers of Wayne county, and duly certified to the defendant, the plaintiff was elected one of the circuit judges for the third judicial circuit at the general election held in April. No question is raised as to the regularity of the returns to the State board of canvassers. Had no contest been had, it must be conceded that it would have been the clear duty of the State board of canvassers to can-

vass the returns and issue to plaintiff a certificate of election. This was a ministerial duty to be performed by defendant. Acting under the provisions of Act No. 320 of the Public Acts of 1913 (1 Comp. Laws 1915, § 3776 *et seq.*), Ira W. Jayne, who was also a candidate for the office of circuit judge for the third judicial circuit at said election, instituted a contest, claiming that the votes on circuit judge had been improperly counted, and that he (Jayne) had been elected to such office. Upon a recount of the votes by defendant, pursuant to the prayer of said Jayne's petition, it was found that Jayne was elected.

It is, and must be, conceded that the Constitution has vested in the legislature sitting in joint convention the power of finally determining the question who was elected to the office of circuit judge. The argument is advanced, and it presents the question in the case, that this is not exclusive, that it is competent for the legislature to empower the State board of canvassers to conduct a recount contest on State officers; conceding, however, that the decision of the board lacks finality or conclusiveness against the determination by the legislature. I cannot agree with this contention. If the argument is sound, the adjudicated cases in this jurisdiction have been incorrectly decided. If the argument is sound, it could have been successfully urged in practically all the cases where this court has had occasion to speak on the subject.

The framers of the Constitution of 1850, and the people of the State in adopting it, made provision for contests for the more important offices before the legislature, and before the legislature alone. This provision even excludes the courts from jurisdiction so far as contests for these offices are concerned, and was designed to discourage and prevent long drawn out and needless litigation and contest between private parties over the higher and more important offices of

the State. The legislature, bound by no hard and fast rule, may or may not, in its discretion, entertain contests. The determination of the legislature is a finality, and private parties, ambitious to fill these offices, or litigious in character, cannot compel action by the legislature or go elsewhere and secure delay in carrying out the recorded will of the electorate. The wisdom of this provision is demonstrated by the fact that it stood without amendment, or attempted amendment, and was carried into the present Constitution.

This court has had occasion to consider this provision in several cases. In the early case of *People* v. *Goodwin*, 22 Mich. 496, this court had before it a proceeding in the nature of quo warranto to test the right of Judge GOODWIN to the office of circuit judge. It was there said:

"Counsel on both sides have overlooked the fact that the Constitution does not permit the regularity of elections to the more important offices to be tried by the courts. It has provided that in all cases where, by the Constitution or by statute, the result of elections is to be determined by the board of State canvassers, there shall be no judicial inquiry beyond their decision. It declares that, 'when the determination of the board of State canvassers is contested, the legislature, in joint convention, shall decide which person is elected.' Article 8, § 5.

"This provision was doubtless suggested by the serious difficulties which would attend inquiries into contested elections, where the ballots of a great number of election precincts would require to be counted and inspected, and probably also to discourage the needless litigation of the right to the higher public offices at the instance of disappointed candidates where the public interest does not appear to require it. A legislative body can exercise a discretion in such cases, and could not be compelled to enter upon such an inquiry except upon a preliminary showing which the courts are not at liberty to require. The conclusive character given to the certificate of the canvassers is

not a novelty. Similar provision has been made elsewhere."

Again, in the case of *Vance* v. *Board of Canvassers,* 95 Mich. 462 (54 N. W. 1084), this court had before it a contest by recount for the office of circuit judge. The recount had been had under the provisions of Act No. 208, Pub. Acts 1887, which by its terms was broad enough to include that office. The board of canvassers of St. Clair county was, however, required by this court to certify the returns as they stood before the recount. It was said by Mr. Justice MCGRATH, speaking for the court:

"The theory of the cases cited is that, inasmuch as another tribunal for that review has been provided by law in that class of cases, and the act in question does not in terms qualify the powers granted to such tribunal or limit the scope of the inquiry to be made by it, jurisdiction is exclusive in such tribunal, and boards of canvassers and the courts are without power in the premises."

This case was followed in *Pound* v. *Board of Canvassers,* 120 Mich. 181 (79 N. W. 114).

In *Belknap* v. *Board of Canvassers,* 94 Mich. 516 (54 N. W. 376), a recount had been had under the act of 1887, which by its terms was made available to "any candidate voted for at any election in this State." The office involved was that of congressman. Application was made to this court to compel the board of canvassers to canvass the votes in accordance with the original returns. The writ was granted on the ground that under the Federal Constitution the house of representatives is made judge of the election and qualifications of its own members and that the act of 1887 had no application.

Recently, and since the act under consideration became effective, Samuel W. Beakes, a candidate for the office of congressman from the second congressional

district at the general election of 1916, filed a petition under the provisions of this act with this respondent for a recount of the votes cast at such election. His petition was refused by the board. Upon application to this court for mandamus to compel action by the board this court refused to issue the order to show cause upon the grounds that the *Belknap Case* controlled.

In *Wheeler* v. *Board of Canvassers,* 94 Mich. 448 (53 N. W. 914), application was made to this court for mandamus to compel a recount, under the act of 1887, on the office of State senator. Under the Constitution of this State "each house shall judge of the qualifications, elections, and returns of its members." Based upon this provision of the Constitution and on the authority of *Naumann* v. *Board of Canvassers,* 73 Mich. 252 (41 N. W. 267), the writ was denied. Had the argument made in the instant case been there followed, the writ would of necessity have issued.

People v. *Harshaw,* 60 Mich. 200 (26 N. W. 879, 1 Am. St. Rep. 498), was an information to test respondent's right to the office of mayor of Alpena. Under the charter of the city of Alpena its common council was made the judge of the election and qualifications of its members. It was held that the mayor was a member of the common council, and that the action of the council was final, and not subject to review.

Other cases might be cited, but these are sufficient to demonstrate the rule adopted by this court. Running through all these cases is the rule, to my mind clear and distinct, that wherever by the organic law, whether Federal, State, or municipal, a tribunal is created to finally determine the right to an office, that tribunal is exclusive, and there, and there only, may the right to the office be tested. By the organic law of this State the legislature, sitting in joint convention, is made such tribunal as to the office here involved.

By that tribunal, and by that tribunal alone, may the ballots cast for the office of circuit judge be recounted, and the contest for this important office be decided.

I think the writ should be issued as prayed.

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

GUY *v.* CINCINNATI NORTHERN RAILROAD CO.

1. MASTER AND SERVANT—PERSONAL INJURIES—INDEPENDENT CONTRACTOR—EVIDENCE—SUFFICIENCY.

   In an action by an employee of a railroad to recover for injuries sustained as the result of the starting of machinery in a coal dock used for loading coal on engines, where the foreman in charge, in addition to his yard duties, had a contract with the company for loading coal and hired and paid plaintiff, evidence *held*, insufficient to show that such foreman was an independent contractor.

2. SAME—INTERSTATE COMMERCE.

   One who is engaged in coaling and placing water in tanks of engines used in interstate commerce, among other duties, is engaged in interstate commerce.[1]

3. SAME—JOINT TORT FEASORS—RELEASE—EFFECT.

   The release of a foreman who is in charge of a railroad coal dock from liability for negligence in injuring another employee is not a defense in an action for damages for personal injuries against the railroad.

4. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.

   A verdict for $35,000 in favor of a railroad employee for the loss of one arm below the shoulder and the other at the wrist and other injuries, *held* not excessive.

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[1]For authorities passing on the question as to State regulation of relation between railroad companies engaged in interstate commerce and their employees, see notes in 15 L. R. A. (N. S.) 134; 29 L. R. A. (N. S.) 240; 52 L. R. A. (N. S.) 266.

Error to Lenawee; Hart, J. Submitted June 27, 1917. (Docket No. 80.) Decided September 27, 1917. Rehearing denied December 28, 1917.

Case by Leo Guy against the Cincinnati Northern Railroad Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Herbert R. Clark, for appellant.

Alonzo H. Ranes, Corinne L. Rice, and *Earl C. Michener,* for appellee.

MOORE, J. The questions involved in this case are clearly stated in the charge to the jury, of the trial judge, from which we quote:

"It is the further claim that the plaintiff, Leo Guy, was, on the said 18th day of January, 1914, a resident of the city of Hudson in this county; that on that date and prior thereto he was in the employ of the Cincinnati Northern Railroad Company in the city of Hudson; that his work and duties consisted of coaling engines that were engaged in interstate commerce between the State of Michigan and the State of Ohio as above set forth, in placing water in the tanks of said engines, and of assisting in cleaning the ash pans of said engines, keeping up the fires in engines that stopped at this station overnight on their way from the State of Michigan to the State of Ohio, oiling said engines, and operating the switch allowing said engines to pass from the main track onto the side tracks and from said side tracks back onto the main line, for the purpose of placing water in the tanks of said engines to be used in said interstate commerce. * * *

"Plaintiff further claims that during all the time Leo Guy was engaged in said work he was under the direction of a boss or foreman, C. E. Duvall, who was an agent or vice principal of said defendant, and that in the absence of the said Duvall he was under the control and direction of Emil Morgret, said Morgret being also in the employ of the said defendant. Plaintiff further claims that there was being maintained by the said defendant a certain elevator or coal dock located on the right of way of the said defendant in said city of Hudson and where plaintiff was working,

which was used for the purpose of elevating coal up and into a certain hopper by the means of steam power, and from said hopper into and through a certain chute into the tenders of said engines engaged in an interstate commerce, as heretofore set forth.

"Plaintiff further claims that on said date, January 18, 1914, said C. E. Duvall ordered the plaintiff to go to the top of said tower, and to spread about the coal in said hopper at the top of said tower, and that in doing so it became necessary to ascend a ladder to or near the top of the tower, and to cross upon and over a certain platform, which was of a width of about 14 inches, said platform being unprotected by any railing, and that near said platform there were located certain cogwheels, and that it was necessary for plaintiff in going to said hopper for the purpose of arranging the coal to pass near said cogwheels, and that said cogwheels were unprotected by any covering or guard, and it is further alleged that at said time it was snowing and blowing and very cold, and that while plaintiff was passing, or attempting to pass, over said platform in pursuance of said negligent order of the said Duvall, he necessarily and unavoidably passed in close proximity to said cogwheels, and while passing said cogwheels the machinery was negligently and suddenly put in operation by the said Duvall without any warning, and by reason thereof plaintiff was caught in the machinery of said cogwheels, and that his left arm and right hand were mangled and crushed and his left jaw was fractured in three different places. Plaintiff further alleges that he was compelled to remain at the top of said tower for a period of one-half or three-quarters of an hour, during which time he suffered great pain and agony by reason of said injuries, and by reason of the severe cold; that he was then lowered by means of a canvas and rope to the ground and taken to a hotel near by; that a doctor was called, and upon examination amputated his left arm just below the shoulder and his right arm at the wrist, and an attempt was made to set the broken jaw and lacerations sutured. * * *

"Plaintiff further claims that at the time he was taken from the hospital in the city of Adrian, as above set forth, he was suffering with pains in his head and other parts of his body; that he was in a weakened

condition, both mentally and physically, and while in that condition he was taken from said hospital to the city of Hudson in company with C. E. Duvall, and taken into the office of an attorney in the city of Hudson, and that while in said office a certain alleged release was prepared, which purported to release the said Duvall from all liability by reason of the said injuries that he had sustained as above set forth, and that said release was signed by plaintiff's mother, and that the said Duvall paid to plaintiff's mother, Mrs. H. P. Bangs, the sum of $75, and executed and delivered to his said mother, Mrs. H. P. Bangs, two notes, one for the sum of $50, payable in 90 days, and one for the sum of $75, payable in one year from the date of execution. Plaintiff further claims that he received no part or any of the moneys paid by the said Duvall by reason of said alleged release, and that he did not, and could not by reason of his condition as above set forth, authorize his mother, Mrs. H. P. Bangs, to sign or execute said release. Plaintiff further claims that the said C. E. Duvall for the purpose of securing the alleged release, represented to his mother, Mrs. H. P. Bangs, that he, the said Duvall, was the employer of the plaintiff, and that plaintiff had no rights as against the Cincinnati Northern Railroad Company, and that he, the said Duvall, was insolvent, and that if she did not accept the money according to the terms of the alleged release, the plaintiff would not be able to recover any money, and that the said Mrs. H. P. Bangs, believing and relying on the said statements signed this alleged release.

"Plaintiff further claims that the alleged release is void under section 5 of the Federal employers' liability act [Act April 22, 1908, chap. 149, 35 U. S. Stat. (U. S. Comp. Stat. 1916, § 8661)] under which act this claim is brought, and which reads as follows:

"'Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under, or by virtue of any of the provisions of this act, such common carrier may set off therein any sum [of money] it has contributed or paid * * * to the injured employee, or the person entitled thereto on account of the injury or death for which said action was brought.'

"Plaintiff further claims that the so-called independent contract alleged to exist between Duvall and the plaintiff was a device, the purpose and intent of which was to enable the defendant to exempt itself from any liability created by this act, and is void under the said section 5 of said act. * * *

"Now, gentlemen, that in substance is the claim of the plaintiff in this lawsuit. On the other hand, the defendant claims that plaintiff was not in its employ at the time of the accident; that plaintiff was in the employ of Edwin Duvall, an independent contractor, at the time of the accident; that plaintiff was not engaged in interstate commerce at the time of the accident; that plaintiff assumed the risk of being injured in going upon the platform of the coal dock near the cogwheels; that the accident was not due to any negligence on the part of the defendant; that the accident was due entirely to the negligence of plaintiff himself; that a settlement was made with and release given to Edwin Duvall by the plaintiff, and that such settlement and release constitutes a bar to this action; that under the pleadings and proofs, plaintiff has not made a case against defendant such as to entitle him to recover in this action.

"Defendant claims that the coal dock in question was constructed, owned, and operated by Edwin Duvall, under and by virtue of a written contract entered into between him and the defendant, which written contract consists of two letters * * * It claims that the said Edwin Duvall hired the men who worked on said dock, and paid them for such work.

"Defendant claims, further, that the plaintiff was never hired by it in any capacity, that his name was never upon its pay rolls, and that it never paid him nor became obligated to pay him for any such services performed. Defendant claims that the said Edwin Duvall was what is known under the law as an independent contractor, and that as such he hired the plaintiff and paid him for his services. Defendant claims that if it was the duty of any one to furnish a safe place for plaintiff to work, any such duty was that of Edwin Duvall, who constructed, owned, and operated the tower in question upon land which defendant had leased to him.

"Defendant claims, further, that it was no part of the duty of plaintiff to assist in transferring coal from the tower to the tenders of engines, and that that was no part of the work required to be performed by the said Edwin Duvall under the terms of said contract. Defendant claims that plaintiff was warned not to go up to the platform where he was injured, and when so told answered, 'All right' or words to that effect. * * *

"Defendant claims further that the accident occurred through the negligence of plaintiff alone. It claims that plaintiff stated to Edwin Duvall several times after the accident that he, Duvall, was not to blame for it, and that if he, plaintiff, had done as he was told, he would not have been injured, or that in substance, and that he made the same statement to other witnesses at different times.

"Defendant claims further that plaintiff made a settlement with the said Edwin Duvall for all damages on account of the injuries he received at the time in question, and that a release was executed by him, or for and in his behalf, with his authority, by his mother, Mrs. H. P. Bangs, said release being first discussed and read aloud in his presence, and that such release and full payment thereunder was a satisfaction for all his said injuries. * * *

"It is upon these conflicting claims, gentlemen, that you are to pass, and you are to determine from the evidence and under these instructions who is in the right and who is in the wrong in this matter.

"This is an action which is brought by the plaintiff under what is known as the Federal employers' liability act (35 U. S. Stat. chap. 149, §§ 1, 3, 5 (U. S. Comp. Stat. §§ 8657, 8659, 8661). You are instructed that at the time the plaintiff claims to have received his alleged injuries, a statute of the United States was in force in this State and in all of the other States, and that such statute reads in part as follows:

" 'That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States and Territories or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in

damages, to any person suffering injury while he is employed [by such carrier in such commerce, if the injury is caused] in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves or other equipment.

" 'That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

" 'That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void.' * * *

"You are instructed that the defendant was at the time of the alleged injury engaged in interstate commerce; that is, the railroad company. You are also instructed that if you should find that the plaintiff was at the time of the injury engaged in leveling coal or was going to the bin for that purpose, this work would be so closely connected with and a part of interstate commerce that it would be considered within the law, in the opinion of the court, as being engaged in interstate commerce. Therefore the first question for you to ascertain is whether the plaintiff at the time of the alleged injury was proceeding to the coal bin under orders and directions for the purpose of leveling this coal off. * * *

"If you find under this instruction then that the plaintiff satisfied you by a preponderance of the evidence that he was at the time of the injury engaged in interstate commerce work, then the plaintiff must next satisfy you by a preponderance of the evidence that he was at the time of the alleged injury in the employ of the defendant, the Cincinnati Northern Railroad Company. You are instructed that if the plaintiff was in the employ of Edwin Duvall as an independent contractor, and not in the defendant's employ, he cannot recover in this action.

"You are also instructed that even if the plaintiff

was engaged in interstate commerce work at the time of the accident, he could not recover in this action unless he was in the employ of the defendant at the time it occurred.

"You are instructed that the defendant would have a legal right to enter into a contract with Edwin Duvall, and would have a right to delegate to him by a contract the right to construct the dock in question and the work of operating and control of the same, if you find under the evidence that the defendant did do so. But even at that, if the plaintiff was in the employ of the defendant, then you have a right to proceed with your inquiry. * * *

"If you find from all the evidence that the plaintiff has satisfied you by a preponderance of the evidence that he, at the time of the injury, was in the employ of the railroad company, then you will continue your inquiry.

"On the other hand, if he hasn't satisfied you, that will end your inquiry, and your verdict will be, 'No cause of action.' * * *

"You are instructed that if the plaintiff at the time of the alleged accident was in the employ of the defendant, then it was the duty of the defendant to exercise ordinary care for the safety of the plaintiff, and you are further instructed that ordinary care, as used in these instructions, is that degree of care which a reasonably prudent man would exercise under the same or like circumstances.

"You are instructed that if the plaintiff was in the employ of the defendant and was directed by a foreman of the defendant acting within the scope of his authority to go upon the tower or elevator, and if you find that the giving of such orders was a failure to use that degree of care which a reasonably prudent man would have exercised under the same circumstances, then this would be negligence.

"You are also instructed that if you find that the plaintiff was employed by the defendant and that his work required him to work around a place which was not reasonably safe, in that there was an unguarded platform or unguarded cogwheels, and the defendant required the plaintiff to work in such a place, then this would be negligence. However, if the platform

was reasonably safe without barriers, if you should find it had none, or if the cogwheels were reasonably safe without guards if you should find that they had none, then this would not be negligence. * * *

"Then if you find under these instructions and evidence that the defendant was negligent and you will continue your inquiry. However, if you find that the defendant was not negligent, and that it did all that a reasonably prudent man would do under like circumstances, then the defendant would not be negligent, and that would end your inquiry, and your verdict would be, 'No cause of action.' * * *

"You are instructed that if you find the defendant was negligent, and you also find that the plaintiff was guilty of contributory negligence, that is that the plaintiff was guilty of doing something or omitting to do something which he should have done, by the test of what a reasonably prudent man would do under the same circumstances, and which if he had omitted to do or done, the injury would not have happened, yet this would not bar the plaintiff's recovery; neither would it bar the plaintiff's recovery if the injury was caused by the negligence of a fellow servant. However, if you find that the plaintiff was guilty of contributory negligence, that he was to blame some, that he didn't do his part in the matter, you should take this into consideration in estimating the damages if you find he has suffered any, and you should diminish his damages in proportion to the amount of the negligence which you attribute to him. * * *

"Then if you find that the plaintiff has established all of the elements that I have so far outlined which it is necessary for him to establish before he can recover, you will then proceed and inquire whether the plaintiff assumed the risk of the employment. If the injury resulted from what is known as an assumed risk, plaintiff cannot recover. You are instructed that whoever hires out for any service assumes those risks which properly belong to the employment. The servant assumes all the dangers that are obviously incident to the employment, which dangers he knows, or should know. You have a right to consider in fixing the liability here whether the railroad company furnished another way which was safe to get to this coal

bin without going by the cogwheel, and if it did, and plaintiff knew it, or should have known it, by the exercise of ordinary caution, and plaintiff picked out his own way, which was not the way to be used, and which was not the ordinary way that was used, the plaintiff assumed the risk of going the way he did, and cannot recover. * * *

"You are instructed that before the plaintiff can recover he must establish by a preponderance of the evidence the following elements: (1) That he at the time of the accident was engaged in interstate commerce work; (2) that he was in the employ of the company at the time of the accident; (3) that the defendant was negligent; (4) that the negligence of the defendant was the proximate cause of his injuries; (5) that he has been injured; (6) that the injury was not assumed by him by virtue of his employment, and was not such as is known as an assumed risk. * * *

"You are instructed that there has been some evidence in this case tending to establish a settlement by Edwin Duvall with Leo Guy for his injuries. This evidence is to be considered by you in determining the question as to whether Leo Guy was working for the railroad company, or whether he was working for Edwin Duvall at the time of his injury. That is, if you find the release was authorized and made when the plaintiff was competent and that he understood it or ratified the signing of it, you will take this release as bearing on the question of who hired him, whether the railroad company did, or Edwin Duvall. If you find he was working for the railroad company, however, I do not believe under this act of congress that the railroad company could escape its liability by reason of the injury, if you find it is liable by reason of a settlement made by Leo Guy with Edwin Duvall, even if you should find it was knowingly made and understood, because it would seem to me that this would be a device by which the purpose of the statute could be nullified and avoided. Of course if it wasn't knowingly made or ratified and was done by fraud and deceit, it would not be any settlement or release. If, therefore, you find under the evidence and these instructions the plaintiff is entitled to recover from the railroad company, you will not consider this receipt

as diminishing liability, if any liability is once established against the railroad company."

The jury returned a verdict for $35,000 in favor of the plaintiff. The case is brought here by writ of error.

The assignments of error are grouped in the brief of appellant as follows:

(1) Was the plaintiff in the employ of defendant at the time he was injured?
(2) Was plaintiff engaged in interstate commerce at the time he was injured?
(3) Was defendant guilty of negligence?
(4) Did plaintiff assume the risk?
(5) Does the release plaintiff gave Edwin Duvall bar recovery?
(6) Is the verdict against the weight of the evidence?
(7) Is the verdict excessive?

It was stated on the oral argument by counsel for appellant that the controlling questions are 1, 2, and 5, and in considering these it is necessary to go into the testimony at some length.

It is claimed by the defendant that one Duvall was acting in a dual capacity; that while he was foreman of the yards of defendant at Hudson, he was also an independent contractor. To establish the last proposition two letters were introduced in evidence reading:

"Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.
"VAN WERT, O., July 1. '13.

"MR. E. DUVALL,
"Hudson, Mich.

"*Dear Sirs:* Confirming the understanding between us in my office last week:

"If you build the hoist at Hudson, it is understood that we are to pay you 11c per ton for handling the coal, the Cincinnati Northern to furnish the coal for operating the hoist and if the coal used for this purpose amounts to more than three-fourths of a ton daily, the price of hoisting the coal will be reduced from 11c to 10c per ton. Bryan scale weights will

govern in determining the amount of coal handled, if the coal is weighed at Bryan, and if it is not weighed there, billed weights will govern. If you are required to unload five or more straight flat bottom cars in one month, you will be paid 13c per ton for the number of flat bottom cars unloaded but if you unload less than five flat bottom cars in one month, the regular rate will apply to the flat bottoms as well as the hopper bottoms. You are to pick up all coal that falls to the ground. You are not to be held to this agreement if it is found that the hoist cannot be operated successfully, but you will bear the burden that results from a failure of a day or two. There is no understanding that we will continue this method of handling coal beyond the first of June, 1914.

"Have I outlined your understanding of our conference?

"Yours truly,

"J. V. KENNEDY."

"The Cincinnati Northern Railroad Company.

"HUDSON STATION, July 6, 1913.

"MR. J. V. KENNEDY, Supt.

"*Dear Sir:* Referring to your letter on date of July 1st relating to our agreement about handling the company coal at Hudson. Everything is all right and I will accept this letter as our contract. Work is progressing nicely with the new dock and hope to have same in operation by the first of the month. Thanking you for the interest you have taken in this in my behalf as well as that of the company,

"I am yours truly,

"E. DUVALL."

Mr. Duvall claimed there was a lease made later, but it was not produced upon the trial.

It is not claimed that plaintiff had any knowledge of this correspondence. It is claimed by the plaintiff that no authority was shown on the part of Mr. Kennedy to write the letter, and it is also claimed that if it is conceded a contract was made, it is against public policy. It will be noticed that the correspondence does not show how much coal is to be handled, or what is to be done in handling it, how many cars, who is to

direct their placings, and after the coal is hoisted what is to be done with it; if to be used in coaling locomotives, who is to direct the placing of them and the times of coaling. The correspondence is silent as to these and other details. As to what was actually done, the testimony offered by the plaintiff in part is as follows:

"Morgret, Emil. Am employed by the Cincinnati Northern Railway Company. I was employed by that company January 18, 1914, when the accident occurred. I got acquainted with Leo Guy during that month. I met him at the Cincinnati Northern Railway Company coal dock. He had been working there about a week. I had been there almost 2 years.

"We elevated coal on the coal dock with a machine built there on the Cincinnati Northern Railway Company's land. It was about 40 or 50 feet high, and just about square at the base. * * * There is also a water tank located there on the right of way about 50 feet south of the coal dock, on the same side of main track as the elevator, and between the main track and switch track. The water tank is about 8 feet from the main track. There were also a couple of box cars there that we used for an office and storeroom; oil, corncobs, wire, kegs and sand are stored there. The main line extends from Jackson, Mich., to Franklin, Ohio.

"Edwin Duvall was a foreman there in charge of elevating coal and water into the engines. He was there all day and sometimes in the evening. When he was not there I was in charge. Leo Guy and Bert Elliott both worked there about January 18, 1914, the day of the accident, and the week previous to that. Leo Guy elevated coal. He opened the door of the cars and let the coal down into a hopper, and then it would be conveyed across into the endless chain and elevated up into the hopper above. He saw that the coal went down into the hopper and shoveled it out. We used a threshing machine engine to furnish power. After the coal was elevated into the hopper, it was put on the locomotives when they came by there. When a car would come up there or a locomotive en-

gine, Leo Guy would release the clutch and let the spout down, and the coal would run out on the engine or tender. The fireman and engineer would generally be on the engine. The engines that we coaled came from Ohio, and were going north to Jackson, Mich., or came from Jackson, Mich., and were going south into Ohio. There was one freight train that was a short local run from Hudson to Jackson only. Outside of that all other trains went from Ohio into Michigan or Michigan into Ohio. When a locomotive engine or tender was there for coal the fireman of the locomotive engines would tell Leo Guy when to let the spout down or up. These locomotive engines were going from Ohio into Michigan or from Michigan into Ohio. * * *

"In addition to the work of elevating this coal, there was a couple of engines there we had to tend each night. One came from Ohio and the other from Michigan. The one coming from Michigan would go to Ohio the next day, and the other one had to come from Ohio. At night we put sand, water, and coal on those engines. Leo Guy assisted in that work a part of the time. Generally sent him to open the switch and send the engines south on the main track. When they had run the engines by the switch he would turn the switch back and lock it and get on the back of the engine. After that he would get on the tank and go and draw water in the tank. He would generally pull down the spout of the water tank and draw water. After the tank was filled, he would hang up the spout and go back onto the side track again, and turn the switch. He used to hoe the ashes out of the ash pan of the locomotive engines. If Mr. Duvall wasn't there, this was done under my direction. He also carried sand up on the engine and put it on the sand box. The sand kept the wheels from slipping on the rails. He also filled the oil cans with oil, and put them back on these locomotives. These locomotives, when they left for Ohio, hauled box cars and coal cars. I have seen coal cars go by, and have seen threshing machines hauled. Leo Guy helped keep fires up on those engines at night. The next morning when the engineers came down these engines would have the steam all up for the purpose of going out and taking their trains.

"When Mr. Duvall was present he assisted in the work that I have named over. He ceased working there about 14 months ago. I took Mr. Duvall's place. I got my pay from the Cincinnati Northern Railroad Company. I also got it from the Cincinnati Northern Railroad Company before Mr. Duvall left. I do the same work now that Mr. Duvall did before he left. I was present a couple of times when Mr. Duvall got his pay; he got it from the Cincinnati Northern Railroad Company."

On cross-examination in part:

"I worked there nights. Leo Guy worked part of the time nights and part of the time daytimes. Besides Leo Guy and myself Bert Elliott worked there. I think another man came to Hudson with Guy and was also employed there, but I don't remember his name.

"*Q.* Now, at the time you worked for the Cincinnati Northern Railroad Company?

"*A.* Yes, sir.

"*Q.* And did you also work for Mr. Duvall?

"*A.* I worked under his instructions; he was there.

"*Q.* Did you work for him?

"*A.* Yes; I done whatever there was to do there.

"*Q.* You were paid by both were you not?

"*A.* Not at that time.

"*Q.* Were you paid by the Cincinnati Northern Railway Company?

"*A.* Yes, sir.

"*Q.* To do work for the company, and paid by Mr. Duvall to do the work for him?

"*A.* Not at that time.

"*Q.* Not at the time of this accident?

"*A.* No, sir.

"*Q.* You are sure about that, too, are you, Mr. Morgret?

"*A.* Yes, sir."

On redirect examination in part:

"*Q.* Before Leo Guy worked at this place, how long had you been working there?

"*A.* About two years.

"*Q.* Were you carrying on the same kind of work during the two years prior to the time Leo Guy worked

there that you were during the time Leo Guy did work there? Were you doing the same kind of work?

"*A.* Yes, sir.

"*Q.* State about when, if you remember, that you received your communications from the defendant here, the Cincinnati Northern Railway Company, by message. * * *

"*Mr. Ranes:* (Question read) with reference to coal being furnished by you there for those engines?

"*A.* I don't believe I can just tell.

"*Q.* Fix the date as near as you can.

"*A.* We got some long before this accident and got some after.

"*Q.* About how long were those last ones you remember received, either by phone or message before this accident?

"*A.* Just about a month I should judge.

"*Q.* I will ask you what did those messages state?

"*A.* It took a little bit longer than the time they thought it would to coal the engines, and they wanted to know what was the reason, and we simply told them we had a little trouble with the dock at the time, and there was a little delay in getting the coal on the engine."

"Bert Elliott: My business is day work. I had been working off and on at the coal dock, where Leo Guy was working before January 18, 1914. I had been working there a couple of days before the accident happened. I worked some days and some nights. Leo Guy worked there while I was working. I was working for the railroad company under Mr. Duvall's instructions. I got my money in checks from the Cincinnati Northern Railway Company at the depot. Mr. Morgret worked some nights and some days when I was there. Ed Duvall was boss or foreman; when he was not there Emil Morgret was in charge. When Duvall was there I worked under him, and when he was away I worked under Emil Morgret. I have been working at the coal dock off and on since it was built. I helped to do the first work. The week Leo Guy was working there we unloaded coal nights from the Cincinnati Northern Railway Company trains into the hopper, and elevated it up in that tower. After it was elevated it was put on the coal tenders or engines.

The engines were bound from Ohio to Jackson, Michigan, or from Jackson, Michigan, to Ohio. The engine would come up and stop, and the fireman would call for coal, and we would give him coal. We would untie a rope over a hook set there and let the spout down and let coal into the tender. Leo Guy and I both did that work. When they had enough coal on the engine the fireman would give the signal. I drew the ashes from the ash pan underneath the engine. I have seen Leo Guy do that. I also put on sand and sifted it for the engines. It is used for a brake on the rails of the Cincinnati Northern Railroad Company. We also worked and cleaned up loose coal around the dock. We also run engines out to get water. Leo Guy always turned the switch, and always pulled the rope to the spout to get water from the tank; pulled it down to the tender. The water would then come out of the tank into the tender of the engine. These engines ran from Ohio into Michigan, and from Michigan into Ohio. Leo Guy worked underneath the engines, cleaned out the ash pans and oiled it, got the oil cans ready and the lanterns and such things. He cleaned and filled the lanterns and put them on the engines. The engineer and fireman of the engines took the lanterns with them. * * *

"I was present at the time Leo Guy was injured. Mr. Duvall was also present. On that day Leo Guy and I were both upon that platform. The belt came off, and we went up to put the belt on. Mr. Duvall directed us to go up there. Mr. Duvall had started the machinery several times, and the belt came off, and we put it back on. When Leo Guy first got up there I think the machinery was standing still. At the time he was injured I had just gone down to the lower part beneath the dock. I was close to 50 feet below Leo Guy. While I was there and he was up there, the machinery came to a stop and started on. Before that time it had been running until I got down to the ground. When it started up I noticed a check of the motion of the machinery, and it stopped. I heard somebody holler and went out and seen. When the machinery was started up, I don't remember now if I heard any warning given or anything said to me or Leo Guy that the machinery was going to be start-

ed. When I felt the machinery kind of stop and heard the scream, we ran out and looked to see what it was, and we see him hanging up there. I was down in back when I heard this cry. I never saw Leo Guy on that dock before as I remember of. * * * Prior to this accident we were unloading cars there. Leo Guy and I were both working at the same thing, to get the coal out of the cars into the hopper and elevate it above."

"Leo Guy: I was 29 the 28th of last October. I was located at Hudson, Mich., January 18, 1914. I now reside at the Cook County Poor Farm, Cook County, Ill. January 18th and some time prior thereto I was working for the Cincinnati Northern Railroad Company at the coal dock at Hudson, Mich. I went to work there the Sunday morning before I got hurt on the following Sunday. When I made application for this position or work I went down to see the foreman, Ed Duvall. On that Sunday I went to work somewhere near 8 o'clock or 9 o'clock in the morning, and worked that day and all that night, and the next day. They gave us a couple of hours' rest in the little box car office that was there.

"January 18, 1914, we were working around there, and there was a belt come off, and we went up and put the belt on and got it fixed on the wheel, and went down, and Duvall told me to go up on top and level off the coal in the bin, to level it off good so we can get lots of coal up there. He expected some more trains in there, and we would need lots of coal. On that day I had been working one week. I went to work that day about 6 o'clock in the morning. Before that we quit work the night before. During the daytime when I worked there Mr. Duvall was boss or foreman over me. When I worked there of an evening Mr. Morgret was boss or foreman.

"*Q.* State when you went to work there on Sunday, tell us just what work you were doing—the kind of work.

"*A.* The machine was broke down when I went there and— The machinery was broken down, and we had to shovel coal into buckets and then move the buckets with a crank outside so we could put more buckets up against the side of the car and keep the buckets

firm so we could coal the engines running from Ohio into Michigan and from Michigan into Ohio.

"*Q.* What else did you do there besides coaling; tell us all the work you did?

"*A.* At nighttime when I was assisting in the work with Mr. Morgret I was told to sand the engines, clean the oil cans, fill them with oil, and put them on the engine.

"*Mr. Clark:* Just a moment. State who he was told by.

"*A.* I said Mr. Morgret.

"*Mr. Ranes:* By whom were you told?

"*A.* I was told by Mr. Morgret.

"*Q.* To do what?

"*A.* To fill oil cans, put them on the engines, carry sand from the dry sand pile, and put it on the engine.

"*Q.* What else did you do there besides that?

"*A.* I went and opened the switch, and let Mr. Morgret with the engine on the main track from the switch track and closed the switch, climbed on the engine, went down and got off the engine, unloosened the rope that held an iron cable that we had attached to the chute of the coal dock, and let the coal go into the tender of the engine. * * *

"*A.* From Michigan to Ohio and from Ohio to Michigan.

"*The Court:* Were the trains actually going through, or didn't you get ready for the trains to go out in the morning?

"*A.* Ready to go out in the morning. * * *

"*Q.* What was done to the engines while they stopped there?

"*A.* They were cleaned, sanded, cleaned ashes out of pan.

"*Q.* Who did this?

"*A.* Myself and Mr. Morgret.

"*Q.* Under whose direction did you do it?

"*A.* Mr. Morgret's.

"*Q.* Tell us all that was done to the engines while stopping there?

"*A.* Cleaned, sanded, took ashes out from under the engine with a long scraper, cleaned the oil cans, put them on the engine, filled them full of coal and water,

and had steam up so they were ready to go out the next morning. * * *

"*Q.* And under whose direction?

"*A.* Mr. Morgret's.

"*Q.* In addition to that, what did you do while working there, if anything?

"*A.* Elevate coal. * * *

"*Q.* After you got this coal up there and into this hopper, what did you do with it?

"*A.* Put it in the tender of the engines. * * *

"*Q.* What fireman?

"*A.* The fireman of trains coming in there, the locomotive fireman.

"*Q.* What did he do?

"*A.* He would come up on top of the tender, and would give the signal to the engineer to stop the train, and when he would get into the position he wanted it, he would say, 'All right,' and I would release the rope and let the chute down and let the coal fall out of that bin or hopper, as we called it, into the tender of the engine. Then he would say, 'That is enough,' and I would put the chute back up again until he moved the engine probably a few feet. Then he would say, 'Give me some more,' and I would let the coal down again and level it up so it was nice and level on the tender.

"*Q.* Is there anything else you did there?

"*A.* Yes, sir; I dried sand.

"*Q.* What was afterwards done with that sand?

"*A.* Put in a sand tank on the engine."

The witness described in great detail the accident, and the extent of his injuries. He denied that he had knowingly settled for his injuries, or that he had authorized anybody else to do so.

In view of the exceedingly meager statement in the alleged contract of what Mr. Duvall was to do, and in view of what was actually done in handling the coal, and the other work which was done by the plaintiff and by his co-worker Mr. Elliott, and by the assistant foreman, Mr. Morgret, we do not think the court erred in declining to direct a verdict for the defendant on

the theory that plaintiff was at work for an independent contractor. The jury having found plaintiff was in the employ of the defendant, it necessarily follows under the proofs that he was engaged in interstate commerce. We think it also follows that what was done by way of settlement with Mr. Duvall is not a defense to this action, against the railroad company.

The other assignments have been considered. We think them without merit.

Judgment is affirmed, with costs.

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

TRUSSED CONCRETE STEEL CO. *v.* ROSEMA.

COMPROMISE AND SETTLEMENT—PAYMENT—ADMISSIONS.

Where the purchasers of steel claimed credit for labor in tagging the pieces in a letter inclosing a check for the balance, after deducting the amount of the claim, a letter in reply from the seller asking the purchasers to forward bills for the charges so that they could be passed upon and credited, if correct, did not constitute an admission that the check was received as payment

Error to Kent; Brown, J. Submitted June 15, 1917. (Docket No. 54.) Decided September 27, 1917.

Assumpsit in justice's court by the Trussed Concrete Steel Company against Nanco Rosema and Jacob B. Top, copartners as Rosema & Top, for goods sold and delivered. There was judgment for defendants, and plaintiff appealed to the circuit court. Judgment for plaintiff. Defendants bring error. Affirmed.

William J. Landman, for appellants.

Clapperton, Owen & Hatten, for appellee.

MOORE, J. The amount of the controversy in this litigation is less than $80. The case was tried before the circuit judge without a jury. He made findings of fact and law as follows:

"1. The written contract under which the plaintiff sold certain building materials to the defendants was completely performed by the plaintiff.

"2. The amount due to the plaintiff under the terms of this contract was the sum of $900 and the total payments credited the defendants amount to the sum of $829.84, leaving a balance upon said contract price of $70.16.

"3. There is no evidence of any failure on the part of the plaintiff to fully perform the conditions of sale in said written contract. When the defendants sent their last remittance to the plaintiff, the same was inclosed with a statement of an alleged claim of the defendants' against the plaintiff for an amount equal to the balance of the $900 for 'labor, sorting and remodeling reinforced steel,' as follows:

"'GRAND RAPIDS, MICH., Sept. 1, 1914.

"'Trussed Concrete Steel Co.,

"'Youngstown, Ohio.

"'To ROSEMA & TOP, Dr.

"'General contractors and Builders, Dr.

"'To steel contract				$900 00
"'July 17.	By Cash	$73 69		
"'May 9.	By freight on footing steel.	6 71		
"'May 21.	By freight on carload steel.	66 24		
"'July 24.	By Cash	500 00		
	"'By labor sorting and remodeling reinforcing steel as follows:			
	"'144 hours labor at 30 ct...	43 20		
	"'52 hours foreman labor at 60 ct.	31 20		721 04
				$178 96'

"Upon the receipt of this check the plaintiff replied as follows:

"'ROSEMA & TOP,

"'Grand Rapids, Mich.

"'*Gentlemen:* We have your check for $178.96 which you forward in settlement of the balance on invoices of May 15th, less freight $66.24 and $6.71 and contras of $43.20 and $31.20. Kindly forward us the bills for these charges so we can have same passed upon and credited to your account, if correct. The freight bills we will also have checked up.

"'Awaiting your further advices we remain,

"'Very truly yours,

"'TRUSSED CONCRETE STEEL CO.'

"The written contract entered into between the parties set forth the conditions of sale and delivery and the remedies of the defendants in case of shortage or defective material. It clearly appeared that the defendants had failed to comply with the conditions of said contract in presenting any claims they might have thereunder.

"The claim of the defendants is that the labor represented by the amount not remitted was occasioned by the failure of the plaintiff and its agents to properly tag the steel. I find that there was no obligation upon the plaintiff to tag the steel, and that there is no default on the part of plaintiff for failure to tag the steel, and defendants are not entitled to a set-off, recoupment, or any consideration whatever, for the amount of any labor or expense that they have incurred.

"I therefore find as a matter of fact that the plaintiff had fully performed its contract and was entitled to receive from the defendant the full contract price of $900. The sum of $829.84 credited the defendants was an amount admitted to be due by them, and which was undisputed and due in any event, and there was no dispute or controversy as to the balance of $70.16; the balance due on said $900, except as defendants presented the claim, which was not in accordance with said contract. The plaintiff had no knowledge of the items making up such charge for labor, nor could it determine as to whether it would allow or disallow same until it was presented with an itemized state-

ment. An accord and satisfaction can only be predicated upon an unliquidated claim. Nothing was paid upon this item of labor and material and the amount paid was such as would, as before said, be due and payable in any event. There was, therefore, no accord and satisfaction of this balance.

"Further I find that there was no evidence of the payment by the defendants and the acceptance by the plaintiff of any sum in full settlement of the balance due on said contract.

"I find and conclude, therefore, that the defendants are liable to the plaintiff in the sum of $70.16, together with interest thereon at the rate of 5 per cent. per annum from September 9, 1914, to the date of judgment, and that a judgment should be entered in favor of the plaintiff and against the defendants for that amount, viz., $77.16, and costs to be taxed.

"Dated November 21, 1916."

Exceptions were duly made, and the case is brought here for review.

Counsel for appellant in his brief says:

"There are only two questions involved: (1) Was the account unadjusted or unliquidated, and therefore subject to an accord and satisfaction? (2) Was there an accord and satisfaction?"

—and insists that each of these questions should be answered affirmatively. This contention is based upon the claim that it was the duty of the plaintiff to tag the pieces so as to show where they were to go in the construction; that it had failed to do so, which failure resulted in the need of making expenditures by the defendant which were the subject of negotiation and was followed by their sending a statement of their account with a check as payment of the balance, and a recognition of such payment and of its purpose by the defendant.

The contract between the parties was in writing. It was for a stated amount of steel for the price of $900, to be paid for in the manner stated in the contract. It contained the following:

"Conditions of Sale.

"No one has authority to depart from the conditions of sale named herein, nor to make representations other than those printed hereon, unless the same are written on this order and approved by the home office. No claim for material purchased locally will be entertained unless the written authority of the home office for such purchase is first secured. * * *

"Material proving defective will be replaced if reported promptly and same returned to us, but no claim shall be made for labor on such material or for damages therefor.

"It is distinctly understood and agreed that where general information and drawings are furnished for the proper placing of our products in the structure, such drawings are furnished gratis and form no part of this contract. These drawings must not be used before being rechecked by the purchaser or his architect, and the purchaser alone shall be responsible for the correctness of said drawings.

"Unless specifically provided otherwise, this quotation includes no bending or other special labor on the materials mentioned. * * *

"Consignees should carefully check material immediately upon its arrival at destination as no claim for shortage will be entertained unless filed with us within five days thereafter."

There was no agreement in the contract to tag the articles, and no agreement is shown on the part of the defendant to make an allowance because they were not tagged. The letter of plaintiff dated September 9, 1914, is claimed to be an admission that the check was received as payment. When it is all read we think it will not bear such a construction as is indicated by the following language:

"Kindly forward us the bills for these charges so we can have same passed upon and credited to your account, if correct. The freight bills we will also have checked up."

The record is clear that the entire amount of material which was to be furnished for $900 was fur-

nished. We think the trial judge reached the right result. See *Goldsmith* v. *Lichtenberg*, 139 Mich. 163 (102 N. W. 627), and cases cited therein.

Judgment is affirmed, with costs to the plaintiff.

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

HOLCOMB *v.* ALPENA POWER CO.

1. INJUNCTION — RIGHT TO RELIEF — PERMANENT STRUCTURES — EQUITY—REMEDY AT LAW—DAMAGES.

Where the owner of land bordering on a lake has had knowledge for a number of years of the increased height of the water due to a dam of a power company, has stood by and allowed the company to spend a great deal of money in acquiring flowage rights and in making other large investments, and, in two different actions, has recovered and been paid damages for overflow for a series of years, he is not entitled to an injunction to compel the lowering of the dam to its former height, but the case will be remanded to take proofs on the question of damages in full satisfaction for the damage, past and prospective.

2. WATERS AND WATERCOURSES—FLOODING LANDS—DAMAGES, MEASURE OF—PERMANENT INJURIES.

The measure of damages for the overflow of land bordering on a lake, due to the increased height of a dam, is the difference in value of the property as it is and as it would be if the dam had remained without alteration.[1]

[1]On the question of liability for damming back water of stream by increasing height of dam, see note in 59 L. R. A. 874.

On the question of liability of one damming back water of stream, for injury by flood, see comprehensive note in 59 L. R. A. 817, 28 L. R. A. (N. S.) 156.

Appeal from Alcona; Widdis, J. Submitted June 7, 1917. (Docket No. 4.) Decided September 27, 1917.

Bill by Samuel Holcomb against the Alpena Power Company, Limited, to restrain the maintenance of a dam. Defendant filed a cross-bill to determine plaintiff's past, present and future damages from such maintenance. From a decree for plaintiff, defendant appeals. Reversed, and remanded.

Joseph H. Cobb, for plaintiff.

Henry & Henry, for defendant.

MOORE, J. The plaintiff is the owner of a valuable farm situated a short distance from the shores of Hubbard lake. Many years ago a dam was erected at the north end of Hubbard lake. This dam until 1906 was used by the log owners in sluicing forest products out of Hubbard lake and driving them down the lower south branch of Thunder Bay river. It passed into the control of the Alpena Power Company, Limited, in the year 1905.

It is the claim of plaintiff that since 1905 and from that date the power company has raised the water in this lake from 2½ to 3 feet higher than it was carried before 1906, and that this increased height of the water flows and injures the plaintiff's farm. Litigation followed the making higher of the dam, which found its way to this court (see 175 Mich. 500 [141 N. W. 534]), where a verdict of $1,080.70 for damages for the years 1907, 1908, and 1909 was affirmed. Later the plaintiff sued for injury to his crops for the years 1910, 1911, 1912, and 1913, and recovered a judgment for $1,398, which was paid. The plaintiff filed this bill in the circuit court in chancery to compel the defendant to take down its dam to the point where it was previous to 1906. The case was heard and a decree

entered in favor of the plaintiff. From this decree the defendant has appealed to this court.

The plaintiff to maintain the issue upon his part, introduced the pleadings, charge of the court, verdict, and judgment of the court in the two law cases, and gave testimony tending to show the defendant has continued to maintain the water in Hubbard lake by means of this dam to practically the same heights from the year 1906.

The defendant filed a cross-bill and asked the court to take testimony as to plaintiff's damages and to render a judgment and decree for such damages, past and prospective, giving the defendant the right to maintain and operate its dam in the future the same as it has done since 1906. The court refused to entertain this proposition, deciding the two law cases were *res adjudicata.*

I quote from the brief of the plaintiff:

"The attorneys then stipulated they would take such testimony as either side desired to introduce upon the condition of the water in the lake, value of plaintiff's property, and the value of defendant's property bearing upon the question of whether or not the defendant is entitled to the relief claimed and prayed for in its cross-bill so that this proposition could be determined upon this appeal. Under this stipulation no evidence of damages was introduced; this question being left open for further proofs providing this court should decide the plaintiff is not entitled to the relief granted to him by the trial judge."

We quote from the brief of defendant:

"Defendant in its cross-bill prays that it be permitted to maintain and operate its dam in its present condition. It further asks that, if the court shall determine that plaintiff's land is damaged by reason of the facts set up in the bill of complaint, the court ascertain the extent to which plaintiff has been damaged and will be damaged for all time, and the amount of damages and award to the plaintiff such amount as

permanent damages. * * * We ask that it remand the case to the circuit court for Alcona county in chancery, for the determination by that court of the damages, if any, to which plaintiff is entitled as prayed for in our cross-bill."

Many interesting questions are presented and argued by counsel, but we think the testimony of the plaintiff simplifies the situation. We quote part of it:

"In 1905 I had full knowledge of the condition of the lake. In 1905 I had full knowledge of the condition of the lake and knew the condition of the dam.

"*Q.* You knew that as well as anybody that lived around there?

"*A.* Yes, sir.

"*Q.* From that time until the present time you have known very particularly about the lake and the dam?

"*A.* Yes; I have known the lake.

"*Q.* And when you started the first suit—before you started the suit you went to the dam and looked at it?

"*A.* Yes.

"*Q.* You have kept track of the dam ever since?

"*A.* Yes. * * *

"*Q.* How long before they built it did you have information that they were going to build it?

"*A.* Probably a year or such a matter. * * *

"*Q.* You had knowledge of all the cases that have been brought?

"*A.* I have had knowledge of some of them; yes. * * *

"*Q.* You had knowledge for the past ten years that the power company were acquiring flowage rights around this lake and dam, acquiring some and attempting to acquire others?

"*A.* Yes. * * * I remember the circumstances of George P. Smith and W. H. Le Roy coming to me in reference to buying my flowage rights on my farm for the purpose of raising the water in Hubbard lake. I think it was in 1905, away along about July, I think. They wanted to buy my flowage rights; they said the water would bother me. They said they were going to raise it and it would bother me and they wanted to buy my flowage rights.

"*Q.* Up to the time they came there and wanted to

buy your flowage rights how had they manipulated this dam in reference to letting the water go out the 1st of June or some time along there, and letting the lake run down?

"*A.* The water went down, until about 1906 the water wasn't held up—until 1906 the water was not held up, except there might have been one or two years, or not so much; after that it was held up steady all the summer long, except one year, I think it was 1910, it was drawed out a little earlier."

The record discloses that between 1906 and the beginning of the instant case defendant invested a good deal of money in acquiring flowage rights about the lake, and made other large investments, the value of which is largely dependent upon the continued use of the dam. About ten years were allowed to intervene after the erection of the dam before the filing of this suit.

It is probable, under the cases cited by his counsel, that if plaintiff had promptly appealed to the chancery side of the court, he could have made a case for injunctive relief, but he did not see fit to do so. Knowing the dam was to be increased in height, he took no steps to prevent it, but appealed to the law side of the court, where he has recovered and been paid damages for overflow for a series of years.

The principle involved in the case is not new in this court. We shall not quote from the cases, as they are so easily accessible. Some of them are *Jacox* v. *Clark,* Walk. Ch. 249; *Payne* v. *Paddock,* Walk. Ch. 487; *Blake* v. *Cornwell,* 65 Mich. 467 (32 N. W. 803); *Miller* v. *Cornwell,* 71 Mich. 270 (38 N. W. 912); *McKee* v. *City of Grand Rapids,* 137 Mich. 200 (100 N. W. 580; *Howard* v. *Bellows,* 148 Mich. 410 (111 N. W. 1047); *Reason* v. *Peters,* 148 Mich. 532 (112 N. W. 117); *Cornwell Manfg. Co.* v. *Swift,* 89 Mich. 503 (50 N. W. 1001); *Allen* v. *Electric Co.,* 144 Mich. 370 (108 N. W. 79, 115 Am. St. Rep. 453); *Stock* v. *City of*

Hillsdale, 155 Mich. 375 (119 N. W. 435); *Morrison* v. *Power Co.*, 181 Mich. 624 (148 N. W. 354).

We think the judge erred in the instant case in granting injunctive relief, and that he should have permitted the testimony offered on the question of damages.

The decree is reversed, and the case is remanded to take proofs on the question of damages in full. These should be computed upon the basis of the difference in value of plaintiff's property as it is, and as it would be if the dam had remained as it was in 1905. The defendant will recover its costs.

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

STAPLETON *v.* INDEPENDENT BREWING CO.

1. AUTOMOBILES—LIABILITY OF OWNER—NEGLIGENCE—STATUTES.
   Under Act No. 302, Pub. Acts 1915, § 29 (1 Comp. Laws 1915, § 4825), providing that the owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle when it is being driven by another with his express or implied consent or knowledge, where the owner loans it to a company for use in its business and a wagon and team belonging to a third person are injured as the result of the negligence of the company's driver, the owner is liable.

2. SAME—STATUTES—CONSTITUTIONALITY.
   Act No. 302, Pub. Acts 1915, § 29, relating to the liability of the owner of a motor vehicle for injury occasioned by negligence in operation while it is being driven by another by his express knowledge and consent, while safeguarding the rights of persons having occasion to use the

streets, does not unreasonably infringe upon the rights of those able to own automobiles, and is within the police power of the State.[1]

Error to Wayne; Shepherd, J., presiding. Submitted June 22, 1917. (Docket No. 130.) Decided September 27, 1917.

Case in justice's court by William J. Stapleton against the Independent Brewing Company for the negligent killing of plaintiff's horse. There was judgment for defendant, and plaintiff appealed to the circuit court by writ of certiorari. Judgment for plaintiff. Defendant brings error. Affirmed.

J. O. Murfin (*Howard M. Campbell,* of counsel), for appellant.

Guy W. Moore and *Hal. P. Wilson,* for appellee.

MOORE, J. This suit arises as a result of an automobile accident. The suit was commenced in justice's court to recover the sum of $375 for damages done, as a result of the accident to a wagon and team of horses belonging to plaintiff. The automobile which caused the accident was owned by the defendant, but at the time of the accident above referred to it had loaned it to the Detroit Axle Company to be used in the Detroit Axle Company's business, and at this particular time the automobile was being driven by an employee of the Detroit Axle Company. The record discloses the following:

"*Q.* On this particular occasion did you know that this automobile was being used by the Detroit Axle Company?

"*A.* Yes, sir.

"*Q.* And it was with the consent of the Independent Brewing Company?

"*A.* Yes, sir."

[1] On liability of owner of automobile when car is being used by borrower or hirer, see notes in 33 L. R. A. (N. S.) 81; 37 L. R. A. (N. S.) 834; 47 L. R. A. (N. S.) 662; L. R. A. 1916A, 957.

Counsel for appellant say there is but one question represented for determination—*i.e.:*

"If an employee of the Detroit Axle Company, engaged in that company's business, negligently operates an automobile owned by another party, is the owner of that automobile liable where there is no relation of master and servant, but where the automobile is so used with the consent of the owner?"

This question involves a construction of section 29 of Act No. 302 of the Public Acts of 1915 (1 Comp. Laws 1915, § 4825). The portion of that section necessary to an understanding of this case reads as follows:

"SEC. 29. *Civil Actions.* Nothing in this act shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages by reason of injuries to person or property resulting from the negligence of the owner or operator or his agent, employee or servant, of any such motor vehicle, or resulting from the negligent use of the highway by them or any of them. The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle, whether such negligence consists in violation of the provisions of the statutes of this State or in the failure to observe such ordinary care in such operation as the rules of the common law require: *Provided,* That the owner shall not be liable unless said motor vehicle is being driven by the express or implied consent or knowledge of such owner." * * *

Counsel say:

"The statute itself does not purport to give a cause of action on the facts of this case. * * * As the statute now stands this section is merely declaratory of the common law. If it was intended to make the owner liable no matter by whom the car was operated, it would have been very easy to say so, but the statute does not purport to use any such language. An analysis of the proviso is interesting; the proviso reads: '*Provided,* that the owner shall not be liable unless said motor vehicle is being driven by the express or implied consent or knowledge of such owner.' If the legis-

lature intended to make the owner liable, no matter by whom the car was driven, the language employed would probably have been: 'That the owner shall be liable if said motor vehicle is being driven,' etc. * * * It does not so state."

This argument is answered by the reading of the statute:

"The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle."

And the proviso contains the exceptions to that liability. We quote again from the brief of counsel:

"If the construction contended for in the previous subdivision of this brief is not upheld, it necessarily follows that the statute must be deemed to impose a liability upon the owner of an automobile for an accident happening through its operation whether the owner is at fault or not. A statute of this description would violate both the Federal and State Constitutions. It would constitute a deprivation of property without due process of law and would be so obviously unjust, oppressive and arbitrary as to contravene the fundamental rights of a citizen. At the outset it should be borne in mind: 'An automobile is not a "dangerous instrumentality" in the sense in which that term is used in the law.' *Brinkman* v. *Zuckerman*, 192 Mich. 624 (159 N. W. 316), decided by our Supreme Court September 26, 1916; *Hartley* v. *Miller*, 165 Mich. 115, 119 (130 N. W. 336, 33 L. R. A. [N. S.] 81); *Cunningham* v. *Castle*, 127 App. Div. 580 (111 N. Y. Supp. 1057); *McIntyre* v. *Orner*, 166 Ind. 57 (76 N. E. 750, 4 L. R. A. [N. S.] 1130, 117 Am. St. Rep. 359, 8 Am. & Eng. Ann. Cas. 1087); *Jones* v. *Hoge*, 47 Wash. 663 (92 Pac. 433, 14 L. R. A. [N. S.] 216, 125 Am. St. Rep. 915); *Lewis* v. *Amorous*, 3 Ga. App. 50 (59 S. E. 338). It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless. * * * Has the legislature power to say that the Independent Brewing Company, totally and wholly without fault, with nothing whatsoever to do with the situation, shall be liable for that

accident? Our Supreme Court has already held in substance and effect that such a liability may not be imposed by the legislature. *Daugherty* v. *Thomas,* 174 Mich. 371 (140 N. W. 615, 45 L. R. A. [N. S.] 699, Am. & Eng. Ann. Cas. 1915A, 1163)."

So far as the cases cited by counsel are applicable they do not sustain the contention of counsel. The quotation from *Brinkman* v. *Zuckerman, supra,* should contain two or three more lines reading:

"An automobile is not a 'dangerous instrumentality' in the sense in which that term is used in the law; and the relation between the owner of the car and his chauffeur is determined in the absence of a statute by the general rules of law relative to master and servant."

We think this intimates that the general rules of law may be changed by statute. The case of *Daugherty* v. *Thomas, supra,* construed certain provisions of Act No. 318 of the Public Acts of 1909. Act No. 33, Public Acts of 1909 (3 Comp. Laws 1915, § 15431), provided:

"Every person who takes or uses without authority an automobile or other motor vehicle without intent to steal the same * * * shall, upon conviction," etc.

In the case of *Daugherty* v. *Thomas* this court discussed at length all the issues involved in the instant case. In concluding its opinion it was said of Act No. 318, Public Acts of 1909:

"Had this provision of the statute been followed by language indicating that the owner should not be liable in case the automobile or other motor vehicle was taken or used in violation of Act No. 33 of the Public Acts of 1909, the infirmity would have been cured."

Acting strictly along the lines suggested in this opinion the legislature in 1915 enacted Act No. 302, § 29 (1 Comp. Laws 1915, § 4825), containing the following:

"* * * The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle: * * * *Provided,* That the owner shall not be liable unless said motor vehicle is being driven by the express or implied consent or knowledge of such owner."

It is true that the automobile has become so perfected that it may not be classed as a "dangerous instrumentality" when intelligently managed. It will not shy, balk, back up, or run away when properly directed, but may do all of these when managed by an inexperienced, incompetent, or reckless driver. When in the control of such a one it becomes an exceedingly destructive agency as the daily toll of lives and the many injuries to persons chronicled by the newspapers attest. If the owner of such agency consents to turn it over to the control of an incompetent or reckless chauffeur he is not deprived of any legal right by holding him liable for its negligent operation when in such control and a greater degree of safety to the general public is likely to follow.

The present statute, while safeguarding the rights of persons having occasion to use the streets, does not unreasonably infringe upon the rights of those able to own automobiles. The owner of an automobile is supposed to know, and should know, about the qualifications of the persons he allows to use his car, to drive his automobile, and if he has doubts of the competency or carefulness of the driver he should refuse to give his consent to the use by him of the machine. The statute is within the police power of the State.

Judgment is affirmed, with costs to the plaintiff.

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

ROUSE *v.* BLAIR.

1. APPEAL AND ERROR — LAW OF CASE — FORMER APPEALS — RES JUDICATA.

The determination on a former appeal that the evidence made a question for the jury is the law of the case on a subsequent trial where the testimony is substantially the same as on the first trial.

2. SAME.

In an action for damages for personal injuries sustained in a collision between plaintiff's automobile and defendant's train at a crossing, the testimony was substantially the same as that presented on the first trial so as to render the determination on a former appeal that the evidence made a question for the jury the law of the case on the second trial, where the defendant offered no evidence on the first trial and called a large number of witnesses to establish its defense on the second trial and their testimony, if believed, would have warranted a judgment for defendant, but it related to questions within the realm of fact.

Error to Berrien; North, J., presiding. Submitted June 13, 1917. (Docket No. 39.) Decided September 27, 1917. Rehearing denied December 28, 1917.

Case by Elmer E. Rouse against Frank W. Blair and others, receivers of the Pere Marquette Railroad Company for personal injuries to himself, his wife, and child. Judgment for plaintiff. Defendants bring error. Affirmed.

Parker, Shields & Brown (*Gore & Harvey*, of counsel), for appellants.

Cady & Andrews (*Thomas J. Cavanaugh*, of counsel), for appellee.

MOORE, J. This is the second appearance of this case in this court. Upon the first trial in the circuit

court, after the plaintiff had put in his proofs, the judge directed a verdict in favor of the defendant. The case was brought to this court for review. *Rouse* v. *Blair,* 185 Mich. 632 (152 N. W. 204). A majority of the court were of the opinion that a directed verdict was error, and that plaintiff presented a case for the consideration of a jury. Upon the second trial in the circuit court after the plaintiff had closed his case defendant moved a directed verdict, which motion was overruled. The defendant then called upwards of 20 witnesses in its defense. At the conclusion of all the testimony a motion was again made by the defendant for a directed verdict. This motion was overruled, and the case was submitted to the jury in a charge, which covers nearly 14 pages of the printed record. After a few minutes the jury was recalled, and the record shows the following:

"*The Court:* I am very sorry to have had to disturb you in your deliberations, but after you had gone to your room I discovered upon checking up my notes that inadvertently I had overlooked one of the requests to charge, which I think is essential that it should be given to you in order that the charge, as a whole, may cover the law. You will remember that I said to you during the course of the charge that if you believed from the evidence that defendant's employees did not give the customary signals, and were negligent in running the train backward, at a high rate of speed, across the highway, and that this was the proximate cause of the injury, and the plaintiff did under the circumstances all that a reasonably prudent man would have done, and the injury would not have occurred had the defendant's employees been lawfully operating the train, then the plaintiff is entitled to recover.

"Now, I want to add to that this which I overlooked:

" 'The defendant company had a right to back its train across the highway crossing, but in so operating the train, defendant's employees were bound to be mindful of the manner and the

place of operating the train, and to exercise care commensurate with the extra danger, if any, to persons and property in the highway.'

"You will probably recall the charge went on as follows:

"'But if you find that the whistle was blown and the bell rung, and there were men as lookouts on the flat car, or leading car, so called, as the train approached the crossing, and that the train was running at a reasonable speed under all circumstances, and that the train was properly managed by the train crew, then I charge you no negligence has been shown, and it will be your duty to render a verdict of "not guilty."'

"I think you will recall that comes between two portions of the charge."

The jury returned a verdict in favor of the plaintiff for $7,500. The defendants then made a motion for a new trial, alleging 18 reasons. In overruling this motion the judge expressed himself as follows:

"The matter is now before the court on the defendants' motion for new trial. Various reasons are assigned in support of this motion, but the two which are principally relied upon in the presentation of this matter are:

"(1) That the verdict is clearly against the weight of the evidence; and

"(2) The approximate cause of the injury was the negligence of the plaintiff, and therefore the court should have directed in favor of the defendants.

"This case was tried once before in the circuit court, and upon review in the Supreme Court it was held that the question of the plaintiff's contributory negligence was a question of fact which should have been submitted to the jury. I have had the assistance of somewhat lengthy arguments by counsel for the respective parties in an effort to ascertain whether or not there is any material variance between the records made at the second trial of this case and that made at the former trial so far as this phase of the litigation is concerned. I have also made a somewhat extensive investigation from the records furnished me by counsel

of the showing made as to this question at the respective trials. While it is true that the testimony was concluded at the first trial at the close of the plaintiff's case, and without the defendants offering their testimony, still I am of the opinion that there is not such a difference in the testimony found in the two records which is material and relevant to the plaintiff's contributory negligence as would justify the trial court in disregarding the former ruling of the Supreme Court to the effect that this is a question of fact to be submitted to the jury.

"I do not think it can be said as a matter of law that the amount of damages awarded is excessive, or that the verdict is contrary to the weight of the testimony in the case."

The case is brought here by writ of error.

The assignments of error are substantially the same as the reasons presented to the trial judge on the motion for a new trial. Upon the oral argument the assignments most dwelt upon were: (1) That the plaintiff's testimony in this record conclusively shows him to have been guilty of contributory negligence; (2) that no negligence on the part of the defendants was proven; (3) the weight of the evidence was so clearly in favor of the defendant that it was the duty of the trial court to so direct. The other assignments were not waived.

When the case was in this court before, Justice STONE, writing for a majority of the court, stated the claims of the parties with considerable detail. A reading of his opinion will make it unnecessary to write so long an opinion now as might otherwise be necessary.

It has been repeatedly held that the determination on a former appeal that the evidence made a question for the jury was the law of the case on a subsequent trial where the testimony was substantially the same as on the first trial. See *Foley* v. *Railway Co.*, 193 Mich. 233 (159 N. W. 506); *City of Sault Ste. Marie* v. *Railway Co.*, 192 Mich. 65 (158 N. W. 164); *Johnson*

v. *Surety Co.*, 194 Mich. 292 (160 N. W. 548); *In re Foerster's Estate*, 193 Mich. 440 (160 N. W. 459).

To meet the above counsel insist this record is different from the former one. We quote from the brief:

"We direct attention (1) to the material difference in the plaintiff's case upon this record from the plaintiff's case upon the former record, upon which the above decision was based; and (2) that this is the first time the testimony of the defendants' witnesses has been before this court. * * * *First*, then, of the difference in material facts between the plaintiff's proof upon this record and the former one:

"(*a*) The former record contained not one word to the effect that Mrs. Rouse, in explaining their conduct in getting in front of the moving train, stated in the presence of Norman E. Main, plaintiff's witness, that she 'saw smoke,' but she 'thought it came from an engine attached to cars upon the switch track.' This testimony is not only material; it is controlling. * * *

"(*b*) The former record failed to show such negligence on plaintiff's part as may be fairly deduced from the testimony of plaintiff's witness Henninger, who swears that as Rouse approached the crossing he saw two men, waving their arms and hallooing to Rouse to apprise him of the approach of the train and to stop his car."

Mrs. Rouse testified on her direct examination:

"*Q.* Did you attempt to look to the south?

"*A.* I watched; as we were coming along I watched over the cars that were there, watched for any possible show of smoke that might be a train coming that way.

"*Q.* Did you see any smoke there?

"*A.* No, sir."

On her cross-examination she testified that she had no recollection of saying anything in the presence of Mr. Main about smoke, and that she could not have said she saw smoke, for she did not see any. It is not claimed that Mr. Rouse said he saw smoke.

In the cross-examination of Mr. Henninger the following appears:

"I know F. L. Ackerman. I didn't see him there that day. I did not see him holding his hands up and waving at Rouse. I heard a number hallooing to Rouse to stop. I didn't call to him myself. He didn't seem to stop. I saw two or three people at the railroad track signaling Rouse to stop. They were waving their hands for him to stay back. I know where the railroad crossing sign is there between the scales and the railroad track. That is within 30 or 35 feet of the track. He (Rouse) was about in there when those men were waving at him. He didn't stop. I don't know how fast he was going.

"*Q.* You would know whether he was moving along 18 miles an hour or 4 miles an hour? Wouldn't you?

"*A.* Well, I don't know.

"*Q.* It appeared to you if he had seen those men that he had plenty of time to stop?

"*A.* Maybe he was so close he couldn't stop, something or other.

"*Q.* As it appeared to you?

"*A.* I didn't any more than see the auto and the collision took place."

Mr. Rouse testified on cross-examination:

"On the morning of the 19th, as I approached that crossing, I did not see some men holding up their hands and waving at me to stop.

"*Q.* What were you looking at?

"*A.* I saw no one except after I had seen the train, a man I believe is the station agent; he was waving his hands to stop when I had seen my danger and was endeavoring at that time to stop. I did not see a large man there near the track with both hands raised. I think I would if he had been there, but I did not see anybody. I was not in the least asleep that morning."

Counsel are so insistent in their briefs, and were in the oral argument, that a different case is presented now than was presented before, that we have gone over this long record with great care. We are quite convinced the case presented on the part of the plaintiff is substantially the same that was presented on the first trial. It is true that upon the second trial

defendant called a large number of witnesses to establish its defense. Their testimony, if believed by the jury, would have made a defense, but it related to questions well within the realm of fact. Some of the testimony of some of the witnesses offered by the defendant must have afforded comfort to the attorneys for the plaintiff.

Much of the testimony was conflicting. The case was ably tried by zealous and capable counsel before a painstaking and careful judge, who endeavored to, and did, protect the rights of the respective parties.

Judgment is affirmed.

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

BROOKE, J. The law of the case having been settled by the former opinion, I concur in the result.

STEERE and FELLOWS, JJ., concurred with BROOKE, J.

WILCOX *v.* JENISON.

1. BOUNDARIES—DOCUMENTARY EVIDENCE—RECORDS OF SURVEYS—ADMISSIBILITY IN EVIDENCE.

Surveys of State, but not Territorial, surveyors, are admissible in evidence under Act No. 196, Pub. Acts 1915, § 102 (1 Comp. Laws 1915, § 2486), providing that "records of surveys, field notes, and calculations made by any former county surveyor which has been, or shall be, on file in the office of the county surveyor, register of deeds or county clerk for a period of fifteen years or upward * * * shall be admissible in evidence of the facts they contain in any court of record."

2. SAME.

Records of surveys and other papers that have been subject of statutory regulation are not admissible as ancient records.

3. EVIDENCE—RECORDS OF SURVEYS—ADMISSIBILITY.

Under Rev. Stat. 1846, chap. xiv, §§ 96, 97, 102, providing that certain records of surveys made by the county surveyors since the organization of the State government may be received in evidence, records of surveys are not competent evidence unless made by county surveyors.

4. SAME—SURVEYORS—MISTAKES—DECLARATIONS OF DECEASED SURVEYOR—ADMISSIBILITY.

Declarations by a surveyor, since deceased, to his employer that he had made a mistake in a former survey are admissible where such mistake was discovered during the course of the second survey, but it is not apparent whether the surveyor made the declaration in the course of such second survey.

5. APPEAL AND ERROR—INSTRUCTIONS—CHARGE AS WHOLE.

Where the charge of the court, taken as a whole, correctly states the law as applicable to the particular case, and clearly defines the issue, the fact that sentences are objectionable, when considered independent of the context, does not constitute reversible error.

6. ADVERSE POSSESSION—BOUNDARIES—INSTRUCTIONS — EJECTMENT —GOVERNMENT SURVEYS—BURDEN OF PROOF.

In an action of ejectment, in which the boundary line between two tracts of land was in dispute, the charge dealing with the manner of making government surveys and their conclusiveness, the establishment of boundary lines by adverse possession, and the burden of proof, *held*, to be sufficient.

Error to Oakland; Smith, J. Submitted June 18, 1917. (Docket No. 64.) Decided September 27, 1917.

Ejectment by Mary M. Wilcox against Eugene A. Jenison. Judgment for plaintiff. Defendant brings error. Affirmed.

Merriam, Yerkes & Simons and *John H. Patterson* (*Lewis H. Paddock,* of counsel), for appellant.

Peter B. Bromley and *Pelton & McGee,* for appellee.

MOORE, J. Ejectment was brought by plaintiff against defendant to recover possession of approximately 16 acres of land which she claims is located in the northwest quarter of section 27, and northeast quarter of section 28, Royal Oak township, Oakland county. Defendant's claim is that the land in question is located in the southeast quarter of 28, and the southwest quarter of 27, so that the important question in dispute is as to the location of the east and west quarter line of sections 27 and 28. In the opening of his charge to the jury the trial court stated somewhat in detail the claims of the parties to the litigation, and, after doing so, turning to counsel, he said:

"Do you think of anything further I need to say without going into details?
"*Mr. Bromley:* No, your Honor.
"*Mr. Patterson:* No, sir."

He then read to the jury a great many written requests which had been preferred by counsel. Among them the following:

"On the part of the plaintiff I charge you as follows: It is the claim of the plaintiff in this case that her husband procured the premises in question under a land contract in January, 1889. And that in May, 1889, the plaintiff went into possession of the premises and remained in possession of the premises from May, 1889, until the disputed strip was fenced in by the defendant, Jenison, in March, 1903. There is no dispute but that the description of the deeds to the plaintiff recite that the southern boundary of their lands should be the quarter section line. In other words, it is undisputed that the deeds themselves recite that the premises in the northeast quarter of section 28 and also that portion of the northwest quarter of section 27 lying west of Woodward avenue should belong to the plaintiff. It is also undisputed that the defendant's land, according to the description contained in

his deed (or deeds it should be), should lie immediately south of plaintiff's land. The question therefore for you to determine is 'Where is the true quarter section line?' It is the claim of the plaintiff that the true quarter section line is a straight line approximately equidistant from the north and south boundary line of the section.

"(8) I further charge you that the government lands are required by the United States government to be surveyed into sections one mile square. The government surveyors are required in making such surveys to place monuments at the corners of the sections and also on the four sides of the sections halfway between the corners. These latter are called quarter posts, being half a mile from the north and south lines of the section and dividing it into quarter sections of equal size. The lines between the quarter posts are not run by the government surveyors, but are found by extending a straight line from one quarter post to that on the opposite side of the section. I further charge you that when a boundary line between adjoining proprietors is disputed, the true line is to be determined in accordance with the original government survey, unless fixed by agreement, acquiescence, or adverse possession. I further charge you that as between surveys the original government survey must control, although it may have been incorrect at the time it was made.

"(9) I further charge you that it is the duty of the surveyor to follow monuments as called for in the original government field notes; and if they find a quarter section corner extinct, that is lost, and are unable to determine its original location from the field notes and plats of the government surveyor, then it is their duty to re-establish it equidistant, that is equal distance and in a straight line between the section corners.

"It should be quarter section corner shouldn't it?

"(10) It is the claim of the plaintiff that the original government survey marked the quarter section corners of sections 27 and 28 at the point designated at the Wilmarth corner; that the original government field notes call for a birch tree at that point. It is the claim of the plaintiff that the evidence of the

birch tree was found and seen by Surveyor Wilmarth and by Mr. Wilcox and by Mr. Thomas Tracey, the chainman. If you are satisfied by a fair preponderance of evidence that the government survey called for a birch tree at the disputed quarter section corner, and if you further find by a fair preponderance of the evidence that there had been a birch tree at about the quarter section corner as claimed by the plaintiff, and that the said birch tree was a monument marked under the original government survey as the quarter section corner, then I charge you you have the right to consider that corner indicated by a birch tree in the original survey as the true quarter section line between sections 27 and 28, and in that event your verdict should be for the plaintiff, unless it is settled by the other proposition in this case.

"(11) I charge you that it is a well-settled law in this State that surveyors making surveys after the original government survey is made cannot make monuments of their own which shall control the government surveyors' measure, and that the original government survey must always control, and the effort of the surveyor should be to find, if possible, where the lines are on the ground; the original survey must control as between the surveys, I mean, although it may have been incorrect at the time it was made. If you find, therefore, that the Wilmarth survey was based upon the government survey and the government field notes, and if you find that the line located by Mr. Wilmarth is on the line located by the original government survey, then you should treat the line as established by Mr. Wilmarth to be the true line, and your verdict should be for the plaintiff, and I add, unless the line between these parties has been settled by agreement, acquiescence, or adverse possession; that is, by the second proposition in the case.

"(12) The defendants have been permitted to offer in evidence some records of field notes and plats purported to be made by Surveyors Russell and Serrell, but I say to you that unless you are satisfied from the evidence that such surveys were based upon the original government field notes, and that they were made in accordance with the monuments as called for in the original government survey, or the original gov-

ernment field notes, then I charge you that such survey should not prevail as against the Wilmarth survey, provided (notice) provided you find the Wilmarth was made in accordance with and based upon the field notes of the United States government as offered in evidence by the plaintiff; in other words, unless you find that the Wilmarth survey coincides with the original government line. * * *

"(19) It is the defendant's claim that he received the property by deed in 1897, but that no fence was built around the premises until 1903. It is the claim of the plaintiff that the defendant never actually occupied the land and never claimed to own the disputed strip in question until on or about the time he put the fence around the disputed land, which was in 1903. Now in order for the defendant to avail himself of title by adverse possession, which would apply to both parties by means of the fence he built in 1903, such possession under the statute must be open, notorious, continuous, exclusive, visible, and distinct, as well as adverse, and such possession must have been for a period of 15 years prior to the starting of this suit. * * *

"(22) I further charge you that the United States statute requires that the government surveyors, that is, men surveying government lands, to set the quarter section posts at equidistance from the north and south lines of the sections, and that the quarter section lines shall run through the middle line of the said sections; and it is the duty of the government surveyor to make his survey and set the quarter section posts in this manner, and he is presumed to have done his duty and to have placed these lines and posts as the law requires him to do.

"(23) The burden therefore is upon the party who claims the government surveyor made a mistake in his survey to show that the government surveyor did commit the blunder as claimed and failed to do his duty, and unless the defendant has shown that the government surveyor did make a mistake, and that the Wilmarth line is incorrect, then on this branch of the case, you must find for the plaintiff. * * *

"(30) Taking up now gentlemen, the claims of the defendant, I charge you as follows: The United States

government in its original survey fixed section corners and quarter posts. The division of the section was afterwards done by surveyors and points established thereon from the original corners and quarter posts thereon, and if the government surveys had all been accurate and in accordance with the rules laid down for the guidance of the surveyor there would commonly be no difficulty in locating the government subdivisions with reasonable certainty even if the monuments had disappeared. But government surveyors were not always accurate in their work, and monuments do sometimes disappear. That a fence of long standing erected upon what the parties have called the true line and up to which they have improved and cultivated is better evidence of the true line than a survey made after the monuments had disappeared and not while they were in existence.

"(31) It is the claim of the defendant that the north boundary of defendant's land is the east and west quarter line running through a part of sections 27 and 28 in the township of Royal Oak, and is the line indicated in red on the map received in evidence and designated as plaintiff's Exhibit No. 3, and that this line does not run due east and west in a straight line, and has been referred to in this case by defendant's counsel as the 'true quarter line,' while the plaintiff claims that the quarter line is the line referred to as the 'Wilmarth line,' and if the jury find by a preponderance of the testimony in the case that the quarter line is substantially along the line as contended for by defendant as the true quarter line, then the plaintiff cannot recover, and your verdict would be for the defendant. I add the same as I did to the plaintiff's requests, unless the boundary line has been settled under the second proposition by means of adverse possession.

"(32) I further charge you that it is the claim of the defendant that this so-called 'true quarter line' was marked by an old fence substantially along such true quarter line, and that such fence constituted a boundary line between the lands of adjacent owners for more than 15 years. Now if you find from a fair preponderance of the testimony that such old fence did exist and was acquiesced in as a boundary line, then the plaintiff cannot recover, and your verdict would be for the defendant.

"(33) I further charge you that in determining the true boundary line between the parties to this suit, you may consider the testimony with respect to any old fences between the disputed strip of land, and if you find from the testimony that an old fence for 15 years continuously or more ran along the north edge of the wood lot in dispute, and that such fence constituted the boundary line between the disputed strip of land adjoining to the north and was acquiesced in as such boundary line by such owners, then it will be your duty to return a verdict for the defendant regardless of whether such line actually constituted the east and west quarter line of sections 27 and 28 or not. That is, you would settle it upon the second proposition, without regard to the surveyor's lines.

"(34) I further charge you that long acquiescence in a supposed boundary line extending for a period of 15 years or more between adjoining landowners, should be considered as such an agreement upon such lines as to be conclusive, even if originally located erroneously, and if you should find that the north line of the wood lot, so-called, has been acquiesced in for a period of 15 years or more by the owners of the lands adjoining on the north and south as the boundary between said lands, then you must find that such line is the true boundary between the parties to this suit, and in that event your verdict must be for the defendant.

"(35) I further charge you that long acquiescence in and recognition of a boundary line between adjoining owners of land extending over a period of 15 years or more is sufficient to support a claim that said line is the true boundary between such owners, and such line should not be disturbed or upset by any surveys based on alleged original monuments or courses of direction.

"The law was evidently framed by the legislature to fix and end litigation, so that after a while parties cannot bring their suits; that is, if not brought within 15 years they shall be precluded thereby from an attack of a survey.

"(36) The sole question for determination by you in this case is the true boundary line between the adjoining lands owned respectively by the plaintiff and

the defendant, regardless of the fact whether the true boundary line between these parties is also the true quarter line of sections 27 and 28 or not. (This is the part I think it is meant to cover.) If you find from the testimony that the line as claimed by the defendant has been acquiesced in for 15 continuous years or more by the plaintiff or his predecessors in title and the defendant or his predecessors in title as the boundary line between said lands, the plaintiff is not entitled to recover, and the verdict in that event should be for the defendant. * * *

"(42) Now notice this, gentlemen, because there will be some changes made in it. The burden of proof is on the plaintiff to establish her claim by a fair preponderance of the evidence; unless the plaintiff has so established her claim by a fair preponderance of the evidence, your verdict would be for the defendant. There is an exception to this rule, to wit: If she has established by a fair preponderance of the evidence that the Wilmarth survey, Wilmarth line, is in fact the original government survey line, then the burden is upon the defendant to show that the boundary line between these parties ought to be elsewhere. Now that will require a little explanation to make it consistent and harmonious. I have said to you that the presumption was in favor of the government surveys always, but that presumption may be overcome by evidence. The presumption also is that the government surveyors do their duty and make no mistakes, and that the center line will be in the actual center of the section, that is, the quarter line will be, but that presumption also can be overcome.

"(43) Now it devolves upon the plaintiff to establish as it would in most cases to prove by a fair preponderance of the evidence along with the presumption where the center line is, and the plaintiff has endeavored to do that by presenting the Wilmarth line. Of course the burden of proof would be upon the plaintiff because Wilmarth surveyed it out first as a lost line, and not as the true government line, but a few years later Wilmarth and Wilcox and the chainman—I forget his name; Tracy I think it was—claim to have discovered such a monument as indicated that the line, the Wilmarth line, was in fact also the government

line. Now, to that point the burden of proof is upon the plaintiff, but if you are satisfied by a fair preponderance of the evidence that Wilmarth did finally establish what was the actual government line, then the burden of proof shifts to the defendant, and the burden of proof would be on the defendant then to prove by a fair preponderance of the evidence that Wilmarth was wrong, and that the government survey was not in the center of the section, and that is what it was attempted to do by means of other surveyors.

"(44) The burden of proof would be upon the defendant to prove by a fair preponderance of the evidence what he claims under the second proposition, namely, fixing the line where it is because of adverse possession.

"In other words, to state it as the lawyers put it, if the plaintiff has established by fair preponderance of the evidence where the government survey line is, and that it is actually in the center, then the defendant assumes the affirmative of the defense, because he must assume, as far as the affirmative of the defense is concerned, the burden of proof. Now the burden of proof does not necessarily depend upon the number of witnesses sworn on the part of any party on any one proposition. * * *

"(46) The usual definition of preponderance of the evidence is such evidence as, when weighed with that which is offered to oppose it, has more convincing power in the minds of the jury. It is not a technical term at all, but means simply that evidence which outweighs that which is offered to oppose it. It does not necessarily mean that a greater number of witnesses shall be produced on the one side or the other, but that upon the whole evidence the jury believes the greater probability of the truth to be upon the side of the party having the affirmative of the issue."

There was much more of the charge than we have quoted. The jury found a verdict in favor of the plaintiff. The case is brought here by writ of error.

The errors assigned are grouped by counsel as follows:

"(1) Was there error in the exclusion and admission of evidence at the trial?

"(2) Was there error in the charge of the court?

"(3) Was there error in the court's refusal to charge as requested by defendant?

"(4) Was the verdict against the defendant contrary to law and against the weight of evidence?

"(5) Should the motion for a new trial have been granted?"

1. It is said the court erred in excluding certain old surveys, field notes, and other papers. The old records mentioned do not appear in the printed record, and it was agreed that the originals might be used in the oral argument. Counsel are not agreed as to which of these records were excluded. It is claimed that a book of surveys made by Hervey Parke in 1845-46 and a book of surveys made in 1865 were excluded, while counsel for appellee state they were admitted, and cite from the record as follows:

"*Q.* I show you page 28, and ask you what that plat refers to?

"*A.* Section 27, town 1 north, range 11 east, recorded on page 39, Book of Oakland County Records, county survey by Hervey Parke.

"*Q.* Does that show the east and west quarter line through section 27 on that plat?

"*A.* It does. This is the line at an earlier day; consequently a little at variance with the other one. North 88° 20″ W.

"*Q.* Are there any figures to note how far it is from the quarter section corner on the west side of the section to the north line of the section?

"*A.* Yes, sir; it is marked 33 chains 75 links. * * *

"*Q.* Now what connection does the book show with reference to this quarter line? Without taking time to go over all the monuments, give us the monument that the book shows with reference to the east and west quarter line of that plat. * * *

"*Q.* On page 30 you will state whether there is an explanation, or can you read the explanation of the survey on page 30?

"*A.* Yes. To re-establish or find the west quarter post on section 27. * * *

"*Q.* Yes.

"*A.* That gap 1 chain 45 links was described by—

"*Mr. Bromley:* Now I object to that; that is not a part of the record.

"*A.* Yes it is. Found a discrepancy of 1 chain short.

* * *

"*Q.* Well what does it show about that quarter post on page 31?

"*A.* Set quarter post being the intersection of the line and (witness hesitating, using reading glass) the proportionate measurement made upon corner and records and set recorded survey, yes, and said point was recognized and identified by residents of a number of years.

"*Q.* Mr. Slater, I show you page 32 of book, Exhibit 10, and I will ask you if you will read what page 32 is?

"*The Court:* Is that the same exhibit?

"*Mr. Patterson:* Yes, sir."

We have a statute reading as follows:

"All such records of surveys, field notes, and calculations made by any former county surveyor, which have been or shall have been on file in the office of either the county surveyor, register of deeds or county clerk for a period of fifteen years or upwards, even though such records or the certification thereof shall not conform to the requirements specified in section one hundred of this act, shall be admissible in evidence of the facts they contain in any court of record in this State." Act No. 196, Pub. Acts 1915 (1 Comp. Laws 1915, § 2486).

The record is clear that all the records coming within the terms of the above statute were admitted, but it is claimed this law was unquestionably passed to include Territorial as well as State surveyors, and under it the Hervey Parke survey should have been received in evidence. It would seem to be a reply to this claim that the statute does not so read. It is also claimed that these old surveys commencing with the Wampler survey of 1816 should have been admitted in evidence, not only under the statute, but also because

of their being ancient records, counsel citing *Murphy* v. *Cady*, 145 Mich. 33 (108 N. W. 493), and other authorities. A reference to them will show that they do not relate to records of surveys and other papers that have been the subject of statutory regulation.

In addition to the statute quoted we should mention sections 96, 97, and 102, chap. 14, Rev. Stat. 1846, which provide, in substance, that certain records of surveys made by county surveyors since the organization of the State government may be received in evidence. Our attention has not been called to any statute making any records of surveys competent evidence unless they are made by county surveyors. And all the records offered were admitted if shown to have been made by county surveyors. The legislature having provided what records of surveys are admissible, does it not follow that all others are excluded? To permit a party to procure any surveyor to make and file an *ex parte* survey which may affect the lands of another would be a dangerous construction to put upon the statute.

A survey made by Mr. Russell was introduced in evidence, and much reliance was placed upon it by defendant. Mr. Wilcox assisted Mr. Russell in making this survey, and was allowed to testify as to what was said and done by Mr. Russell during its progress, and was also allowed to testify that Mr. Russell later, after making a second survey, told him he had made a mistake in the former survey. This is said to be error for the reason that it is a self-serving declaration made by an employee to his employer.

As to the declarations of a surveyor who is dead it is said:

"The acts and declarations of a surveyor since deceased, while surveying an adjoining lot, are admissible on the question of a boundary, if he was not interested as owner in either lot at the time he made such

declarations. If the location of a tract of land is in dispute, declarations of a surveyor, since deceased, made by him while on the ground and at the time of examining the lines of the tract, are admissible in evidence." 2 Jones on Evidence, § 306.

See, also, 1 Elliott on Evidence, § 403.

The rule as given in 15 Am. & Eng. Ann. Cas. p. 874 (*Collins* v. *Clough*, 222 Pa. 472), is as follows:

"Subject to some qualifications, it is a general rule that upon questions of either public or private boundaries the declarations of deceased surveyors or their assistants in respect thereto, as, for example, in respect to the location of a corner or line, are admissible in evidence" (citing a number of cases).

As to the last conversation it appears the surveyor made a second survey, at which time he discovered the error made in the first survey. It does not appear whether the surveyor made this last declaration when engaged in the survey, but it does appear he discovered the error while determining the lines of these parcels; that Mr. Wilcox was living upon the land, and the surveyor, Mr. Russell, directed him to correct the error which he had previously made. There is such a direct connection with the last statement of Mr. Russell with the last survey in which he discovered his mistake as to bring the testimony within the rule.

Groups 2 and 3 may be considered together.

It has been said:

"Where the charge of the court, taken as a whole, correctly states the law as applicable to the particular case, and clearly defines the issue, the fact that sentences are objectionable, when considered independent of the context, does not constitute reversible error." *Provost* v. *Brueck*, 110 Mich. 136 (67 N. W. 1114).

See, also, *Smalley* v. *Railway Co.*, 131 Mich. 560 (91 N. W. 1027); *Beattie* v. *City of Detroit*, 137 Mich. 319 (100 N. W. 574); *Bouma* v. *Dubois*, 169 Mich. 422 (135 N. W. 322).

We have quoted sufficiently from the charge to show that the material questions involved were very fully and fairly stated to the jury.

The other assignments of error have been examined, but do not call for discussion.

Judgment is affirmed, with costs to the plaintiff.

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

OTIS *v.* ARNTZ.

WILLS—PERPETUITIES—SUSPENDING POWER OF ALIENATION—STATUTES—ESTATES IN TRUST.

A will devising an estate in trust to be distributed in a certain number of years after the death of the testator, the income in the meantime to be paid to designated persons, is void under 3 Comp. Laws, § 8796 (3 Comp. Laws 1915, § 11532), providing that every future estate shall be void in its creation, which shall suspend the absolute power of alienation for longer than the period prescribed by law, and such power of alienation is suspended when there are no persons in being in whom an absolute fee in possession can be conveyed, and 3 Comp. Laws, § 8797 (3 Comp. Laws 1915, § 11533) providing that the absolute power of alienation shall not be suspended by any limitation or condition for a longer period than the continuance of two lives in being at the creation of the estate, and 3 Comp. Laws, §§ 8805, 8818, 8839 (3 Comp. Laws 1915, §§ 11541, 11554, 11575) providing that limitations of terms of years, disposition of rents and profits of lands and trust estates in land shall be governed by the same rules, and 3 Comp. Laws, § 8847 (3 Comp. Laws 1915, § 11583) providing that no person beneficially interested in a trust

estate for the receipt of rents and profits can dispose of such interest.[1]

Appeal from Montcalm; Davis, J. Submitted June 27, 1917. (Docket No. 144.) Decided September 27, 1917.

Bill by Clark C. Otis against Byron Arntz, administrator, with the will annexed, of the estate of Norman L. Otis, deceased, and others to set aside said will as in violation of the statute against perpetuities. From a decree dismissing the bill, plaintiff appeals. Reversed, and decree entered for plaintiff.

William B. Daniels (*Edward A. Barnes*, of counsel), for plaintiff.

MOORE, J. The following statement is taken from the brief of the attorneys for the appellant, and is justified by the record:

"This is a bill for the construction of the will of Norman L. Otis, deceased. It is filed by Clark C. Otis, a son and heir of the testator, and a beneficiary under the will. The administrator with the will annexed, the other beneficiaries under the will, and the only other heir of the deceased, all of whom are of age, are all made defendants. No answers were filed by any of the defendants, and the bill has been taken as confessed. From a decree dismissing the bill plaintiff appeals.

"Norman L. Otis, many years a resident of Montcalm county, died on the 20th day of May, 1916, leaving an estate of approximately $13,000, of which $3,000 was in personal property, and $10,000 in real estate, consisting of a single farm. A will dated February 26, 1910, with several codicils of later date, was duly admitted to probate in Montcalm county on June 23, 1916.

"After providing for the payment of his debts and

[1] On validity of restraint on the alienation of a fee simple during a limited time, see note in 3 L. R. A. (N. S.) 668.

making several small legacies, the will undertook to dispose of the residue of the estate in the following terms:

"'*Fifth.* I give, devise and bequeath to my son Clark C. Otis and to my daughter Grace Otis Harter, share and share alike, the income of the residue of my property, real, personal and mixed, of which I shall die possessed, for the period of twenty-five years after my decease, said income to be paid to them annually and in the case of their decease to their heirs, unless they otherwise direct by will.

"'*Sixth.* I give, devise and bequeath to my natural grandchildren (the children of the body of the said Clark C. Otis and Grace Otis Harter begotten) share and share alike, all of my real and personal estate not hereinbefore disposed of. The share of any deceased grandchild shall go to his children if living, otherwise to revert to the surviving grandchildren.

"'*Seventh.* I hereby order and direct that my farm in Bloomer township consisting of one hundred and sixty acres shall remain intact for twenty-five years from my decease. That no part of it shall be sold or mortgaged, and it shall remain as my estate until the expiration of the said term of twenty-five years, when it shall be partitioned among my said grandchildren, or if deemed best to be sold and the proceeds divided together with the personal property of my estate, as directed in section six above.

"'*Eighth.* I hereby order and direct that the fences and buildings of my said farm shall be kept in good repair, the taxes promptly paid, the land properly fertilized and farmed in a workmanlike manner and the woods allowed to remain intact, excepting what dies of its own accord, or is blown down.'

"The first clause of the first codicil modifies the fifth clause of the will by providing that in the event that the daughter, Grace Otis Harter, shall not survive the term of 25 years the interest devised to her shall for the balance of the 25-year term go 'to the children of my son Clark C. Otis, share and share alike.'

"In one of the clauses in the codicils he increased one of the specific legacies in the will; in another he gave another legacy of a hundred dollars; and in a third he bequeathed to a church society 'the sum of twenty-five dollars a year for ten years after my decease for the pastor's support only, the said sum to be taken from the income of my estate'; and in the last

codicil he transferred this annuity to a different church. The remaining clauses of the codicils were made up of elaborate and specific obligatory directions for the management of the farm by the executor and conditions to be inserted in leases, with provisions that upon failure of the tenant to keep the conditions 'his lease shall become null and void and my executor shall re-enter the said premises and said tenant remove and put out, terminating his tenancy,' and he provided for the removal of the executor and the appointment of another in case the executor should fail to see that such provisions were faithfully carried out.

"The prayer of the bill asks the court to construe and interpret the will, and particularly paragraphs 5, 6, 7, and 8 and paragraph 1 of the first codicil, and that the court construe and declare those paragraphs as void and of no effect, as suspending the power of alienation contrary to the provisions of the statute, and that the court declare the residue of the estate which the testator attempted to dispose of under these paragraphs to be intestate property and as such to belong to the plaintiff and Grace Otis Harter, testator's only heirs, absolutely, in equal shares, and that the administrator be directed to turn over to the plaintiff and said Grace Otis Harter all of said residue."

No brief was filed on the part of the appellee, and in reply to a request for a brief the attorney for Harrison Gray Otis filed a waiver of the right to file a brief accompanying it, with a letter stating in part:

"All the children of C. C. Otis including my client Harrison Gray Otis prefer to have the will construed as prayed for by the plaintiff."

The statutes applicable to the situation disclosed by the provisions of the will and codicil which it is asked shall be construed are as follows:

"Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.

"The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section." (The exception referred to has no bearing here.) 3 Comp. Laws, §§ 8796, 8797 (3 Comp. Laws 1915, §§ 11532, 11533).

Sections 8805, 8818, 8839, 3 Comp. Laws (3 Comp. Laws 1915, §§ 11541, 11554, 11575), provide that limitations of terms of years, disposition of the rents and profits of land and trust estates in land shall be governed by the same rules.

"No person beneficially interested in a trust for the receipt of rents and profits of lands, can assign or in any other manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable." 3 Comp. Laws, § 8847 (3 Comp. Laws 1915, § 11583).

A construction of these statutes has been made by this court, and we quote a part of the opinion then handed down as follows:

"New York has * * * a statute similar to sections 8796, 8797, 3 Comp. Laws, which has been construed a good many times. The effect of these decisions is that a suspension of the power of alienation not based on lives is void, and that the power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed. See *Moore* v. *Moore,* 47 Barb. (N. Y.) 260; *Garvey* v. *McDevitt,* 72 N. Y. 556; *Rice* v. *Barrett,* 102 N. Y. 161 (6 N. E. 898); *Cruikshank* v. *Home for Friendless,* 113 N. Y. 337 (21 N. E. 64, 4 L. R. A. 140); *Haynes* v. *Sherman,* 117 N. Y. 433 (22 N. E. 938); *People* v. *Simonson,* 126 N. Y. 299 (27 N. E. 380); *Booth* v. *Baptist Church,* 126 N. Y. 215 (28 N. E. 238) *Trowbridge* v. *Metcalf,* 5 App. Div. 318 (39 N. Y. Supp. 243).

"Our own statute has been construed by this court in *Trufant* v. *Nunneley,* 106 Mich. 554 (64 N. W. 469),

in which it was held that, if effect was given to certain provisions in the will, there would be a time during which there would be no person or persons in whom the estate could vest in fee simple absolute, hence no person in being who could convey, and that this will in that regard was void, and, as to the property affected by the void will, it must be distributed under the statute.

"In *State* v. *Holmes*, 115 Mich. 456 (73 N. W. 548), Justice GRANT, speaking for the court said:

" 'The law of this State in regard to estates in possession and in expectancy is found in 2 How. Stat. § 5523 *et seq.* The provisions controlling this case are sections 5530 and 5531, which read as follows:

" ' "Every future estate shall be void in its creation which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.

" ' "The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section."

" 'This statute was adopted in the State of New York in 1830. It was subsequently adopted in this State *verbatim et literatim*, and is found in the Revised Statutes of 1846. The construction placed upon this statute by the courts of that State has a controlling influence, and courts will presume that the legislature recognized and accepted such construction. *Greiner* v. *Klein*, 28 Mich. 12. The court of appeals of New York had passed upon this statute several times before its adoption here. *Coster* v. *Lorillard*, 14 Wend. 265, 312; *Hawley* v. *James*, 16 Wend. 61; *Hone* v. *Van Schaick*, 7 Paige, 231; *Irving* v. *De Kay*, 9 Paige, 529. It has been before that court many times since. *Yates* v. *Yates*, 9 Barb. 324, 347; *Tayloe* v. *Gould*, 10 Barb. 398; *Tucker* v. *Tucker*, 5 N. Y. 417; *Rose* v. *Rose*, 4 Abb. Dec. 108; *Moore* v. *Moore*, 47 Barb. 260; *Garvey* v. *McDevitt*, 72 N. Y. 556; *Rice* v. *Barrett*, 102 N. Y. 161 (6 N. E. 898); *Cruikshank* v. *Home for Friendless*, 113 N. Y. 337 (21 N. E. 64, 4 L. R. A. 140); *Haynes* v. *Sherman*, 117 N. Y. 433 (22 N. E. 938); *People* v. *Simonson*, 126 N. Y. 299 (27 N. E. 380); *Booth* v. *Baptist Church*, 126 N. Y. 215 (28 N. E. 238); *Trowbridge* v. *Metcalf* [5 App. Div. 318] 39 N. Y. Supp. 243.

"'The rule established by these authorities is that a suspension of the power of alienation not based on lives is void, and that the power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed. It is said in *Moore* v. *Moore:*

"'"In all the adjudicated cases upon this statute the courts have uniformly held that the period of suspension of alienation could not be measured by time alone; that life must, in some form, be the measure of the period of suspension."'"

Casgrain v. *Hammond*, 134 Mich. 419, at pages 429, 430 (96 N. W. 510, 104 Am. St. Rep. 610).

In that case it was held that, where land is conveyed to a trustee under a trust which is void on the death of the grantor, the land should be distributed under the statute. We think the case on all fours with the instant case, and that the fifth, sixth, seventh, and eighth paragraphs of the will and paragraph 1 of the codicil dated December 24, 1910, are void. The other bequests made in the will and codicils stand.

The decree is reversed, and one will be entered here in accordance with this opinion. No costs will be given to either party.

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

In re GARDNIER'S ESTATE.

GARDNIER *v.* SMITH.

1. WILLS—TESTAMENTARY CAPACITY—BURDEN OF PROOF—PRESUMPTIONS—INSTRUCTIONS.

In a will contest an instruction that the contestant has the burden of proof to show mental incapacity, as the law presumes, in the absence of any proof at all, that a man was not influenced in making his will, and that all men are sane until proved insane, *held*, to be correct.

2. SAME.

Under Act No. 314, Pub. Acts 1915, chap. 17, § 58, the contestant in a will contest has the burden of proof to show mental incapacity of testator, as the law presumes, in the absence of any proof at all, that a man was not influenced in making his will, and that all men are sane until proved insane.[1]

Error to Oakland; Smith, J. Submitted June 21, 1917. (Docket No. 117.) Decided September 27, 1917.

Frank A. Gardnier presented for probate the last will and testament of Esther J. Gardnier, deceased. The will was allowed in the probate court, and Henry Harvey Smith appealed to the circuit court. Judgment for proponent. Contestant brings error. Affirmed.

Washington I. Robinson, for appellant.

Patterson & Patterson, for appellee.

MOORE, J. Esther J. Gardnier died at Rochester, Mich., where she had lived many years, on the 14th day of January, 1915, leaving a last will and testament, bearing date October 9, 1906, and a codicil there-

[1]On burden of proof as to testamentary capacity, see notes in 17 L. R. A. 494; 36 L. R. A. 724, 733.

to, bearing date September 12, 1913. She was the widow of Richard O. Smith who died in 1891, leaving property of the value of $24,000. Richard O. Smith died intestate, leaving the widow and one child, Henry R. Smith. The property of Richard O. Smith was equally divided between Esther J. Smith and Henry R. Smith. Two years and ten months after the death of Richard O. Smith, his widow, Esther J. Smith, was married to Frank A. Gardnier, a man a good deal younger than herself, and they lived together more than 20 years, until the death of Mrs. Gardnier. Henry R. Smith was not a success as a business man or socially. After the death of his father, his mother came to his rescue many times, and finally was appointed his guardian on the ground of his mental incompetency. He died October 2, 1906, at the age of 55 years, leaving a widow, Cynthia Smith, and a son, Henry Harvey Smith. Henry Harvey Smith, the grandson, was 29 years old in November, 1915. He lived in the village of Rochester nearly all his life. He had not seen his grandmother, to talk with her, more than four times in his life. He was divorced from his first wife, and was often in trouble, sometimes under arrest, and at one time was sentenced to the Detroit house of correction. The will of Esther J. Gardnier is dated October 9, 1906. The record shows that when Henry Harvey Smith was arrested on this charge, and while his father was still living, Esther J. Gardnier signed his bail bond. The father died October 2, 1906, and when Esther J. Gardnier was requested to sign another bail bond, after his father's death, she refused, saying that he was no grandson of hers.

Mrs. Gardnier left property, consisting of real estate aggregating, according to the appraisal, $9,500, and personal property appraised at $708.88. At the time of her death she was 81 years of age, and was in good

health until the time of her death. She had the charge and the management of her property. The will in question was executed October 9, 1906, one week after the death of Henry R. Smith, and a little more than a month after Henry Harvey Smith, the grandson, was arrested on the charge that sent him to the house of correction. The will gave to the husband, Frank A. Gardnier, a house and lot in Detroit, and all of the household goods, and one-half of all other property, real and personal, provided he survived testatrix, but, if not, then the whole of the estate was devised to Mrs. Gardnier's brother. The record shows testatrix in her own handwriting, before she signed the will, inserted after the provision for Frank A. Gardnier, the words, "his lifetime, then to my brother, John J. Anderson." She also left $5 to her grandson, Henry Harvey Smith, and $5 to the widow of her son, Henry R. Smith. The codicil, executed September 12, 1913, was made after testatrix had sold the house and lot in Detroit, and her brother had died. The codicil gave to her husband the use during his life of the house and lot and household goods, occupied by testatrix and himself as a homestead, and the use during his life of one-half of all her other property, subject to the payment of her debts and the legacies of $5 each to Cynthia Smith and Henry Harvey Smith, and the other one-half to the children of her deceased brother.

Henry Harvey Smith contested the will and codicil on three grounds:

(1) Mental incompetency.
(2) Undue influence.
(3) An insane delusion that Henry Harvey Smith was not her grandson.

The court instructed the jury there was no evidence of mental incompetency, but left the other two grounds of contest to the jury. From a verdict establishing the will and codicil, the case is brought here by appeal.

Several minor assignments of error are presented, which do not call for discussion more than to say we think the assignments of error as to them are not well taken. The important question is stated by counsel as follows:

"It is the claim of contestant that the court erred in charging the jury as follows: 'That the burden of proof to establish the two propositions that the court will submit to you for your consideration by a fair preponderance is upon the contestant. * * * The contestant has the affirmative of the issue, because the law presumes, in the absence of any proof at all, that a man was not influenced in the making of his will, and because it presumes that all men are sane until they are proven insane.' "

Counsel insists that it is well established in this State that the burden of proof is upon the proponents upon the question of mental capacity, and rests with the proponents throughout the case, quoting from *In re Mansbach's Estate,* 150 Mich. 348 (114 N. W. 65), and citing *McGinnis* v. *Kempsey,* 27 Mich. 373, *Prentis* v. *Bates,* 93 Mich. 245 (53 N. W. 153, 17 L. R. A. 494), *Beaubien* v. *Cicotte,* 8 Mich. 9, *Taff* v. *Hosmer,* 14 Mich. 309, *Aiken* v. *Weckerly,* 19 Mich. 482, *Rivard* v. *Rivard,* 109 Mich. 98 (66 N. W. 681, 63 Am. St. Rep. 566), and *In re Thayer's Estate,* 188 Mich. 269 (154 N. W. 32).

In disposing of a motion for a rehearing the trial judge said the case of *In re Mansbach's Estate, supra,* was not called to his attention, that, if it had been, he might have charged the jury differently, but that, as he gave verbatim contestant's requests to charge, the jury was not misled. He expressed himself as of the opinion that another jury would reach the same result, and denied the motion for a new trial.

It may be conceded that until recently the rule as to the burden of proof has been as stated by counsel

for contestant, but this rule was recently changed by the provisions of section 58, chapter 17, of Act No. 314 of the Public Acts of 1915 (3 Comp. Laws 1915, § 12546). The provisions of this section were construed in a carefully considered opinion written by Justice FELLOWS, which construction justifies the charge of the trial court in the instant case. The opinion of Justice FELLOWS is in the case of *Soule* v. *Henry*, 197 Mich. 473 (163 N. W. 944), and was filed July 27, 1917. This opinion is so recent, so exhaustive in its discussion, and so accessible, that we content ourselves by referring to it.

The judgment is affirmed, with costs to the proponent.

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

FREEMAN *v.* MITCHELL.

1. INJUNCTION—PRELIMINARY INJUNCTION—MOTION TO DISMISS—JUDICATURE ACT.

   A contingent application for dissolution of a preliminary injunction may be combined with a motion to dismiss the bill as insufficient on questions raised by demurrer prior to the passage of the judicature act (Act No. 314, Pub. Acts 1915, 3 Comp. Laws 1915, § 12004 *et seq.*).

2. SAME—DISCRETION OF COURT—ABUSE OF DISCRETION.

   To grant or dissolve an interlocutory injunction is a discretionary order of the trial court with which the courts will rarely interfere, and then only on special application and a strong showing of palpable abuse of discretion.

3. APPEAL AND ERROR—PRELIMINARY INJUNCTION—MOTION TO DISMISS.

An order dissolving a preliminary injunction is not a final, appealable order.

4. CORPORATIONS—RIGHTS OF STOCKHOLDERS—FRAUD—ACTIONS—EQUITY.

Where the directors of a corporation are charged with fraud in carrying out a scheme to wreck the corporation by giving a mortgage for an unwarranted amount, timed and intended to be promptly foreclosed, as is done, it is unnecessary that a stockholder apply to such directors to commence a suit for redress before individually seeking relief in equity.

5. SAME.

A bill of complaint by a stockholder against directors of a corporation charging fraud and conspiracy in giving a mortgage for an unwarranted amount, timed and intended to be promptly foreclosed, and the purchase by such directors indirectly of all the assets of the corporation at the foreclosure sale, *held*, sufficient to warrant a court of chancery taking cognizance under its general equity jurisdiction.

6. APPEAL AND ERROR—MOTION TO DISMISS—JUDICATURE ACT—DEMURRER.

A motion to dismiss a bill as insufficient, under the judicature act (Act No. 314, Pub. Acts 1915, chap 14, § 4, 3 Comp. Laws 1915, § 12456), raises only such questions as previous to the enactment of such law could be raised by demurrer.

7. SAME.

On demurrer to a bill the allegations of facts properly pleaded are treated as true.

8. SAME.

In a suit in equity defendant's affidavits in denial and explanation have no place in a demurrer.

Cross-appeals from Hillsdale; Collingwood, J., presiding. Submitted June 18, 1917. (Docket No. 67.) Decided September 27, 1917.

Bill by Amariah F. Freeman against C. T. Mitchell and others, executors of the estate of William W.

Mitchell, deceased, the Alamo Manufacturing Company and others to enjoin the foreclosure of a mortgage against defendant corporation. From an order dissolving a temporary injunction and denying a motion to dismiss, both parties appeal. Affirmed.

A. F. Freeman and *F. M. Freeman,* for plaintiff.

F. A. Lyon, for defendants.

STEERE, J. This proceeding presents for review an order of the circuit court of Hillsdale county in chancery disposing of a motion by defendants asking dismissal of a bill of complaint filed against them by plaintiff, and for dissolution of a preliminary injunction granted when plaintiff filed his bill.

Aside from the request for dissolution of the injunction, the motion is in effect a demurrer to plaintiff's bill under former practice; motions to dismiss being now substituted for demurrers under section 4, chap. 14, of the judicature act (Act No. 314, Pub. Acts 1915 [3 Comp. Laws 1915, § 12456]). With the motion to dismiss, which is purely a demurrer, is combined a motion for dissolution of the injunction, affidavits being filed in support of the latter feature, as we assume, for it would scarcely be contended that a question of the sufficiency of plaintiff's bill as heretofore raised by demurrer will be tested by affidavits to the merits of the controversy.

Upon hearing said motion the trial court dissolved the injunction and denied the motion to dismiss plaintiff's bill. Defendants appealed from denial of their motion to dismiss the bill, and plaintiff from that portion of the order dissolving his injunction.

We see no objection to combining a contingent application for dissolution of a preliminary injunction with a motion to dismiss the bill as insufficient on

questions heretofore raised by demurrer. If the motion to dismiss the bill is well founded and prevails, the injunction falls with the bill; if not, the right remaining to urge an application for its dissolution after demurrer and before answer may be promptly disposed of at the one hearing, the applications being correlated and to a degree seeking the same relief.

To grant or dissolve an interlocutory injunction is a discretionary order of the trial court with which the appellate courts rarely interfere, and then only on special application and a strong showing of palpable abuse of discretion. It is fairly indicated in this proceeding that plaintiff will not be deprived of the benefits sought by his suit should he prevail, and, conceding the question properly here for review, we discover no abuse of discretion; neither does this order dissolving a preliminary injunction appear to deprive the plaintiff of any strict, legal rights, so as to be in its nature a final, appealable order. This rule has been applied to orders denying motions to grant, modify, and dissolve preliminary injunctions. *Wing* v. *Warner*, 2 Doug. 288; *Spencer* v. *Stearns*, 28 Mich. 463; *Simmons* v. *Board of Sup'rs of Alcona Co.*, 144 Mich. 591 (108 N. W. 282). The order of the trial court dissolving the injunction will therefore not be disturbed.

Against the court's refusal to grant defendants' motion to dismiss the bill as fatally defective upon the questions raised, as formerly by demurrer, defendants filed various assignments of error covering the court's failure to recognize as tenable the several grounds set out in their motion, which are condensed in counsel's brief to "questions involved" as follows:

"Did the bill of complaint set forth facts authorizing the plaintiff as a stockholder to bring and maintain this suit as a stockholders' suit?

"Did the bill of complaint set forth facts sufficient

to authorize the plaintiff to prosecute the suit and to put the defendants to the trouble and expense of trying said cause on the merits?"

The bill is filed by plaintiff as a stockholder in the Alamo Manufacturing Company, a corporation, of Hillsdale, Mich., with a capitalization of $600,000, of which $250,000 was preferred and $350,000 common stock. He alleges that it had been doing business "for a long term of years," and he has been a stockholder, owning 100 shares of its preferred and 300 shares of its common stock since March, 1908.

The substance of his grievance as detailed in his somewhat verbose bill is that in 1916, without his knowledge or consent, or that of the general stockholders, as he is informed and believes, defendants in unlawful combination and by a "species of fraud and conspiracy to cheat and defraud the general stockholders and this plaintiff and cut them and him off from further connection or relation to the properties of this defendant company," developed and carried out a scheme to wreck the corporation as such and absorb all its *corpus* of value, by having its president and secretary execute to the representatives of the estate of William W. Mitchell, deceased, a large mortgage on the entire assets of the company payable presently, and by promptly causing the same to be foreclosed in chancery by default and bidding in the property, obtained title and control of all assets of the corporation, taken in the name of the Mitchell estate, for and in the interest directly or indirectly of said defendants, or part of them, to the exclusion of the general stockholders and all others in interest not parties to the conspiracy.

It is strenuously urged that plaintiff has no standing in court as a stockholder because the bill fails to show that he first made application to the board of

directors asking or demanding of them that they bring suit or take some action to remedy the alleged wrong for and in behalf of the corporation, and that they neglected or refused to take such action, citing numerous authorities to the effect that such course is a prerequisite to action by an individual stockholder, and it is said:

"There is absolutely no attempt made to charge the directors or any number of them with having gotten control of the assets of the company and converted them to their own use, nor with having wasted and squandered the assets in any manner, shape, or form."

We cannot so construe plaintiff's complaint. The burden of his bill is that the directors were intentionally false to the trust they had assumed as officers of the corporation; that, being in complete control of its business and assets, they clandestinely and fraudulently conspired, planned, and acted against its interests in the matter of this mortgage, given by their direction for an unwarranted amount, timed and intended to be promptly foreclosed, as it was, on default, by one of their number acting in the foreclosure suit as attorney of the mortgagees, recognized prior thereto as the advisor and attorney of the corporation; further charging, in connection with a cited annual report made by the majority of the directors just before authorizing the mortgage, that:

"There is no such amount as stated properly as mortgage indebtedness nor as a proper decree or obligation against defendant company, and that said mortgage is fraudulent, * * * conceived * * * to cheat and defraud the stockholders of defendant company and gain titles away from defendant company and its stockholders and to the person or persons whom they might select or name as bidders at a foreclosure sale," etc.

It is evident that, if such charges of fraudulent con-

duct are well founded (and for the purposes of a demurrer they are so assumed if well pleaded), it would be idle for plaintiff to apply for redress to the board of directors whose conduct he thus impugns. The following language in *Torrey* v. *Cement Co.*, 150 Mich. 86 (113 N. W. 580), is well in point here:

"This is not a case for the application of the rule that redress must be sought through the corporation before individual stockholders can seek redress in equity. The officers of the corporation are charged with fraud from the beginning, and it would be useless to ask them to cause suits to be commenced in which they are directly interested. The case is well within the principle of *Miner* v. *Ice Co.*, 93 Mich. 97 (53 N. W. 218, 17 L. R. A. 412); *Edwards* v. *Investment Co.*, 132 Mich. 1 (92 N. W. 491)."

There is some foundation for the charge against this bill that many of its allegations are generalities, conclusions, and assertions of belief with scant averment of definite facts to bear them out, but with them run others more tangible. It is also true that certain of the material allegations are upon information and belief, which could not well be otherwise under the circumstances alleged, but it does not follow that the bill is demurrable if it contains distinct charges and material allegations well pleaded. As foundation for the charge that the mortgage was given for an excessive amount and in bad faith plaintiff alleges, amongst other things, that it purports to be given to secure a series of notes in the principal sum of $250,000, was executed by the president and secretary of the corporation acting under authority of its board of directors, was acknowledged before one of said directors as notary public, bears date January 10, 1916, and was recorded January 11, 1916, and within 50 days after it was given a bill of complaint was filed to foreclose it claiming past due and unpaid $269,808.37, principal and interest, and:

"That it will appear by reference to the said last annual report filed and to be filed with the secretary of State as aforesaid as of December 31, 1915 (and sworn to February 29, 1916), and only ten days before said mortgage of $250,000 was given, that there was no mortgage indebtedness whatever against defendant company property, and that the liability on all other secured indebtedness was $190,926.28, and on all unsecured indebtedness was $21,643.39, or a total of $212,569.57, and that by that report it will also appear that the company had of assets $191,620.12 in goods, chattels, material, etc., and credits owing the company of $98,322.64 and of other assets which in all aggregated in value according to that sworn report to the munificent amount of $517,621.12."

It is further alleged as evidence of fraud in combining to give and foreclose the mortgage that the correctness of this report was attested by a majority of the board of directors who authorized the mortgage, including the attorney who foreclosed it for the mortgagees. Particular reference is also made to this and preceding reports as sustaining plaintiff's theories and averments of fraudulent conduct inimical to the interests of the corporation. The merits of these charges are contingent on the truth of the facts alleged and the inferences to be drawn from them.

We find scattered through this bill sufficient definite allegations of fact and charges of conspiracy and fraud to move a court of chancery to take cognizance under its general equity jurisdiction; they are not such as to be summarily met and dismissed on motion, nor can their merits be tried out on affidavits. This motion raises only such questions as could heretofore be raised by demurrer. On demurrer the allegations of fact properly pleaded are assumed as true. Defendant's affidavits in denial and explanation, wherein lies the chief strength of their argument, have no place in a demurrer, and cannot be considered in this proceeding.

The order of the trial court will stand affirmed, with costs of this motion, as on demurrer, in favor of plaintiff; defendants being granted the usual time to plead over issuably herein as they may be advised.

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

McPHEE *v.* MILLERS' NATIONAL INSURANCE CO.

1. INSURANCE—FIRE INSURANCE—PARTNERSHIP — RIGHT OF PARTNERS.

   One partner may insure his interest in partnership property in his own name.

2. SAME—FIRE INSURANCE—CONTRACTS—BREACH OF CONDITION—FORFEITURE—STATUTES.

   Act No. 128, Pub. Acts 1911, § 1 (2 Comp. Laws 1915, § 9481), providing that no policy of fire insurance issued thereafter shall be declared void for the breach of any condition, where a loss has not occurred during such breach and by reason of such breach of condition, must be construed as meaning that no forfeiture is to take effect if the insurer has not been injured by a breach of the condition, nor if the fire was not caused by a breach of the condition, even though the breach was existing at the time of the fire.[1]

Error to Sanilac; Beach, J. Submitted June 21, 1917. (Docket No. 121.) Decided September 27. 1917.

Assumpsit by Hugh McPhee against the Millers'

[1]For authorities passing on the question of formation of partnership or change in personnel of as affecting a change of title or ownership, see note in 21 L. R. A. (N. S.) 442.

National Insurance Company on a policy of fire insurance. Judgment for plaintiff on a directed verdict. Defendant brings error. Affirmed.

Walters & Hicks and *Barger & Hicks,* for appellant.

Charles F. Gates, for appellee.

STEERE, J. Plaintiff recovered a verdict and judgment for the full amount, with accumulated interest, of a $5,000 insurance policy issued to him by defendant on February 28, 1912, insuring the stock and buildings of his retail lumber business in the village of Melvin, Sanilac county, where he conducted a lumber yard. The policy insured this property against loss or damage by fire or lightning for a period of five years, $950 of the insurance being placed upon his building and sheds, and $4,050 on his stock of lumber, etc. The premium was payable annually, in advance as called for; the total amount, however, not to exceed the amount of plaintiff's deposit note given under the terms of the policy. All premiums were paid when due.

On November 11, 1915, the buildings and stock were entirely destroyed by fire. No question is raised as to the extent and honesty of the loss. It is admitted to have exceeded the combined insurance upon the property, and that ten-twelfths of the value of the stock or personal property destroyed by the fire was in excess of the insurance upon it under the policy.

It was shown without question that at the time plaintiff made application for and obtained the policy upon which this action is brought he represented himself to be and was the sole owner of all the property described in the policy, and was then engaged in the retail lumber business at Melvin in his own name, so continuing alone until 1914, when he disposed of a one-twelfth interest in the stock and business to his

son, William, in return for his services in that business, which was thereafter conducted in the name of the H. J. McPhee Lumber Company. About a year later he "took in" and sold a one-twelfth interest in the personal property to another young man named Dennis, continuing to operate under the same firm name as before. They "had no writings" except the statutory certificate filed with the county clerk showing who composed the partnership.

Plaintiff did not notify defendant that he had taken these young men into partnership with him or obtain its consent to the transfer of a one-twelfth interest in the personal property to each of them, but the premiums on the policy were paid thereafter under the name H. J. McPhee Lumber Company. A check for premium, dated February 18, 1915, payable to defendant and signed by "H. J. McPhee Lumber Company," with a receipt therefor given by defendant to "Hugh McPhee," dated February 20, 1915, were produced in evidence. On the check appeared in print, "H. J. McPhee, dealer in lumber and building material."

Defendant declined to pay the loss on the ground that at the time it occurred a change had taken place in the interest of the property insured by the voluntary act of plaintiff without its knowledge or consent, and this action was brought.

The facts were concededly undisputed, and at the conclusion of the evidence plaintiff moved the court to direct a verdict in his favor for the amount of the policy with interest, while defendant moved the court to direct a verdict in its favor for the following reasons:

"That the policy in suit was void at the time of the fire because the plaintiff was not then the sole and unconditional owner of the personal property described in the policy.

"That the plaintiff had, before the fire, without the

knowledge or consent of the defendant, sold and delivered a one-twelfth interest in the insured property to each of two persons, William J. McPhee and Melvin Dennis, respectively, and these interests were outstanding in partnership form at the time of the fire.

"The personal property described in the policy was owned at the time of the fire by a copartnership, the H. J. McPhee Lumber Company, composed of H. J. McPhee, the plaintiff, W. J. McPhee, and Melvin E. Dennis."

It being undisputed that plaintiff was sole owner of the buildings, and had transferred to the two young men but a one-twelfth interest each in the personal property, leaving in him a largely preponderating insurable interest, the trial court said in part:

"Plaintiff still having such an insurable interest, under Act No. 128, Pub. Acts 1911 (2 Comp. Laws 1915, § 9481), the burden was on the defendant to show that the insurer had been injured by the nominal transfer, and that the loss occurred by reason of such nominal breach. No proof of such injury or that the loss occurred by reason of such breach was made in the case."

A verdict was thereupon directed in plaintiff's favor for the full amount of the policy.

Defendant thereafter moved for a new trial, renewing and elaborating the reasons urged in its motion for a directed verdict, which was also denied.

Plaintiff was insured under a Michigan standard policy in form prescribed by Act No. 246, Public Acts 1911 (2 Comp. Laws 1915, § 9475), which contains a lengthy paragraph providing that the entire policy shall be void upon the breach of any one of 14 different detailed conditions, the tenth of which is in part:

"Or, if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupant without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise."

These conditions are disjunctively conjoined by "or if," and the paragraph concludes with the following qualifications:

"*Provided,* A loss shall occur on the property insured while such breach of condition continues, or such breach of condition is the primary or contributing cause of the loss."

Defendant contends that under this contract of insurance, which it was required by statute to adopt, the entire policy is void, because a change in the interest or title of the property insured took place without its knowledge or consent, by the voluntary act of plaintiff in transferring to each of the young men he took into partnership a twelfth interest in the personal property insured.

It is not claimed to have been shown, nor is it inferable in any manner from the fact as proven, that the hazard (moral or otherwise) was increased by the alleged breach of condition, nor that the same was in any way a primary or contributing cause of the loss, but it is a fact that the loss occurred while it continued, and upon this defendant predicates the contention that the policy was then inoperative.

Although no exception is directly made, we assume it is not intended to include in this contention the buildings. When the loss occurred plaintiff was the sole owner of them, they were being used for the same purpose, in the same business. As to them the ownership and actual contracts remained as when the policy was issued insuring them divisibly for a separately specified amount.

It needs no citation of authorities to sustain the proposition that plaintiff had in any aspect of the case an insurable interest in the personal property at the time of the fire, by which he sustained a pecuniary loss exceeding the amount of the policy. He not only owned the buildings outright, but had a five-sixths interest in

the personal property which exceeded in value the insurance on all of it. One partner may insure his interest in partnership property in his own name. *Columbian Ins. Co.* v. *Lawrence,* 2 Pet. (U. S.) 25; *Warren* v. *Insurance Co.,* 31 Iowa, 468 (7 Am. Rep. 160). As limited by the amount of the policy, his loss was as large as though he had been the sole owner, and by reason of his dominant ownership he was as much interested in and had as full possession and control of this business and property as before. But defendant contends that he had changed the title to the subject of insurance by taking in these two young men as partners, with a one-twelfth interest each, thus making the stock partnership property, and so breached a condition of his policy; that the partnership interest he had at the time of the fire was not the interest it insured; that it insured the property itself to him as sole owner, and therefore, although the breach did not contribute to the loss, defendant is entitled to stand upon the forfeiture stipulated in the policy in case of a change in title and interest in the property insured, as here shown.

Forfeitures are not, as a general rule, favored in law (*Insurance Co.* v. *Norton,* 96 U. S. 234; *Imperial Fire Ins. Co.* v. *Coos County,* 151 U. S. 452 [14 Sup. Ct. 379]), and courts are reluctant to enforce them if the rights of parties can otherwise be protected; but the phraseology of contracts of insurance and supporting statutes have often made that duty imperative as the many decisions cited upon the subject by defendant's counsel, from this and other jurisdictions, make manifest. The legislature of 1897 apparently took note of this and passed a law, Act No. 167, entitled.

"An act to prevent the forfeiture of fire insurance policies by the violation of any condition of the policy when such violation has been without prejudice to the insurer."

The construction put upon section 1 of this act left the law of forfeiture substantially as before, and Act No. 128, Public Acts 1911, was passed, amending said section 1 to read:

"No policy of fire insurance shall hereafter be declared void by the insurer for the breach of any condition * * * where a loss has not occurred during such breach and by reason of such breach of condition."

So amended, the act was construed by this court in *Lagden* v. *Insurance Co.*, 188 Mich. 689 (154 N. W. 87, 158 N. W. 848), to mean:

"(*a*) That no forfeiture is to take effect if the insurer has not been injured by a breach of condition.

"(*b*) That no forfeiture is to take effect if the fire was not caused by a breach of condition, even though the breach was existing at the time of the fire."

It is also there said:

"By this provision the legislature has prescribed the conditions under which such a defense can be made, and it has in effect read this provision into each condition of the policy."

Neither is the construction nor act itself limited to any particular kind of fire insurance policies or companies. The act begins with the broad and positive prohibition that "no policy of fire insurance shall hereafter be declared void by the insurer for any breach of condition of," etc., and the decision construes this legislation as prescribing the conditions under which such a defense can be made. Those conditions for defense do not exist in this case.

The contention against this construction, which is here renewed, was strenuously urged, argued, and extensively briefed on hearing and rehearing in the *Lagden Case*. Admittedly the questionable and sometimes inharmonious use of "or" and "and," which infests our insurance legislation, gives opportunity for di-

versity of opinion as to the legislative intent, but in that case it was found and held by the majority opinion of this court that the clearly obvious purpose of the amendment was to accomplish what the title of the act indicated, and avoid the construction for which defendant is here contending. This court, as such, finds no occasion to overrule that decision, which is controlling against the contention defendant renews here, and the judgment of the lower court will therefore stand affirmed.

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

McLAWSON *v.* PARAGON REFINING CO.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EXPLOSIVES—USE OF KEROSENE FOR STARTING FIRES.

   The simple act of using kerosene for the starting of a new fire does not preclude the user thereof from recovering, in an action to recover damages for personal injuries resulting from negligent substitution by defendant of gasoline for kerosene, upon the ground that he was guilty of contributory negligence as a matter of law.

2. SAME.

   The pouring of kerosene directly from a can in relighting a dying fire or kindling a new one, without the party first assuring himself there is no fire in the stove, is negligence *per se*.

3. SAME—EVIDENCE—QUESTION FOR JURY.

   In an action to recover for death due to the alleged substitution by defendant of gasoline for kerosene used by deceased in starting a fire, where there were no eyewit-

nesses and only the exploded can and the character and location of the burns upon the body of the decedent, it was a question for the jury whether deceased acted without first assuring himself there was no fire in the stove in which he was using the liquid.

4. SAME—INJURY TO MINOR SON—LICENSEE.
A minor who resides with his parents and is a member of their household, is entitled to use kerosene in starting a fire exactly the same as the parents, and is not a mere licensee.

5. SAME—EXPLOSIVES—SUBSTITUTING GASOLINE FOR KEROSENE—LIABILITY FOR INJURIES.
One who delivers to another such an article or substance as gasoline for kerosene is liable for injuries resulting therefrom, even though he is ignorant of its noxious character, if, in the exercise of ordinary prudence, he or his servant should have possessed such knowledge.

6. EXPLOSIVES—GASOLINE—JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE.
Judicial notice is taken of the fact that gasoline, either alone or mixed with kerosene, constitutes a highly explosive agent and that extreme care should be used by vendors thereof to prevent their mixture.

7. NEGLIGENCE—SUBSTITUTING GASOLINE FOR KEROSENE—LIABILITY FOR INJURY—QUESTION FOR JURY.
Whether defendant's agent, in making investigation as to the nature of the contents of a can supposed to contain kerosene to be furnished to plaintiff's decedent who was killed as a result of using same to start a fire, exercised that high degree of care imposed upon him by the fact that he was handling a dangerous and, under certain circumstances, a highly explosive substance, was a question for the jury

Error to Ingham; Collingwood, J. Submitted June 14, 1917. (Docket No. 43.) Decided September 27, 1917.

Case by Frank McLawson, administrator of the estate of Arthur I. McLawson, deceased, against the Paragon Refining Company for the negligent killing

of plaintiff's decedent. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

Elmer N. Peters and *Harry H. Partlow,* for appellant.

Alfred J. Mills (*Ira C. Taber,* of counsel), for appellee.

This action is brought to recover damages arising out of the death of Arthur I. McLawson. Plaintiff, administrator, was the father of said McLawson. Plaintiff's decedent, a young man, past 19 years of age, who lived with his father and mother, met his death in the following manner: On the afternoon of October 7, 1915, between 2 and 3 o'clock, in the absence of both of his parents, he attempted to kindle a fire in the kitchen range, and in doing so used a quantity of kerosene or kerosene mixed with gasoline. No one was present at the time he made the attempt to kindle the fire, but the can containing the combustible fluid, whatever it was, was found in close proximity to the stove, and gave evidence of having suffered from a violent explosion, the metal being rent asunder. A fire followed the explosion. The burning liquid was cast upon McLawson's person and clothing, and resulted in his sustaining very serious burns to his hands, arms, shoulders, and his body from his waist downward to his ankles. The fire upon his person was soon extinguished, and he received medical treatment very promptly. He was conscious on the evening of his injury and on the day following and at intervals thereafter until he died on October 11th. His death unquestionably resulted from his injury.

The record discloses that the defendant is engaged in the city of Lansing and surrounding territory in the sale of oil and gasoline; that on Saturday the 2d day of October it made two deliveries of its product to

Taylor & Soper, a copartnership owning and operating a grocery in the city of Grand Ledge. On the first occasion 10 gallons of kerosene were delivered and poured into the receptacle provided by Taylor & Soper for that purpose. The clerk in charge of Taylor & Soper's business requested defendant's agent to leave a larger amount, but was advised that he had no more kerosene, but had two cans of gasoline which he was taking to another customer. A short time afterwards defendant's agent returned to the business place of Taylor & Soper, and announced that the two cans of liquid which he had supposed to be gasoline had turned out to be kerosene, and these cans were then emptied into the large kerosene tank of Taylor & Soper.

The evidence further discloses that plaintiff, decedent's father, purchased from Taylor & Soper 2 gallons of this liquid under the impression that it was kerosene on Monday the 4th day of October, and that he transported the same to his home in Grand Ledge, placing it in the woodshed, where it was habitually used as occasion required for the purpose of lighting fires. Plaintiff kept beside the can in the woodshed an old tomato can with an open top, into which was poured from time to time such small quantity as was necessary to kindle a fire, the can itself remaining in the woodshed.

It further appears that on Tuesday, the 5th day of October, Taylor & Soper discovered that something was wrong with the oil in the kerosene tank through themselves trying to use a small quantity of it to light a fire. They immediately placed themselves in communication with an official of the defendant company, who proceeded to Grand Ledge, and, after making an examination and test of the liquid in the kerosene tank, he advised Taylor & Soper to empty the tank, destroy the contents, and to advise all customers who

had purchased from the tank to destroy the oil so purchased. This Taylor & Soper undertook to do so far as possible, but failed to give any notice to the plaintiff of the dangerous character of the liquid.

It further appears that on Wednesday, the 6th day of October, Mrs. Ida McLawson, mother of the decedent, used a small quantity of the liquid for the purpose of igniting a fire on the morning of that day. She testified that upon applying a match the fire puffed and burned very fiercely, but that she reported this to no one, being of the opinion that she had used a little too much of the oil.

The testimony of several other witnesses was introduced, tending to show that the use of the oil in small quantities for the purpose of lighting fires was followed by more or less violent explosions.

Upon conclusion of the plaintiff's case a motion was made on behalf of the defendant for a directed verdict. This motion was granted, the court saying in part:

"This court cannot take judicial notice of the fact that such a proceeding to light a fire is a safe way, neither can it take judicial notice of the fact that it is an unsafe way to light a fire. There is no one to tell us just what Arthur McLawson did. He is dead. But there are circumstances which speak as loud and as distinctly as any witness could. The testimony in this case is that the last time the mother handled the kerosene can it was in the woodshed, and on Wednesday morning she left it in the woodshed and kindled the fire from oil in the small receptacle. From that time until the fire, which resulted in the death of Arthur McLawson, there is no testimony in this case showing what had become of that oil can, but after the fire, and within half or three-quarters of an hour, the can was found in front of the stove evidently having exploded.

"Now in the absence of testimony that any other member of the family took the can into the kitchen, it can be concluded that Arthur McLawson brought

that can from the woodshed into the kitchen. If he did not bring it into the kitchen, he at least attempted to start that fire with oil from the can containing this fluid standing or being held by the side of the stove. Now, gentlemen, what was the approximate cause of the death of Arthur McLawson? His death occurred as the doctor testified from burns. How were those burns received? Is it reasonable to suppose that they could have been received from placing a cupful more or less of kerosene oil on top of cobs in a cold stove when the covers were removed from the stove and lighting them? There is testimony to show in this case that such a proceeding would make a flash up into the kitchen, but there is no testimony to show that it would hurt anybody. There were at least two witnesses, who testified that they used this same fluid in this way, and, while there was a flash and a shock to them possibly, there was no damage.

"Now, the proximate cause of the burns which caused the death of Arthur McLawson was the fact that the fluid in this can took fire and burned him. If that can had been in the woodshed where Mrs. McLawson left it, and Arthur I. McLawson had taken a cupful of that fluid and poured on the cobs and lighted it, he could not have been injured by the fluid that was in that can. That is just as clear as can be. No reasonable man could dissent from that. Then, if Arthur McLawson had not lighted that combination of cobs and oil in the stove, with that can of fluid setting near the stove, there could have been no accident which would have caused his death. Then isn't it clear to any reasonable man that in lighting that fire with the oil while a gallon can of the fluid was setting by the side of the stove or held in his hands he himself was guilty of negligence which contributed to the accident. It seems so to me that the presumption regarding reasonable prudent conduct which would arise in cases of this kind is brushed aside, and we are confronted with the fact that the can was there in front of the stove when he lighted the fire, and we are forced to the conclusion that because of that fact in some way the fluid in the can took fire, the can exploded, and Arthur McLawson was burned.

"Now, gentlemen, in the absence of any other evi-

dence as to the freedom from negligence of Arthur McLawson, it becomes my duty to tell you that he was guilty of contributory negligence, and, being guilty of contributory negligence, he cannot recover, and so it becomes my duty to instruct you without leaving your seats to find the verdict for the defendant."

BROOKE, J. (*after stating the facts*). There are four assignments of error which may be considered together. They all relate to the action of the court in directing a verdict for the defendant solely upon the ground that plaintiff's decedent was guilty of such contributory negligence as to preclude recovery as a matter of law. Upon this point counsel for plaintiff assert that a person is not to be held guilty of contributory negligence as a matter of law unless all reasonable minds would reach the same conclusion under the undisputed facts. *Beach* v. *City of St. Joseph,* 192 Mich. 296 (158 N. W. 1045).

They assert that, while it has been held (*Riggs* v. *Standard Oil Co.,* 130 Fed. 199; *Dubois* v. *Luthmers,* 147 Iowa, 315 [126 N. W. 147]; *Morrison* v. *Lee,* 13 N. D. 591 [102 N. W. 223]) that to pour kerosene upon a fire for the purpose of replenishing it is an act of negligence *per se,* the use of kerosene for the purpose of starting a new fire is not to be held negligence as a matter of law, citing *Peterson* v. *Standard Oil Co.,* 55 Or. 511 (106 Pac. 337, Am. & Eng. Ann. Cas. 1912A, 625, and notes); *Ellis* v. *Republic Oil Co.,* 133 Iowa, 11 (110 N. W. 20); *Waters-Pierce Oil Co.* v. *Deselms,* 18 Okl. 107 (89 Pac. 212), affirmed in 212 U. S. 159 (29 Sup. Ct. 270); *Ives* v. *Welden,* 114 Iowa, 476 (87 N. W. 408, 54 L. R. A. 854, 89 Am. St. Rep. 379); *Chapman* v. *Pfarr,* 145 Iowa, 196 (123 N. W. 992); *Price* v. *Insurance Co.,* 92 Minn. 238 (99 N. W. 887).

They further assert that under the law in this State, where there is no eyewitness to the accident, which

results in death and the circumstances shown justify legitimate inferences, which bring the defendant's liability within the realm of probability, rather than leaving it one for mere conjecture, the case is one for the jury, citing, *inter alia*, *Lincoln* v. *Railway Co.*, 179 Mich. 206 (146 N. W. 405, 51 L. R. A. [N. S.] 710); *Teachout* v. *Railway Co.*, 179 Mich. 398 (146 N. W. 241).

The claim is made by counsel for appellant that, there being no eyewitnesses to the accident, the plaintiff is entitled to the presumption that his decedent exercised due care. In reply to the propositions advanced, counsel for defendant assert that the presumption of due care is not applicable to this case, because this court has held (*Mynning* v. *Railroad Co.*, 67 Mich. 677 [35 N. W. 811]), that such presumption vanishes where the testimony of an eyewitness or witnesses may be produced, and in this connection it is pointed out that plaintiff's decedent lived for four days after the accident, much of the time in full possession of his mental faculties, and his testimony as to what actually occurred at the time of the accident could easily have been secured and preserved. They urge that slight evidence is sufficient to overcome the presumption, and that such evidence may be furnished circumstantially even though no eyewitnesses are present at the moment of the occurrence of the accident. Reference is here made to the fact that the two gallon can containing the explosive fluid was found in a shattered condition immediately in front of the stove in which plaintiff's decedent was attempting to kindle a fire and to the further fact that the burns upon the person of decedent were such as to indicate beyond peradventure that the oil can was in his hands at the time of the explosion. They contend that the undisputed evidence, considered most favorably for plaintiff, renders it at least as probable that

the accident did not result from the negligence imputed to the defendant as that it did result therefrom. *Powers* v. *Railroad Co.*, 143 Mich. 379 (106 N. W. 1117).

They set out the following facts as bearing upon the question of the negligence of decedent:

"The fact that he poured the oil directly from the can itself is further evidence of his negligence. The fact that he did not use the open cup or receptacle which was in common use by his father and mother, when lighting a fire in their stove, is further evidence of his negligence. The fact that he did not assure himself that there were no live coals or ashes in the stove is further evidence of his negligence. The fact that the fire must have followed into the oil can and caused it to explode is further evidence of his negligence. The fact that the can was found directly in front of the stove and that his hands received the most severe burns from the explosion is further evidence of his negligence. The fact that no evidence was given or the *res gestæ* of the accident, though within the reach of plaintiff, is further evidence that he was negligent"

—and assert that from a consideration of those facts it cannot be said that decedent was free from contributory negligence, and that reasonable minds cannot draw different conclusions from the facts which stand undisputed upon the record. Reference is made to the case of *Molin* v. *Lumber Co.*, 177 Mich. 524 (143 N. W. 624, 48 L. R. A. [N. S.] 878), where this court said:

"The plaintiff has not averred a custom or practice in the locality or generally of starting fires in stoves with oil by reason of which defendant ought reasonably to have anticipated that his licensees would search for his oil and use it to start a fire. We know of no general custom or practice to make such use of kerosene oil."

While this court has never held that the use of kerosene for lighting fires is not negligence *per se*, it is

equally true that it never has held the contrary. The examination of the jurors who sat in this case and the testimony of several witnesses tends to show that this practice, whether extra-hazardous or not, is one which is extremely common, if not well-nigh universal in the vicinity where the accident occurred. We are inclined to the view that it should not be held that the simple act of using kerosene for the starting of a new fire should preclude the user thereof from recovering upon the ground that he was guilty of contributory negligence as a matter of law. A different question, however, is presented when the evidential facts are considered. If plaintiff's decedent attempted to relight a dying fire or to kindle a new one without first assuring himself there was no fire in the stove, by pouring kerosene directly from the can, this act, in our opinion, would plainly be negligence *per se.* The silent witnesses, the exploded can, and the character and location of the burns upon the body of the decedent very strongly point to the conclusion that this is what actually was done, nevertheless we have reached the conclusion that it is not the province of the court to so determine, but the question is one of fact for the jury under proper instructions.

On behalf of the defendant it is urged that if the verdict was properly directed upon any ground the decision should not be disturbed, and in this connection it is said that plaintiff's decedent was a mere licensee in his father's house, and as such is precluded from recovery under the decision in *Molin* v. *Lumber Co., supra.* With this contention we are unable to agree. Plaintiff's decedent was a minor residing with his parents, a member of the household, and as such was entitled to use the kerosene exactly the same as were his parents. It is next contended that, inasmuch as it appears beyond dispute in the record that defendant's agent, Brown, was a careful and competent

employee, and that he made a careful personal inspection of the contents of the cans before emptying them into the kerosene holder upon the premises of Taylor & Soper, if a mistake was made by Brown, such mistaken act, as shown by this record, was not within the scope of his employment, nor an act for which the defendant should be held responsible. We agree with defendant's counsel that there was no conscious adulteration of the kerosene either by the defendant or its servant. It is clear that Brown who delivered the oil believed that the contents of the two cans last delivered was kerosene, and that he came to that conclusion after a personal inspection of such contents, but, these facts being conceded, it does not necessarily follow that defendant may escape liability. In the case of *Wellington* v. *Kerosene Oil Co.*, 104 Mass. 64, it is said:

"It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault" (citing cases).

We think it is equally true that one who delivers such an article or substance is liable even though he was ignorant of its noxious character, if in the exercise of ordinary prudence he or his servant should have possessed such knowledge. We take judicial cognizance of the fact that gasoline, either alone or mixed with kerosene, constitutes a highly explosive agent, and that extreme care should be taken by the vendors thereof to prevent their mixture. The record does not disclose whether the last two cans delivered to Taylor & Soper were painted red or white, but it does disclose with sufficient certainty the fact that through the agency of the defendant or its agent some gasoline

found its way into the kerosene holder of Taylor & Soper and that a part of this mixture was purchased by plaintiff, and was used by plaintiff's decedent at the time of his injury.

Under the circumstances of this case, and considering the baleful consequences which are likely to result to the user of a mixture of kerosene and gasoline when such use is made under the belief that the substance used is kerosene, we are of opinion that the question whether defendant's agent, in making such investigation as he made, exercised that high degree of care imposed upon him by the fact that he was handling a dangerous, and under certain circumstances a highly explosive, substance, is for the jury.

It is urged by counsel for defendant that, even though it is assumed that the defendant was guilty of negligence through the mistake of its driver, Brown, yet it should not be held liable therefor because that negligence was not the proximate cause of the death of plaintiff's decedent. This contention is based upon the claim that between such negligence and the death of said decedent there intervened the negligence of said decedent. This contention may be answered by saying that if the jury determine under proper instructions that plaintiff's decedent was guilty of contributory negligence, that determination ends the case.

The judgment is reversed, with costs, and a new trial is ordered.

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

TOWNSHIP OF SANDSTONE *v.* MICHIGAN RAILWAY CO.

1. STREET RAILWAYS—FRANCHISES—FORFEITURE—MUNICIPAL CORPORATIONS.

   A municipality may not extrajudicially forfeit a street railroad franchise where the company has constructed its road after the time prescribed by the ordinance has expired, and such construction is carried on without interference by the municipality, and especially where the company entered upon the construction of the road in good faith, relying upon the grant.

2. SAME.

   Municipalities, in the performance of legislative functions involving discretion and judgment, can so act only at authorized meetings duly held, and the members of a township board granting a franchise to a street railroad cannot make a valid determination of forfeiture binding upon the municipality by their assents separately or individually expressed.

3. SAME—FRANCHISES—CONSTRUCTION.

   Where an interurban railroad franchise granted by a township relating to the charge to be made was clear and unambiguous and provided for a rate of 1½ cents per mile from any point within the township to any point within a city, and from any point within the city to any point within the township, with a minimum charge of 5 cents, and this construction of the franchise had been adopted by the various operating and owning companies during a period of 12 years, *held*, that the operating company was operating the interurban railroad under such franchise and that it was immaterial that the grantee of the franchise constructed the road only to a particular point in the city, and not to the interurban station, and did not warrant the collection of a city 5 cent fare for the ride between such point and the interurban station over tracks of a street railroad under a city franchise, to the rights under which the operating company as lessee had succeeded.

Certiorari to Jackson; Parkinson, J. Submitted April 17, 1917. (Calendar No. 27,516.) Decided September 27, 1917.

Mandamus by the township of Sandstone to compel the Michigan Railway Company to observe the terms of a franchise. From an order granting the writ, defendant brings certiorari. Affirmed.

James J. Noon and *Lyman B. Trumbull,* for plaintiff.

Sanford W. Ladd (*Charles E. Lewis* and *Warren, Cady, Ladd & Hill,* of counsel), for defendant.

This is certiorari to mandamus.

Relator, the township of Sandstone, sought by the use of the writ to compel the Michigan Railway Company to observe the terms of a certain franchise granted by said township to one Foote with relation to the rate of fare to be charged by said railway company within said township and within the city of Jackson. This franchise is dated July 10, 1901, and has been duly assigned to the lessor of the respondent, which is the operating company. Sections 6, 8, and 11 of said franchise are as follows:

(1) Section 6: "The rates of fare for each passenger shall not exceed one and a half cents per mile and from any point within said township to any point within the city of Jackson, and from any point within the said city of Jackson to any point within said township of Sandstone, except in cases where the amount shall be less than five cents, when five cents may be charged, and a fraction of a cent may be counted and charged as one cent. Children under five years of age shall be carried free when accompanied by parent or guardian."

(2) Section 8: "If said grantee, his successors or assigns, shall at any time refuse or neglect to comply with the provisions of this franchise after due notice in writing by the town clerk or other person under the direction of the township board, the authority, powers and privileges herein granted shall henceforth cease and be forfeited."

Section 11: "Said grantee shall commence the construction of said railway within three months from

the passage hereof, and shall complete said construction within the ensuing nine months. In default thereof, the privileges hereby granted shall be forfeited."

In its answer to the original petition for mandamus respondent admitted:

"*Fourth.* Answering paragraph 4, this respondent admits that it is a corporation organized and doing business under the laws of the State of Michigan, but denies that it owns any street railway as described in said paragraph, but admits that it maintains and operates the lines of street railway that are owned by the Michigan United Railways Company, a Michigan corporation, including both street railways and interurban street railways in the cities of Jackson and Kalamazoo, and the interurban street railway between said cities, and further alleges the fact to be that the lines of interurban street railway built and constructed by the Jackson & Battle Creek Traction Company, to which company said Exhibit A, the franchise in question, was assigned, was sold by the Jackson & Battle Creek Traction Company to the Michigan United Traction Company, and that the tracks of said Jackson & Battle Creek Traction Company only extended along West Main street within the city of Jackson to where First street intersects said West Main street, and that the said lines within the city of Jackson, so-called, were sold by the Jackson Consolidated Traction Company to the Michigan United Railways Company, and that said Jackson Consolidated Traction Company secured its rights in and to said Jackson City Lines from the Jackson-Suburban Traction Company by deed and bill of sale, and that the said contracts and franchise under which said Jackson-Suburban Traction Company and its successor, Jackson Consolidated Traction Company, operated, were separate and distinct from the contracts and franchise under which said Jackson & Battle Creek Traction Company operated, and that the contracts and franchises granted by the city of Jackson under which said Jackson-Suburban Traction Company and its successor, Jackson Consolidated Traction Company, were operated, were binding agreements between said traction companies and the city of Jackson prior to the

granting of the franchise by said township of Sandstone to William A. Foote, and by William A. Foote assigned to the Jackson & Battle Creek Traction Company, an interurban street railway company as distinguished from a street railway company operating the city lines, and that under the terms of the franchise granted by the city of Jackson to the Jackson & Battle Creek Traction Company they operated over the tracks on West Main street laid and built by the Jackson & Battle Creek Traction Company from the city limits to where First street intersects West Main street, said Jackson & Battle Creek Traction Company was expressly bound by the terms of the franchise under which said Jackson & Suburban Traction Company was operating the city lines within said city of Jackson, and that said franchise granted to the Jackson & Battle Creek Traction Company by the city of Jackson was an agreement, of which Exhibit 1 attached hereto and made a part hereof is a true copy. And respondent further alleges that the franchise under which said Jackson-Suburban Traction Company was operating in the city of Jackson at the time said Jackson & Battle Creek Traction Company began its operations was an agreement between Jackson-Suburban Traction Company and said city of Jackson, and that Exhibit 2 hereto attached and made a part hereof is a true copy of said agreement and franchise.

"Further answering, this respondent admits that the Michigan United Railways Company, the owner of said interurban street railway through relator's township, has succeeded to certain rights under Exhibit A and that respondent herein in operating said interurban street railway is bound by said Exhibit A in so far as said Exhibit A applies to the line of street railway owned and built by said Jackson & Battle Creek Traction Company, and that said Exhibit A is not controlling, and that respondent is not bound to operate over all the tracks within said city of Jackson as claimed by relator, but that said Exhibit 2 attached hereto controls the operations of respondent within said city of Jackson, and as to all the other allegations contained in said paragraph 4 this respondent denies the same."

Exhibit 2, referred to in the foregoing excerpt from respondent's answer and attached thereto, is a franchise from the city of Jackson to the Jackson-Suburban Traction Company, and defines the rights and obligations of the respondent's grantors as owners of a traction line within the city of Jackson. By section 28 it is provided that:

"Said grantee and its assigns shall make no greater charge than five cents for one continuous ride upon said railway from any point in the city to any other point in the city limits."

By the issue as originally framed it will be seen that the only point in question was whether the respondent company was obliged to carry passengers from the township of Sandstone to its interurban depot, a point in said city east of the intersection of First and Main streets, at the franchise rate, or whether, having reached that point within the city of Jackson, it was entitled to charge a 5-cent fare under the franchise from the city of Jackson which was dated November 19, 1900, and therefore antedated the franchise from the township of Sandstone to Foote. Later an amended petition was filed by relator, which, however, sought the same relief as the original petition. To the amended petition respondent filed an answer. In this answer it shows that on July 1, 1902, a representative of its grantor or of Mr. Foote, applied to the township board of the township of Sandstone for an extension of the Foote franchise, and that said extension was refused, as shown by the following entry in the township records:

"Mr. Warner, in behalf of the electric railroad company, asks for renewal of their franchise in this township. The motion to renew the franchise was voted down."

It further shows that on July 17, 1902, a notice of

forfeiture was served upon it in the following terms:

"To the Jackson & Albion Electric Railway Company, the Railway Companies General, Their Agents, Servants, Employees:

"You will please take notice that under the provisions of section 8 of the franchise granted by the township board of Sandstone on the 10th day of July, 1901, to William A. Foote, of the city of Jackson, and accepted by the said William A. Foote on the 18th day of July, 1901, we do hereby declare that all of the authority, powers, and privileges granted by said franchise have become forfeited and are hereby forfeited, for the reason that the construction of the railway provided in said franchise has not been completed within twelve months from the passage of said franchise in accordance with the true intent and meaning of section 11 of said franchise resolution. And you are therefore notified to wholly desist from and abandon the further construction or operation of said railroad. And you are further notified that in case you desire an extension of the time for the completion of the construction of said railroad in accordance with said resolution, that the same will be granted by the township board of Sandstone upon your agreeing as a condition thereof not to construct and install or put into operation the third rail system through the township of Sandstone, but to construct, install, and put into operation the usual overhead trolley system.

"Dated July 17, 1902."

In said amended answer respondent further asserts:

"Further answering, this respondent denies that the Michigan United Railways Company, the owner of said interurban street railway through relator's township, has succeeded to any right under Exhibit A (the Foote franchise), as said franchise was forfeited by the relator herein as shown by Exhibit 1, and respondent further denies that in operating said interurban street railway it is bound by said Exhibit A attached to relator's petition, and alleges the fact to be that Exhibit A is not controlling, and that respondent is not bound to operate over any of the street railway tracks, whether the same were formerly owned by the Jackson & Battle Creek Traction company or owned

by the Jackson & Suburban Traction Company within said city of Jackson as claimed by relator, and further alleges that, in so far as the lines of street railway formerly owned by the Jackson & Suburban Traction Company within said city of Jackson, that said Exhibit 2 attached hereto and made part hereof controls the operation of respondent within said city of Jackson, and as to all other allegations contained in said paragraph 4, this respondent denies the same.

"*Fifth.* Answering paragraph 5, this respondent admits that section 6 in Exhibit A set up in said paragraph is a correct copy of section 6 of said original franchise and agreement, but now forfeited, and respondent denies that section 6 is binding upon respondent in any way whatsoever, and even if said section 6 of Exhibit A were in effect, that said section 6 would not be controlling in any way whatsoever at any point within the city of Jackson beyond where First street intersects West Main street, being the terminus of said interurban street railway built by said Jackson & Battle Creek Traction Company within said city of Jackson, and as to the other allegations contained in said paragraph 5 this respondent denies the same; * * * and further answering, respondent alleges the fact to be that respondent is operating within said township of Sandstone under the terms of a franchise granted July 13, 1900, to Frederick N. Rowley, and accepted, a copy of which is attached hereto and made part hereof, and marked Exhibit 3."

The so-called Rowley franchise mentioned as Exhibit 3 in defendant's amended answer provides (section 6) as follows:

"The rates of fare for each passenger shall not exceed one and one-half cents per mile, except in case where the amount shall be less than five cents, when five cents may be charged and a fraction of a cent may be counted and charged as one cent. Children under five years of age shall be carried free of charge when accompanied by parent or guardian."

It will be noted that this provision as to the rate of fare is the same as that in the Foote franchise so far as the rate per mile is concerned, but that it is silent

as to the rate to be charged within the city of Jackson. By the amended answer another question is raised, namely, whether the so-called Foote franchise, under which relator claims was: (1) Terminated by its own terms; or (2) terminated by the notice served by the relator township.

Upon the hearing in the court below evidence was given on behalf of the relator tending to show that the notice of forfeiture was signed by the various members of the board at their several homes, and was not pursuant to any resolution adopted at a meeting of the township board, and that no such resolution appears of record in the proceedings of said board. It was conceded that Rowley was an associate of Foote, and it appears that at the time the application for the Foote franchise was made nothing had been done under the Rowley franchise, and it was understood upon all sides that the same had been abandoned. There was further testimony tending to show that before July 1, 1902, at which time an extension of the Foote franchise was requested and refused, the road had been partially constructed through the township of Sandstone. The notice of forfeiture above set forth likewise indicates this fact, as it recites:

"And you are therefore notified to wholly desist from and abandon the further construction or operation of said railroad."

Evidence was further introduced tending to show that the road through said township and into the city of Jackson was completed some time within the year 1903, and operation was immediately undertaken, and continued from that time down to the time when the respondent filed with the Michigan railway commission its amended schedule (effective May 3, 1915), which provided for rates of fare in excess of those

set out in the Foote franchise. Prior to that date the various operating companies had carried passengers through said township and into the city of Jackson to its interurban depot, located at a point east of the intersection of First street and West Main street at the rate of fare provided in the Foote franchise, to wit, 1½ cents per mile. This practice on the part of the various operating companies was uniform and continuous for a period of about 12 years, with one exception, when for a period of about 4 weeks the company then operating said line inaugurated what was known as the "zone" system of charges, under which the charges made to residents of the township of Sandstone were slightly in excess of those provided for in the Foote franchise. A protest having been made by the officers of the relator township to Mr. Bramlette, the general manager of the then operating company, the company abandoned its so-called "zone" system, and returned to its earlier rate of fare, and so far as relator township was concerned, continued to operate thereunder up to the time it filed the tariff which is the subject of this litigation. It is in testimony that at the time the company receded from its position touching the "zone" system of charges the original Foote franchise was submitted to Mr. Bramlette, the company's then general manager, and the claim was then made that the rates of fare provided by said Foote franchise controlled, and this claim was apparently conceded by the responsible officer of the company then operating.

Issues of fact were framed as follows:

"(1) Is the street railway in question commonly called the interurban railway now being operated by the Michigan Railway Company? If so, how long has it operated said street railway?

"(2) Has said Michigan Railway Company succeeded to all the rights and obligations of the Michigan United Traction Company?

"(3) Has the Michigan Railway Company by lease, assignment, or otherwise succeeded to all the rights and obligations of W. A. Foote under franchise granted to him on the 10th day of July, 1901, by the township of Sandstone?

"(4) Is said Michigan Railway Company now operating under said franchise?

"(5) Did the Michigan United Traction Company and its predecessors carry passengers generally going either way on its local interurban cars between all points within said township of Sandstone and the city of Jackson along the said interurban railway and up to or from its terminal or depot in said city of Jackson at a rate of fare not exceeding 1½ cents per mile for each passenger, except in cases where a minimum fare of 5 cents might be charged or fraction of a cent counted as a cent in accordance with section 6 of franchise dated July 10, 1901? If so, for how long a period?

"(6) Is said franchise still in force?

"(7) Have the respondents, Michigan United Traction Company and the Michigan Railway Company, commencing about the month of May, 1915, charged, requested and exacted a rate of fare either way along their local interurban line between points in the township of Sandstone and their waiting room or terminal on Francis street in the city of Jackson, Mich., exceeding 1½ cents per mile, allowance being made for minimum fares and fractions of a cent as provided in said section 6? If so, over what portion of their said line have they charged such excess?

"(8) Do the conductors, motormen, and other employees of respondent Michigan Railway Company having charge of its local interurban cars through the township of Sandstone as a general rule remain on and operate said cars up to and including the waiting room in the city of Jackson, situated on Francis street, and from the said waiting room in the city of Jackson through the township of Sandstone?

"(9) Did the Michigan United Traction Company or its predecessors exact or attempt to exact at any time a rate of fare in excess of a cent and one-half a mile between points in Sandstone and the city of Jackson up to and including the waiting room, except

where minimum fares were permissive, due allowance being made for a fraction of a cent?

"(10) Is the interurban street railway which is now being operated by the Michigan Railway Company between Jackson and Battle Creek located and operated upon any of the streets and highways of the township of Sandstone? If so, how long has it been so located and operated and upon what highway or highways?

"Approved for the journal."

The learned circuit judge who heard the case ordered the issuance of a mandamus in accordance with the prayer of the relator's petition, and made findings of fact answering the framed issues as follows:

"(1) The street railway in question is now being operated by the Michigan Railway Company, and it has been so operated since the 1st day of January, last.

"(2) As the operating company, the said Michigan Railway Company has succeeded to the rights and obligations of the Michigan United Traction Company.

"(3) I answer 'Yes.'

"(4) To this question my answer is 'Yes.'

"(5) My answer is 'Yes.'

"(6) My answer is 'Yes.'

"(7) My answer is 'Yes.'

"(8) To this question my answer is 'Yes.'

"(9) This interrogatory I answer 'No,' unless such increase of fares for the brief period heretofore stated and the change made on or about June 1, 1915, should be excepted.

"(10) My answer is 'Yes.' The highway upon which it has been so operated in part is the one known generally as the Territorial road. This becomes a street in that part of the village of Parma located in the township of Sandstone. Such railway has been so located and operated upon said highway and street ever since its construction.

"Dated May 31, 1916."

It is this order which respondent reviews by certiorari.

BROOKE, J. (*after stating the facts*). The first po-

sition taken by the appellant is that the provisions of the so-called Foote franchise are not now in force or binding upon the respondent:

"(*a*) Because said franchise terminated by its self-executing provisions.

"(*b*) Because formal notice was waived by the traction company's representative at the board meeting on July 1, 1902. The notice of forfeiture, Exhibit 1, as provided for in section 8 of the Foote franchise, was a ministerial act properly delegated to the township clerk and members of the board, and fully authorized by the original franchise resolution. No further formal action by the board was required for the purpose of declaring a forfeiture or authorizing the notice. Were such action necessary, it was furnished by the resolution of July 1, 1902."

(*a*) It seems to be well settled that a forfeiture clause which would be self-executing and would dispense with judicial proceedings or the intervention of the attorney general must be plain and unmistakable in its terms (*New York, etc., Bridge Co.* v. *Smith,* 148 N. Y. 540 [42 N. E. 1088]), and it has been held that, where franchises are granted by the legislature to construct a street railway within a certain time with a provision that, if the provisions of the act are not complied with, the franchise should be forfeited, the failure, without legal excuse, to lay the track within the time limited, does not work a forfeiture of the right to construct without a judgment at the suit of the State declaring the forfeiture (*Application of Brooklyn Elevated R. Co.,* 125 N. Y. 434 [26 N. E. 474]; Booth on Street Railways [2d Ed.], § 46; *Union Street R. Co.* v. *Saginaw Circuit Judge,* 113 Mich. 694 [71 N. W. 1073]), and a municipality may not forfeit a grant where a company has constructed its road after the time prescribed by the ordinance has expired, where, as in the case under consideration, such construction is carried on without interference from

the municipality. It is particularly true that an effective forfeiture may not be extrajudicially declared where the railroad company has entered upon the construction of the road in good faith, relying upon the grant. *Knickerbocker Trust Co.* v. *City of Kalamazoo,* 182 Fed. 871; *Iron Mountain R. Co.* v. *City of Memphis,* 96 Fed. 123 (37 C. C. A. 410); *City of Detroit* v. *Plank Road Co.,* 43 Mich. 144 (5 N. W. 275).

(*b*) With reference to the service of the notice of forfeiture upon the person or company then holding the franchise and constructing the road thereunder, it clearly appears that, though the notice was signed by every officer of the municipality, it was not so signed at any regular or special meeting of the board, and no resolution of forfeiture was ever passed by the township board. Municipalities in the performance of legislative acts or acts involving discretion and judgment can so act only at authorized meetings duly held, and the members of said board cannot make a valid determination binding upon the municipality by their assents separately or individually expressed. 2 Dillon on Municipal Corporations (5th Ed.), § 501, and cases cited in notes 4 and 5.

It is next asserted on behalf of appellant that the rate of fare given to the respondent by the franchise from the city of Jackson to the Jackson & Suburban Traction Company is controlling as to the transportation of all passengers east of First street in the city of Jackson. In support of this claim it is pointed out on behalf of respondent that the respondent, which is the operating company under a lease from the Michigan United Railway Company, which is the assignee of the franchise granted by the city of Jackson to the Jackson Suburban Traction Company, operates its lines within the city of Jackson under the city of Jackson franchise which was granted a year or more before the so-called Foote franchise was granted through

the township of Sandstone. It is clear from the record that through some sort of a traffic arrangement made as early as 1903 the operating company transported its cars through the township of Sandstone and over the tracks of the Jackson Suburban Traction Company within the city of Jackson to its interurban station, this station being located some distance east of First street. Later, on July 25, 1908, the Michigan United Railways Company, through *mesne* conveyances, became possessed of the franchise rights of the Jackson Suburban Traction Company. Thereafter the various operating companies then being the owners of all the franchise rights both in the city of Jackson and the township of Sandstone for a period of more than seven years carried passengers through the township of Sandstone to the interurban station within the city of Jackson east of First street at the Foote franchise rate of 1½ cents per mile until 1915, when the new tariff was filed under which respondent asserted its right to exact a city fare from interurban passengers upon reaching the intersection of First and Main streets in the city of Jackson. The language of the Foote franchise is not obscure or ambiguous. It provides for a fare rate of 1½ cents per mile "from any point within said township of Sandstone to any point within the city of Jackson and from any point within said city of Jackson to any point within said township of Sandstone."

That Foote and his associates to whom said franchise was given constructed that particular road only to the intersection of First and Main streets, within the city of Jackson, it seems to us is of no particular significance. They evidently intended to make traffic arrangements with the urban lines of Jackson by means of which the interurban cars could reach the center of the city, and this they were able to do until they, or the various companies succeeding to their

rights, were able to acquire the entire system urban, as well as interurban. The construction given these contracts by the various operating and owning companies during a period of 12 years, while perhaps not absolutely controlling, is most pursuasive (*Rice* v. *Railway*, 122 Mich. 677 [81 N. W. 927, 48 L. R. A. 84]; *Township of Ross* v. *Railways Co.*, 165 Mich. 28 [130 N. W. 358]), inasmuch as it has not been observed that public service corporations habitually charge less than the tariff permitted by their franchise contracts. We conclude, then, that the road through the township of Sandstone was built under the Foote franchise, and was and is operated under it, and that section 6 of said franchise is binding upon the respondent in this case, and under the terms thereof respondent must carry passengers from any point within relator's township to its interurban depot within the city of Jackson at the franchise rate of 1½ cents per mile.

Finally it is asserted on behalf of respondent that to enforce the terms of the so-called Foote franchise would amount to a violation of the respondent's constitutional rights. If we are correct in our conclusions hereinbefore announced, this claim requires no discussion.

The judgment is affirmed.

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

In re REHFELD'S ESTATE.

BLOSS *v.* SCHREITER.

BANKS AND BANKING—JOINT DEPOSITS—STATUTES—SURVIVORSHIP —JOINT TENANCY IN PERSONALTY.

Under Act No. 248, Pub. Acts 1909, § 3 (2 Comp. Laws 1915, § 8040), providing that when a deposit shall be made in a bank by any person in the name of the depositor or any other person, and in form to be paid to either or the survivor of them, such deposit shall be the property of such persons as joint tenants, and may be paid to either during the lifetime of both, or to the survivor, the ownership of the fund is actually fixed, and the fund, in the absence of competent evidence to the contrary, when deposited, becomes the property of such persons as joint tenants, with the attendant right of survivorship. FELLOWS and MOORE, JJ., dissenting.

Error to Wayne; Codd, J. Submitted June 8, 1917. (Docket No. 17.) Decided September 27, 1917.

George Bloss presented his final account as executor of the will of Charles Rehfeld, deceased. The account was disallowed in part by the probate court, and the executor appealed to the circuit court. Judgment allowing the account in full on a directed verdict. Arthur E. Schreiter, a residuary legatee, brings error. Affirmed.

Munroe & Powell and *Arthur E. Schreiter,* for appellant.

Dohany & Hersch, for appellee.

BROOKE, J. In this case the deceased, Charles Rehfeld, on August 5, 1913, deposited in the Mt. Clemens Savings Bank the sum of $2,000 to the credit of

"Charles Rehfeld or George Bloss or either or the survivor." On February 27, 1915, the deceased made a last will and testament by the terms of which, after a number of specific bequests, he devised and bequeathed the residue of his estate to George Bloss and Arthur E. Schreiter, two-thirds to Bloss, and one-third to Schreiter. Shortly thereafter Rehfeld died. Bloss, who was named executor in the will, took possession of the estate and the evidences thereof and went to Mt. Clemens for the purpose of having the deposit in the Mt. Clemens Savings Bank transferred to himself as executor. There for the first time he learned of the terms under which the deposit had been made. He thereupon signed the signature card and withdrew the fund, claiming it to be his own. His account in the probate court was charged with said deposit, it being there held that the same constituted a part of the Rehfeld estate. Upon appeal to the circuit court this ruling was reversed, and the fund was held to belong to Bloss personally. From this decision Arthur E. Schreiter appeals; it being his contention that said fund is a portion of Rehfeld's estate, and that he is entitled to one-third thereof as devisee of that proportion of the residue.

Appellee relies upon the provisions of Act No. 248, Pub. Acts 1909, section 3 (2 Comp. Laws 1915, § 8040) of which provides:

"When a deposit shall be made in any bank or trust company by any person in the name of such depositor or any other person, and in form to be paid to either or the survivor of them, such deposits thereupon and any additions thereto, made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named and may be paid to either during the lifetime of both, or to the survivor after the death of one of them, and such payment and

the receipt or acquittance of the same to whom such payment is made shall be a valid and sufficient release and discharge to said bank for all payments made on account of such deposits prior to the receipt by said bank of notice in writing not to pay such deposit in accordance with the terms thereof."

The State of New York has a statutory provision (section 144 of the Banking Law [1 Consol. Laws, chap. 2; Laws of 1909, chap. 10]) practically identical with the Michigan statute.

In March, 1913, in the case of *Clary* v. *Fitzgerald*, 155 App. Div. 659 (140 N. Y. Supp. 536), the identical question here at issue was considered. The court there said:

"It may be conceded that, had this provision not been added to the banking law, the charge of the trial court would * * * have been correct. * * * The effect of this added provision has not been directly at issue in any reported decision to which our attention has been called. In the case of *Bonnette* v. *Molloy*, 153 App. Div. 73 (138 N. Y. Supp. 67), in discussing the effect of a deposit similar in form to that before us in the present case, Laughlin, J., incidentally refers to the added provisions and says:

"'If the moneys had been deposited after the enactment of this statutory provision there could be no question but that the defendant [the survivor] would be entitled to the fund.'

"The effect of this same provision of the law is thus stated in Brady on Bank Deposits, p. 46:

"'It must be added that, under a New York statute, a deposit of this character would to-day create an estate in joint tenancy, even without the delivery of the passbook. But, under that statute, once the deposit is opened, and the estate in joint tenancy created, the depositor cannot revoke the gift or take it back. If he draws the money and uses it, he is accountable to the donee as any other joint tenant of personal property would be.' (It may be observed that equivalent statutory provisions were in 1909 adopted in California * * * and Michigan. * * *)

"The fact that this deposit was entered in form to

the credit of intestate 'or' defendant by name, instead of to the credit of intestate 'and' defendant, does not change the effect of the deposit as one being in the names of both. *Matter of Meehan,* 59 App. Div. 156 (69 N. Y. Supp. 9); *McElroy* v. *Savings Bank,* 8 App. Div. 46 (40 N. Y. Supp. 422). The deposit was one within the classification of the statute, made by the intestate in the names of herself 'and another person and in form to be paid to either or the survivor of them.' It would seem, therefore, if any effect is to be given to the direct and explicit language of the statute, this deposit, as the statute provides, thereupon, presumptively at least, became the property of the designated depositors 'as joint tenants,' *i. e.,* as joint owners. * * *

"We think, therefore, that the necessary effect of this provision of the statute is that the single fact, unexplained by other competent evidence, that a deposit in a savings bank in the form in which this deposit was made fixes the respective rights of the depositors named as joint owners of the property with all the incidents attaching to such ownership. * * *

"We conclude, therefore, that the deposit in the bank of the fund in the form in which it was made was sufficient, in the first instance, to establish in this action a joint ownership in the fund with the attendant right of survivorship therein."

This decision was affirmed in the court of appeals, 213 N. Y. 696 (107 N. E. 1075), without opinion.

In *Anson* v. *Savings Bank,* 155 App. Div. 939 (140 N. Y. Supp. 1017), it was held that, where a deposit was made to the credit of either of two persons, either or the survivor to draw, evidence of declarations and oral statements by them, made after the deposit, was admissible to show that it was not intended that they should own the deposit as joint tenants. See, also, *In re Reynolds' Estate,* 163 N. Y. Supp. 803, where the deposit under consideration was held to be governed by section 144 of the banking law of New York, and that the use of the word "or" instead of the word "and" was of no consequence.

We are of opinion that in enacting the legislation in question it was the legislative intent not only to protect banks in the payment of deposits made in the manner indicated by the statute, but, in the first instance and in the absence of competent evidence to the contrary, to actually fix the ownership of the fund in the persons named as joint tenants with the attendant right of survivorship therein.

But, aside from the statute, we think this case is controlled by our decision in *Negaunee National Bank* v. *Le Beau*, 195 Mich. 502 (161 N. W. 974), where it was held that the writing governing the deposit itself indicated on the part of the depositor "the intention to create in his daughter, Sophia Charles, a present estate in the fund * * * in case of his death."

The judgment is affirmed.

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

FELLOWS, J. (*dissenting*). It is not and cannot be claimed that, independent of the statute in question, joint tenancy in personal property, with the rights of survivorship, obtains in this State. It is undoubtedly true, as stated by some of the New York courts, and as claimed by appellee, that in many instances deposits in the joint names of husband and wife are made by the husband in such a manner as that money may be drawn by either. Eliminating from consideration the statute, the money in such cases is the property of the husband, the wife having no beneficial interest therein, but upon the theory of agency has authority to withdraw the same. This agency, as in other cases, terminates with his death, and the money then goes to his estate. It is undoubtedly true that prior to the passage of the act of 1909 thousands of dollars of deposits had been made in this manner under the then state of the law. The question here is:

Was it the legislative intent to change the title to these thousands of dollars of deposits so held, and if such was the legislative intent could it be made effective under an act, the title to which reads:

"An act in relation to the payment of deposits of money in banks and trust companies by minors, trust deposits, and deposits in the names of more than one person."

The first section of this act deals with deposits of minors and the payment of the same; the second section deals with trust deposits and their payment; the third section is set out in the opinion of Mr. Justice BROOKE, and deals with joint deposits. The concluding portion of section 3 is, to say the least, peculiar if the act has already absolutely fixed the title of such deposits. It is as follows:

"* * * And the receipt or acquittance of the same to whom such payment is made shall be a valid and sufficient release and discharge to said bank for all payments made on account of such deposits prior to the receipt by said bank of notice in writing not to pay such deposit in accordance with the terms thereof."

Before this provision the section in terms makes such deposits "the property of such persons as joint tenants."

Outside of the provisions of section 3 here involved, the act shows a legislative intent to protect banks and trust companies in the payment of deposits of the character enumerated and is consistent with its title. Section 21, art. 5, of the Constitution provides in part:

"No law shall embrace more than one object, which shall be expressed in its title."

The purpose of this constitutional provision is well known to the profession. It is that not only members of the legislature, but the public generally, shall have

notice by the title of the act the purpose of the legislation, the subject involved. It was said by Mr. Justice MORSE, speaking for the court in *Brooks* v. *Hydorn,* 76 Mich. 273 (42 N. W. 1122):

"This purpose of the constitutional direction, which has been disregarded in this act, is that the intent of the bill—its object—shall be clearly shown by its title, for the benefit, not only of the members of the legislature who are to vote upon it, but also for the benefit of the people of the State outside of the legislature, who are interested and have a right to be, in all legislation, whether the same be general or special."

See, also, *Blades* v. *Water Com'rs of Detroit,* 122 Mich. 366 (81 N. W. 271); *Grosvenor* v. *Duffy,* 121 Mich. 220 (80 N. W. 19); *McDonald* v. *Township of Springwells,* 152 Mich. 28 (115 N. W. 1066); *Village of Fairview* v. *City of Detroit,* 150 Mich. 1 (113 N. W. 368); *Vernor* v. *Secretary of State,* 179 Mich. 157 (146 N. W. 338, Am. & Eng. Ann. Cas. 1915D, 128); *Shepherd* v. *Judge of Recorder's Court,* 175 Mich. 193 (141 N. W. 556).

Is the title to this act notice to the legislators, and the public generally, who are interested in the subjects of legislation, that the long-established rule that joint tenancy in personal property in this State did not exist, was to be changed in part? Was this notice that the character of the title to thousands of dollars in property was to be changed by legislative mandate? I think not. Clearly one subject was expressed in the title, viz., the payment of deposits in banks and trust companies, not the character of the title of such deposits. To make so radical a change in the law of the State, to my mind, requires some notice by the title that the subject of such change is being considered by the legislature. In so far as this act protects banks and trust companies in their payment of deposits of the character enumerated, I think the act is valid.

In so far as it fixes the character and title of such deposits, I think it offends the constitutional provision above quoted.

Nor do I think the facts in the instant case bring it within the case of *Negaunee National Bank* v. *Le Beau*, 195 Mich. 502 (161 N. W. 974). Here the evidence, at most, only shows an intent to make a gift; there the evidence not only showed an intent, but its execution, so that a gift *inter vivos* was consummated.

For these reasons I dissent from the opinion of Mr. Justice BROOKE. I think the case should be reversed.

MOORE, J., concurred with FELLOWS, J. OSTRANDER, J., did not sit.

ANDRÉ *v.* DONOVAN.

1. DEEDS—COVENANTS—BUILDING RESTRICTIONS—ABANDONMENT.
   There was no abandonment of mutual covenants in a deed of one-half of all the portion of a block fronting on a certain street restricting the use of the premises conveyed "only for residence purposes" by subsequent deeds of each of the owners of a portion of the land of each, the two strips sold adjoining, where, although the covenants were not in all respects similar, they were essentially similar, it being asserted in each deed that the property conveyed was to be used "only for residence purposes."

2. SAME.
   A covenant against the use of premises for other than residential purposes is not broken by the use of a barn located on a corner of the premises as a garage and of a house formerly standing on the premises as a rooming house, where no objections were offered by other property owners or by their predecessors in title.

3. SAME.

Where the entire portion of a block fronting on a certain street was subject to restrictive covenants against use for other than residence purposes, there is no change in the character of the neighborhood through the encroachment of business rendering enforcement of the covenants inequitable, where both sides of the street up to and including the property in question are residential in character, some of the residences being very costly, and to permit the erection of store buildings would be an injury to residence owners, although the part of the block not subject to the restrictions has become business in character.[1]

Appeal from Wayne; Van Zile, J. Submitted June 22, 1917. (Docket No. 142.) Decided September 27, 1917.

Bill by Anthony J. Andre and others against Timothy R. Donovan to restrain the erection of a building in violation of certain building restrictions. From a decree for plaintiffs, defendant appeals. Affirmed.

Ward N. Choate, for plaintiffs.

Williams C. Harris and *Seth J. Wicker,* for defendant.

In this case plaintiffs, who are the owners of three residences on the north side of Palmer avenue between Cass avenue and Woodward avenue, sought and obtained in the court below a permanent injunction preventing the defendant, who is the owner of a lot 60 feet by 150 feet on the northeast corner of Palmer and Cass avenues, from erecting thereon a block of stores covering the entire lot in violation of certain building restrictions. The history of the property in question shows that the block bounded by Woodward

[1]For cases discussing the question of multiple residence structures as a violation of restrictive covenants, see note in 45 L. R. A. (N. S.) 726.

avenue on the east, Cass avenue on the west, Antoinette street on the north, and Palmer avenue on the south, originally consisted of nine or ten lots numbered from 13 to 22. Although, so far as said lots were occupied at an early date, they were occupied for residence purposes, the record does not show that the block generally was restricted to residence purposes. Prior to 1883, however, one Alfred F. Wilcox became the owner of a strip of ground 301 feet in frontage on Palmer avenue and about 150 feet on Cass avenue, being the northeast corner of Cass and Palmer avenues. While said Wilcox was the owner of said corner, and on June 14, 1883, he executed a deed of the easterly one-half thereof to one J. C. Hough, which deed contained mutual covenants of the parties in the following terms:

"The parties hereto covenant and agree each with the other (with reference to his one-half of said parcel above described) as follows: (1) The said property shall be used only for residence purposes and no residence shall be erected thereon of a less value than four thousand dollars. (2) Said property shall not be divided into lots or parcels of less than fifty feet in width, and there shall be only one residence erected upon each lot or parcel. (3) The front of such residences, when erected, shall be not less than the following distances from the northerly side of said Holden avenue, viz.: Upon the lot nearest Woodward avenue, forty feet; upon the second lot from Woodward avenue, forty-five feet; and upon all the other lots fifty. And no residence or other building shall be nearer than fifty feet from said Holden avenue, except the two residences above excepted. (4) No residence shall be erected so that any part thereof will be nearer than fifteen feet from the dividing line between the easterly and westerly half of said parcels as above determined. (5) Said Wilcox (Alfred F.) covenants and agrees that when a barn is erected upon the lot on the northwest corner of Woodward avenue and said Holden avenue, the north part thereof shall be at least seventy-three feet from said Holden avenue. All these cove-

nants are intended to be binding upon the heirs and executors of the parties hereto, and upon their grantees of said premises.

"Said A. F. Wilcox further agrees to erect upon the westerly half of said parcel a residence as above provided within eighteen months from the date hereof."

Thereafter residences were built which occupied all of said 301-foot strip, which residences have been occupied to the present time, with the exception of that which had been erected on the corner lot, now owned by the defendant. That one has been demolished, and defendant has now made an excavation covering the entire lot with the intention of building thereon a business block consisting of six or eight stores. It is said that the houses owned by two of the three plaintiffs are operated as rooming houses. There is no claim, however, on the part of the defendant that any business in its proper sense has been conducted upon any portion of the 301 feet covered by the restriction, with the possible exception that an old barn facing Cass avenue on the northerly corner of defendant's lot was for a time operated as a garage. The record discloses that the balance of the block bounded as above shown has gradually changed from a residential to a business block, and that on Cass avenue business places have been erected in said block up to the northerly line of defendant's property.

On June 20, 1884, Wilcox sold to one Adeline L. Sprague 90 feet frontage of the land retained by himself, and Hough likewise on said date sold to the said Adeline L. Sprague 30 feet of the frontage acquired by him. These deeds severally contained the following restrictive covenants:

Deed, Wilcox to Sprague:

"Said first parties further agree that the adjoining lot of sixty and one-half feet front still owned by them shall be used only for residence purposes; that only one residence which shall be of brick shall be erected

thereon the cost value of which shall not be less than four thousand dollars; the front thereof shall be not less than forty feet back from the northerly line of the street and the easterly walls of which shall be at least ten feet from the easterly line of said lot, and that the barn to be erected on the lot on the northwest corner of Woodward avenue and the Holden road shall be located as described in said deed from the first parties to Joseph C. Hough.

"Said second parties agree that no more than two residences shall be placed upon the one hundred and twenty feet front included in this deed and the deed this day made by J. C. Hough and wife to said second parties. That said residences shall be of brick, two stories high; the fronts thereof shall be at least forty feet back from the northerly line of the street and no part of either shall be nearer than ten feet from the westerly line of the parcel hereby conveyed and said property shall be used only for residence purposes and that two single two-story brick residences of the cost value of at least four thousand dollars each shall be erected upon said one hundred and twenty feet within one year from the date hereof."

Deed, Hough to Sprague:

"Said second party agrees that the property hereby conveyed shall be used only for residence purposes and that within one year from the date hereof she will cause to be erected upon this parcel and that this day conveyed by A. F. Wilcox and wife to said second party two (2) two-story single brick residences of the cost value of not less than four thousand dollars each. That no more than two residences shall be erected upon said two parcels without the written consent of said first parties, the fronts of which shall be at least forty (40) feet back from the northerly line of the street.

"Said first parties agree that upon the adjoining one hundred and twenty and one-half (120½) feet front still owned by them there shall be erected not more than two single residences, and that said property shall be used for residence purposes only, and that said residences shall be built of brick, and that the front of buildings placed thereon shall be at least forty (40) feet back from the northerly line of the street, and

that the cost value of such residences shall be not less than four thousand dollars each."

From the decree awarding an injunction, defendant appeals.

BROOKE, J. (*after stating the facts*). The first contention urged by defendant is that the two deeds from Hough and Wilcox to Sprague, dated June 20, 1884, operated as an abandonment of the restrictive covenants contained in the deed from Wilcox to Hough, dated June 14, 1883. Touching these deeds, it is said in argument:

"It is a singular and significant circumstance that, after making their mutual restrictive covenants in definite words, Wilcox and Hough should have omitted to affirm those covenants in making their later deeds to Mrs. Sprague; for it would have been the natural thing to mention them if they intended to perpetuate the covenants. Conversely it was perfectly competent for Wilcox and Hough, by appropriate language in their later deeds, to change or abrogate their former covenants, for they were still the only parties interested in the whole 301-foot strip, and the later deeds are of equal force with the first one."

We have examined the restrictive covenants contained in these two deeds with care, and find that in all essentials they agree with those contained in the earlier deed; at all events it is asserted in each deed that the property conveyed "shall be used only for residence purposes."

It is next urged by defendant that the restrictive covenants, if not abandoned, have been broken by permitting the use of the premises now owned by the defendant for a garage and repair shop and the house formerly standing thereon for a rooming house, no objection having been offered by the plaintiffs nor their predecessors in title. Upon this point defendant cites several cases from foreign jurisdictions. The

question has so frequently been passed upon by our own court contrary to the contention of the appellant that we find it unnecessary to go outside this State for authority. *Moore* v. *Curry,* 176 Mich. 456 (142 N. W. 839); *Schadt* v. *Brill,* 173 Mich. 647 (139 N. W. 878, 45 L. R. A. [N. S.] 726); *Misch* v. *Lehman,* 178 Mich. 225 (144 N. W. 556); *Stewart* v. *Stark,* 181 Mich. 408 (148 N. W. 393); *Casterton* v. *Plotkin,* 188 Mich. 333 (154 N. W. 151); *Sherrard* v. *Murphy,* 193 Mich. 352 (159 N. W. 524).

The contention of the appellant that the character of the neighborhood has so changed through the encroachment of business as to render enforcement of the restrictive covenants at this time inequitable will be found treated in several of the cases above cited. Both sides of Cass avenue up to and including the property in question are residential in character; the residences in the immediate neighborhood in many instances being very costly.

We have no hesitation in reaching a conclusion that to permit the erection of the structure contemplated by the defendant would very seriously injure not only plaintiffs, but others residing near by.

The decree is affirmed, with costs.

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

GAGUSH *v.* HOEFT.

1. TRIAL—CONDUCT OF PLAINTIFF—DISCRETION OF COURT.
   The fact that the plaintiff in an action of breach of marriage promise, aggravated by seduction, becomes hysterical during a recess, is not reversible error where the court cautions the jury with reference thereto.

2. BREACH OF MARRIAGE PROMISE — SEDUCTION — REQUESTS TO CHARGE.
   In an action for breach of marriage promise, aggravated by seduction, a requested instruction that if the jury found that the only consideration for the promise, if any promise was made, of marriage, was a promise that, if plaintiff would submit herself to have sexual intercourse with defendant, he would marry her in case she became pregnant, and that was the only consideration, the contract rested upon an immoral consideration and was void, was improperly refused.

3. SAME—IMMORAL CONSIDERATION—VALIDITY.
   If a woman submits herself to the sexual embraces of a man solely in consideration of his promise to marry her if she becomes pregnant, such consideration is immoral and a promise based thereon is void.

Error to Wayne; Mandell, J. Submitted June 21, 1917. (Docket No. 99.) Decided September 27, 1917.

Case by Anna Gagush against William Hoeft for breach of promise of marriage accompanied by seduction. Judgment for plaintiff. Defendant brings error. Reversed.

McHugh & Lee, for appellant.

Silas E. Champe (*Harold McIntyre,* of counsel), for appellee.

This is an action of breach of promise aggravated by seduction resulting in the court below in a judgment in favor of the plaintiff for $2,000. The plaintiff

is a woman 35 years of age, a widow, and the mother of five children, the eldest being 17 years of age. Her husband had died in August, 1913. Defendant is 37 years of age, a widower, and the father of four children. Plaintiff claims to have met the defendant first in November, 1913, when a casual conversation lasting but a few moments occurred. It is her claim that upon the next occasion she met him, July 12, 1914, the meeting occurred in Woodmere Cemetery, where she had gone with one of her daughters to take care of her husband's grave. She testified that on that occasion he walked up to her and said, "How do you do?" inquired of her where her husband's grave was, how old her children were, and told her the ages of his own; that he inquired how much she paid for her husband's headstone, and told her how much he had paid for that of his wife. Plaintiff then testified in part as follows:

"*Q.* What other subject did you and Mr. Hoeft talk about besides the headstone and your children?

"*A.* Well, about marrying me. He asked me how I would like to have him for my man, and I said, 'Why, Mr. Hoeft, you don't want me; I am poor, and your family would not like to have me marry you.' He said, 'I don't want any one else; I just want you.' * * * When he asked me if I would like him for my man, I said, 'Why, Mr. Hoeft, you don't know me, and you ask me that the first,' and he said, 'I have known you a long time and been watching you many times, been watching many times for you,' and I said, 'I am so homely and poor, and you can find some one you like better,' and he said, 'I don't want any one else; you look like a girl;' and he said, 'Will you marry me?' And he looked right in my eyes, and I said, 'I will.'"

With reference to the seduction she testified as follows:

"There was a small path he led me, and I said, 'Mr. Hoeft, I don't want to walk here; I believe there are snakes.' He said, 'Nothing can harm you as long as

I am with you.' He got the place and put his coat on the grass like this and put his arms out and said, 'Kiss me, you are mine,' pulled me in and got me to sit on the ground by pulling and hugging and insisting, and forced me to submit to him. He did this after he made the promise to marry me. He talked about marriage, and he said not to worry one bit, he would keep his word; he was a man; had sense; no one could part him from me. He seemed awfully good to me. He took out his handkerchief and wiped my forehead and told me not to worry one bit, for he knew that if I got into the family from that time he would stay home to-morrow and go down and get a marriage license, and I was not to worry, and he would marry me as soon as he could."

Upon cross-examination with reference to the seduction and the alleged promises to marry she testified:

"He did tear my underwear. He tore it all to pieces; not the top clothes, but the underwear. He forced me to submit to him. I would not have permitted him if he had not forced me. He also told me that if I would submit to him, that he would take care of me if I got in the family way. I would not have submitted to him if he had not made that promise. He promised to marry me first; when I got in the family way he would marry me. If I got in the family way or not, he promised to marry me. He promised me first before going to the back of the cemetery, right by the grave. When he forced me to submit to him by strength, he made the promise that he would marry me if I got in the family way, and he promised to marry me over at the grave again. I relied upon that promise. I let him proceed. I would not have submitted under any consideration if he did not make that promise. On the 13th he promised even if I did not be in the family way he promised to marry me. There was a promise of marriage if I got in the family way on the 13th. I would not have submitted then if it was not for that promise; I don't think I would in such a place as that. That state of affairs took place on the 12th of July and on the 12th and 26th. They were all alike promises of marriage of marrying me if

I got in the family way on each time, and I would not have submitted if he did not promise to marry me. When he forced me to submit to him I would not have submitted if that promise had not been given. He overpowered me. His strength and his promise is what made me submit."

Defendant categorically denied every assertion made by the plaintiff except that he had a casual acquaintance with her and had spoken with her on a very limited number of occasions. No witness aside from the parties themselves was present or testified to the promise of marriage except the 12-year-old daughter of plaintiff. Considerable testimony was introduced with reference to alleged conversations between the parties to the action and others subsequent to the alleged breach of the contract tending, if believed, to cast discredit upon the claims of both parties.

BROOKE, J. (*after stating the facts*). The first 16 assignments of error are based upon alleged errors in the refusal of the court to charge as requested by defendant and to the charge as given. These assignments will be discussed later.

Assignments 17, 18, 19, 20, and 22 are based upon alleged errors in receiving or excluding testimony. With reference to these assignments it is sufficient to say that we find them without merit.

Assignment 21 is based upon the ruling of the court in refusing to declare a mistrial on account of the action of the plaintiff, who during a recess appears to have become hysterical. This matter was one addressing itself to the sound discretion of the trial court, who cautioned the jury with reference thereto in such manner as to fully meet the requirements of the situation.

The 24th assignment of error is based upon alleged errors committed by counsel for plaintiff in his final argument to the jury. It is unnecessary to hold that

the language used by counsel constitutes reversible error, for the reason that the case must go down for a new trial upon another ground, but it may be said that the language used was open to criticism, and should be avoided upon another trial.

The 7th assignment of error is based upon the refusal of the court to give defendant's 11th request to charge, which is as follows:

"I charge you that, if you find in this case that the only consideration for the promise, if there is any promise in the case, of marriage, was a promise that, if she would submit herself to have sexual intercourse with him, he would marry her in case she became pregnant, if you find that was the only consideration, the only arrangement or contract, then I instruct you that that is a contract resting upon an immoral consideration and is void, and the plaintiff could not recover."

The court upon this point charged the jury:

"Now, gentlemen of the jury, there is one thing that I know I have omitted, and that is this, the plaintiff claims that the seduction that she claims occurred in this case followed the promise to marry, and that without the promise to marry she would not have submitted herself to the defendant. The defendant claims that there is evidence in the case that the seduction was based upon a promise to marry in case of the seduction resulting in the birth of a child.

"Now, gentlemen of the jury, if you should find from a consideration of the evidence that the seduction was brought about by reason of promise of marriage in case, and only in case, the plaintiff should become in the family way by reason of this seduction, then, gentlemen of the jury, no damages can be awarded because of the seduction, and your consideration must be given only to the charge of the promise to marry. I state that because the plaintiff's claim is that the seduction was based solely and alone upon the promise to marry. Now, putting that in another way, I will say this the plaintiff is entitled to recover damages for both the breach of promise to marry, in case you find that there was a promise, and the seduction only in

case you should find the seduction was based solely and alone upon the general promise to marry and upon no other promise. In case you should find that the seduction was based upon the promise to marry in case the plaintiff became in the family way, then, gentlemen of the jury, this action resolved itself into a question whether or not the plaintiff is entitled to recover damages by reason of the breach of promise to marry, and that alone."

This identical question was raised in the case of *Jaskolski* v. *Morawski,* 178 Mich. 325 (144 N. W. 865). There plaintiff had secured a judgment for breach of promise of marriage accompanied by seduction. There the claim was made on behalf of appellant that the promise of marriage was void because the consideration was immoral. We there said:

"Counsel cite authorities which he claims sustain his contention. We have examined them, but we do not deem it necessary to decide whether he is right in his contention for the trial judge held with him, and instructed the jury."

Then follows the charge of the court to the jury upon this question, in the course of which the trial judge said:

"Now, should you find the fact to be that the defendant promised plaintiff solely upon the consideration that she should permit him to have sexual intercourse with her, or solely on consideration that she should have sexual intercourse with him, and if she became pregnant and had a child he would marry her, and that there was no other consideration or promise, then and in such case I instruct you that the promise to marry rests upon an immoral consideration and is void, and your verdict should be for the defendant."

We sent that case back for a new trial upon other grounds, but this portion of the charge was not disapproved by this court. While it may be said that it was not distinctly approved and a citation from the case of *Spellings* v. *Parks,* 104 Tenn. 351 (58 S. W.

126), might be construed as indicating the contrary, we are of opinion that the instruction is sound and should have been given without qualifications in the case at bar.

If the plaintiff submitted herself to the sexual embraces of the defendant solely in consideration of his promise to marry her if she became pregnant, such consideration would clearly be immoral, and defendant's promise based thereon would be void. The following cases are authority upon this point: *Davie* v. *Padgett,* 117 Ark. 544 (176 S. W. 333); *Boigneres* v. *Boulon,* 54 Cal. 146; *Hanks* v. *Naglee,* 54 Cal. 51 (35 Am. Rep. 67); *Judy* v. *Sterrett,* 153 Ill. 94 (38 N. E. 633); *Eve* v. *Rogers,* 12 Ind. App. 623 (40 N. E. 25); *Saxon* v. *Wood,* 4 Ind. App. 242 (30 N. E. 797); *Sramek* v. *Sklenar,* 73 Kan. 450 (85 Pac. 566); *Donallen* v. *Lennox,* 6 Dana (Ky.), 89; *Edmonds* v. *Hughes,* 115 Ky. 561 (74 S. W. 283); *State* v. *Howard,* 264 Mo. 386 (175 S. W. 58); *Button* v. *Hibbard,* 82 Hun (N. Y.), 289 (31 N. Y. Supp. 483); *Steinfeld* v. *Levy,* 16 Abb. Prac. (N. S.) 26; *Baldy* v. *Stratton,* 11 Pa. 316; *Spellings* v. *Parks,* 104 Tenn. 351 (58 S. W. 126); *Burke* v. *Shaver,* 92 Va. 345 (23 S. E. 749); *Connolly* v. *Bollinger,* 67 W. Va. 30 (67 S. E. 71, 20 Am. & Eng. Ann. Cas. 1350); *Beaumont* v. *Reeve,* 8 Q. B. (Eng.) 483. See, also, 5 Cyc. p. 1000, note 12.

We are not unmindful of the fact that plaintiff gave testimony which would tend to support the theory that a promise to marry was given before and quite independent of the alleged seduction. Her testimony upon cross-examination, however, was such as to warrant, we think, the submission of the question to the jury under the request proposed by defendant's counsel.

The judgment is reversed, with costs, and a new trial ordered.

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

FISK *v.* LIVERPOOL & LONDON & GLOBE INSURANCE CO.

1. INSURANCE—FIRE INSURANCE—NOTICE OF LOSS—WAIVER.
   The denial of liability on part of an insurance company by its adjusters constitutes a waiver of the filing of proofs of loss.

2. SAME—POWERS OF AGENT.
   Powers possessed by agents of insurance companies, like those of agents of any other corporations, are not governed by any individual principle, but are to be interpreted in accordance with the general law of agency.

3. PRINCIPAL AND AGENT—POWERS OF AGENT—EVIDENCE.
   Agency cannot be proved by the statements, declarations or admissions of the agent made out of court, but must be established by tracing its source to some word or act of the alleged principal.

4. SAME—ADMISSIONS—PROOF OF AGENCY.
   The agency of one alleged agent cannot be shown by the admissions, declarations, and recognition of another agent of the same principal unless the latter be one authorized to make those admissions.

5. INSURANCE—CERTIFICATE OF AUTHORITY—STATUTES.
   Act No. 84, Pub. Acts 1901, § 2, as amended by Act No. 215, Pub. Acts 1913 (2 Comp. Laws 1915, § 9151), relating to the granting of certificates of authority to insurance agents by the State, does not operate to increase an agent's authority and to make the principal liable for his representations as to authority.

6. SAME—EVIDENCE—SUFFICIENCY.
   Evidence *held*, insufficient to show that a person representing himself as an adjuster of defendant insurance company was in fact an adjuster of such company.

Error to Sanilac; Beach, J. Submitted June 22, 1917. (Docket No. 123.) Decided September 27, 1917.

Assumpsit by Charles Fisk against the Liverpool & London & Globe Insurance Company, Limited, on a

policy of insurance. Judgment for plaintiff on a directed verdict. Defendant brings error. Reversed.

Phillips & Jenks, for appellant.

Fred A. Farr (*Charles F. Gates*, of counsel), for appellee.

This is an action on a Michigan standard form insurance policy upon which the premiums had been paid.

Within the period covered by the policy the property insured was destroyed to an amount equal to or in excess of the amount of the policy. The policy provides that, if a fire occur, the insured shall give immediate notice of any loss in writing to the company. It further provides for a proof of loss which must be rendered to the company. It further provides that no officer, agent, or other representative shall have power to waive any provision or condition of the policy, except such as by the terms of the policy may be the subject of agreement indorsed thereon. It is conceded that no proofs of loss were filed by the plaintiff before the commencement of suit.

It is the claim of the plaintiff that the defendant waived the filing of the proofs of loss and he bases such claim upon his own testimony, which is as follows:

"I am the plaintiff in the case and the Charles Fisk named in the policy issued by the defendant. I ordered it from Mrs. J. H. Murdaugh, who delivered it to me, and whom I paid. After the fire I had a talk with Mrs. Murdaugh about the adjustment of the loss.

"*Q.* Did she tell you that any person was the adjuster on this loss? (Objected to as immaterial and improper, that conversation or statements by local agents do not in any manner confer any authority upon anybody, and that there must be proof that the company sent the adjuster.)

"*The Court:* You may take the testimony simply in

relation to the manner in which Mr. Fisk got into relation with the adjuster. (Exception by defendant.)

"*A.* Mrs. Murdaugh told me who the adjuster was.

"*Mr. Jenks:* We object to all testimony of conversations between Mrs. Murdaugh and this witness in reference to the adjuster.

"*A.* She said his name was William Phillips, of Port Huron. After that I saw Mr. Phillips.

"*Q.* What did Mr. Phillips say to you?

"*Mr. Jenks:* It is understood that all this testimony is subject to my objection?

"*The Court:* Yes. (Exception by defendant.)

"Phillips said he came to adjust the loss of both companies, the Liverpool & London & Globe and the fire association. I took him into the room, and he almost immediately denied the right to pay, and said it was a hell of a funny fire and the company would never pay a dollar of the insurance. He asked if I had a bill of sale, and I handed him a bill of sale. Without even seeing my handwriting, he asked if I had written that myself. He took the invoice and inventory and had copies made. The 19th of May he returned again with the deputy fire marshal, Samuel Robinson, and said the company wouldn't pay a dollar, that it was a hell of a funny fire. Both of these times he admitted of being the adjuster. I also saw him in Port Huron again. I went to Port Huron, and he told me again that the company wouldn't pay. He told me, 'You don't need to loaf around there any more for it.' The company never sent any other adjuster. All the negotiations for settling this loss were through the adjuster Phillips. * * * After the fire I reported it to Mrs. Murdaugh before Mr. Phillips was there, the same one from whom I got the policy and who introduced Mr. Phillips to me as the adjuster. I afterwards visited the State office of the Liverpool & London & Globe Insurance Company, the defendant company, in Detroit, and had a conversation with the person I found in charge. This conversation was since the trial of the other case.

"*Mr. Jenks:* We object to any conversation with anybody in the office.

"I do not remember the date. I had a paper the girl gave me that Will Phillips was the adjuster. I was struck by an auto, and the paper was lost."

Another witness testified to the fact that the local agent, Mrs. Murdaugh, told him that the adjuster was Mr. William Phillips. As bearing upon the authority of a local agent, plaintiff's witness Charles F. Gates testified over objection as follows:

"That he was attorney at law, and also engaged in fire insurance, and had been for upwards of 30 years. I am familiar with the duties of local agents, and have acted as adjuster for stock insurance companies for several years, and have adjusted many losses for many companies. I am familiar with the duties of a local agent of an insurance company. * * * This is what is known as a recording agency; it is the agent's duty to represent the company in his immediate vicinity. He issues policies in companies where applications are necessary, receives the application, and receives the money and remits to the company, and in case of loss notifies the company of the loss, watches the property to see that the company's interests are protected, and when the adjuster comes on the local agent takes him to the assured and introduces him; then the adjuster takes it in his hands. Up to that time it is in the hands of the local agent, not to adjust, but to introduce the adjuster to take the responsibility from the local agent to the adjuster."

At the close of the testimony a motion was made on behalf of the defendant for a directed verdict upon the ground:

"That there is no competent evidence in the case showing that the requirements of filing a proof of loss, which concededly was not done, has ever been waived."

This motion was denied, and a verdict was directed in favor of the plaintiff for the face of the policy, with interest.

BROOKE, J. (*after stating the facts*). The sole question raised upon this record is whether the acts of Phillips, his statements and admissions, and the as-

sertion of Mrs. Murdaugh, the local agent, taken together, were sufficient to support the inference that Phillips was in fact the adjuster for the defendant company. If that fact was sufficiently established, his denial of liability on the part of the company constituted a waiver of the filing of proofs of loss. *Popa* v. *Insurance Co.*, 192 Mich. 237 (158 N. W. 945); *Fisk* v. *Fire Ass'n*, 192 Mich. 243 (158 N. W. 947).

Section 2 of Act No. 84, Pub. Acts 1901, as amended by Act No. 215, Pub. Acts 1913 (2 Comp. Laws 1915, § 9151), is as follows:

"Any insurance company, corporation or association authorized to do business within this State, appointing or employing any agent or person to transact its business within this State, shall at once notify the commissioner of insurance of this State of such appointment or employment, giving the name and business address of such agent or person, and setting forth the kind of business that he is authorized to transact; whereupon the commissioner of insurance shall transmit by mail or deliver personally to such agent or person a certificate of authority, which shall specifically set forth the name of the person so appointed or employed, the name of the company, corporation or association for which he is to act in transacting insurance business, and the particular kind of insurance said agent is authorized to solicit. Said agent's certificate of authority shall continue in force until the expiration of the annual certificate of authority of said insurance company, corporation or association unless the same is revoked for cause: *Provided always*, That none of the provisions of this act shall be construed as applying to fraternal beneficiary societies organized or authorized to do business in this State."

In *Weidert* v. *Insurance Co.*, 19 Or. 261 (24 Pac. 242, 20 Am. St. Rep. 809), it is said:

" 'The declarations of an agent are not evidence of his authority, but the scope and extent of his powers must be determined by his actual authority, or by his

acts, and the recognition thereof by his principal.' 2 Wood on Fire Ins. § 421."

See, also, 1 Clement on Fire Insurance, p. 49, rule 7, where it is said:

"The authority of an adjuster cannot be established by his own declarations, but may be by his own testimony or inferred from his acts, and recognition by the company, or proved by declarations and admissions of its officers"—citing cases, note 3.

It is elementary that the powers possessed by agents of insurance companies, like those of agents of any other corporations, are not governed by any individual principle, but are to be interpreted in accordance with the general law of agency. A different view may not be applied to a contract of insurance than is applied to other contracts. *Quinlan* v. *Insurance Co.*, 133 N. Y. 356 (31 N. E. 31, 28 Am. St. Rep. 645).

Generally it may be said that agency cannot be proved by the statements, declarations, or admissions of the agent made out of court, but must be established by tracing its source to some word or act of the alleged principal (1 Mechem on Agency [2d Ed.], § 285); "nor can the agency of one alleged agent be shown by the admissions, declarations and recognition of another agent of the same principal unless the latter be one authorized to make those admissions" (*Id.* § 285, note 81).

In *Barry & Finan Lumber Co.* v. *Insurance Co.*, 136 Mich. 42 (98 N. W. 761), this court said:

"It has been repeatedly held that an agent's declarations are not proof of his authority, and that his acts have no significance, unless recognized by the alleged principal in a way to be equivalent to a holding out that the relation of principal and agent exists and a holding out of the requisite authority."

With reference to the statute quoted *supra*, this court there said:

"Nor does the statute (2 Comp. Laws, § 7246) operate to increase an agent's authority, and make the principal liable for his representations as to authority."

The record in the case at bar is barren of evidence tending to show that Mrs. Murdaugh, the local agent, was authorized by her principal to introduce or identify Phillips as the adjuster. It is equally barren of evidence tending to show that any act of Phillips was recognized by the defendant or any of its officers. We are constrained to hold that there was no competent evidence in the case showing that Phillips was in fact the adjuster for the defendant company. It follows, therefore, that his denial of liability did not operate as a waiver of the condition of the policy requiring the filing of proofs of loss.

The judgment is reversed, with costs, and a new trial ordered.

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

BROWN *v.* HURT.

BROKERS—FIDUCIARY RELATIONS—FRAUD—FORFEITURE.

Where a broker has been accustomed to invest money for certain persons and to give them advice in real estate matters and they only contract to purchase land from other persons on the broker's assurance that the investment will be profitable and that he will handle the land, which is to be improved, divided into lots and sold for a share in the profits, fiduciary relations exist between the

parties, and any right of recovery of compensation for platting and improving the property and endeavoring to market the same upon the ground that the broker was prevented from performing the contract by the opposition of the purchasers is barred by the concealment of the receipt of a commission from the vendor for the sale of the property.[1] OSTRANDER, J., dissenting.

Error to Kent; Perkins, J. Submitted June 27, 1917. (Docket No. 60.) Decided September 27, 1917.

Assumpsit by Chauncey M. Brown against Frank J. Hurt and another for services rendered. Judgment for defendants on a directed verdict. Plaintiff brings error. Affirmed.

Smedley & Linsey, for appellant.

Clark H. Gleason (*Ellis & Ellis,* of counsel), for appellees.

Plaintiff, a real estate dealer, on January 28, 1913, secured the agency for the sale of 31½ acres of land at $250 per acre from Warren Corkins and wife, who executed the following authority:

"C. M. BROWN & Co.:

"Please book for sale the following property: 31½ acres Sec. 10, Wyoming township.

"Price $7,875.00. Terms ½ cash, for which I agree to pay a commission of $25.00 per acre, if a sale is effected while your agency continues, or is barred by defect in title or my acts. Your agency to terminate February 11th, 1913.

"WARREN CORKINS.
"MRS. LAURA CORKINS."

Shortly thereafter he brought this property to the attention of defendants, with the result that the defendants purchased the property from Mr. and Mrs.

[1] On the question of fraud and secret dealings of real estate broker as affecting compensation, see comprehensive note in 45 L. R. A. 33; 24 L. R. A. (N. S.) 659; 34 L. R. A. (N. S.) 1047.

Corkins upon land contract on or about February 4, 1913. Upon the same date defendants entered into a contract with plaintiff in the following terms:

"This agreement made and entered into this 4th day of February, A. D. 1913, by and between Frank J. Hurt and Caroline Hurt, his wife, parties of the first part, and C. M. Brown, party of the second part, all of the city of Grand Rapids, county of Kent, and State of Michigan, witnesseth:

"1st. Said first parties hereby agree to purchase 31 acres of land on section ten (10) Wyoming township, on the terms and conditions of a certain land contract this day executed by Warren Corkins and Laura Corkins, his wife, to said first parties.

"2d. Said first parties hereby agree to pay bills for the improvement of said land, such as platting of the same into lots, grading of streets, laying of sidewalks, drainage, and advertising, as may from time to time be presented to them, when O. K.'ed by said second party, to the amount of not less than two thousand ($2,000) dollars, or more, at the discretion of the said first parties.

"3d. Said first parties hereby agree to sign all contracts or deeds presented to them by said second party for sale of lots and said land, providing, however, such sale shall be for an amount and on terms satisfactory to said first parties.

"4th. Said first parties further agree that after they have received in full the amount of money invested in purchase price, improvements, drainage, advertising, or for any moneys expended for the improvements of said land, together with interest on the same in full, at the rate of six per cent. per annum, then, that is to say, after the payment of all said above sums, said first parties shall contract or deed, as may be, an undivided half (½) interest in whatever lands there may be left, together with half (½) interest in all moneys due said first parties in consequence of unpaid amounts due or to become due for lands sold from said above description as payment in full for all services rendered.

"5th. Said second party hereby agrees to contract for, oversee, and look after the platting, laying of

streets, sidewalks, drainage, and all other improvements that may be necessary or may be required of said first parties in order to prepare the land in the best possible shape for quick sale and to render bills for all such work to said first parties for their approval and payment.

"6th. Said second party further agrees to put forth his very best efforts in the sale of said lots, to use every honorable means to dispose of and make the most possible money from said land, and to turn over to said first parties all moneys received by him in any way through the sale of said lands, and to accept in full for all services, an undivided half (½) of the net profits from the sale of said land after all the purchase price, moneys expended for improvements, and all interests at the rate of six per cent. per annum on all moneys invested, have been paid in full to said first parties.

"In witness whereof, we have this day first above written, set our hands and seals.

"FRANK J. HURT. [Seal.]
"CAROLINE HURT. [Seal.]
"C. M. BROWN. [Seal.]"

The record shows clearly that defendants refused to entertain the proposition unless plaintiff would handle the property for them. Touching the sale to defendants plaintiff testified:

"I first learned the Corkins had this land for sale through Mr. Wolford. They were tendering him a contract for $225 an acre I think. Dr. Wolford came to me to go out and see the land. I went out there with him in an automobile, and looked the property over. It was perhaps two weeks after that I saw Mr. and Mrs. Hurt. I found out the doctor was not going to take it by talking with him. Before that time I had been handling money for Mr. and Mrs. Hurt. I couldn't tell exactly how long; probably three or four years. I don't know I had any way of knowing they had money they could invest, except what I learned by loaning for them.

"*Q.* How did you come to go and see the Hurts about buying this property?

"*A.* I went to see them, as I naturally would any-

body that I thought might be interested in making an investment. They had already been to me, and talking about investment; I had been with them to see some properties that they were talking of investing in. I went for one place in particular to see the Keeley Institute on College avenue and looked it over with them.

"*Q.* When they came to you, they came to you to advise them at that time?

"*A.* I think so.

"*Q.* Owing to the confidential relations that existed at that time between the Hurts and yourself?

"*A.* Yes, sir. I can't tell which I saw first Mr. or Mrs. Hurt. I presume likely I went to their house. I don't know whether I went to their house, or whether one of them might have been in the office when I first mentioned it to them. I saw them either at the office or at the house, and asked them if they would not consider buying such a piece of property as that; and, after talking it over with them, telling them exactly what it was, they said they would go down with me and look at it, which they did. I simply told them that there was 31 acres down there that could be bought for $250 an acre, and that I thought it was reasonable, and that I thought it could be platted and some money made off from it.

"*Q.* Did you tell them in your conversation with them that Dr. Wolford had just turned it down at $225 an acre?

"*A.* I did not; no, sir.

"*Q.* Did you tell them that you had a contract to sell it, and that if you sold it you would get $25 an acre for selling it?

"*A.* I did not; no, sir.

"*Q.* Did you tell them you had an option on it?

"*A.* I told them that I had a contract on it for to sell it, if I could sell it within two weeks, for so much money.

"*Q.* You had an option on it if you could sell it within that time?

"*A.* Yes.

"*Q.* And told them that the option you had was $7,500?

"*A.* Yes, sir; $7,750.

"*Q.* $7,750?

"*A.* Yes, sir. I took them down to see it—I think both of them. I don't just remember the weather at that time; there might have been a very little snow on the ground. There was not very much, if any; I don't remember about it. I told them I considered it cheap at $250 an acre. I made this contract for the Corkins and I made my contract. These contracts are both made and dated the same day, but the agreements were not made on the same day.

"*Q.* Did they ever agree to take that place at all until you agreed what you would do with it if they would take it?

"*A.* Yes, sir; they agreed to take the place, but they wanted me to handle it.

"*Q.* That was one of the conditions you held out to them that you could sell it and make a large amount of money for both of you, didn't you, to get them to buy that place?

"*A.* I held out that I thought it could be sold for a good, big profit; yes, sir, I think so yet.

"*Q.* Why didn't you tell them that you were interested to the extent of $25 an acre in the sale of it?

"*A.* When I go to sell a man a piece of property, I don't tell him that I am going to get a commission on it, the first thing I tell him. That would be a very poor business."

In accordance with the terms of the contract between plaintiff and defendants, plaintiff undertook to and did plat and improve said property and endeavored to sell the same. In this respect plaintiff was unsuccessful, although he handled the property for something like 1½ years. At the time of the trial in the court below the learned circuit judge found that defendants had expended in buying and improving said property the sum of $13,740, and had received from the sale of the lots and the sale of gravel found upon some of the lots, $1,553, leaving a net investment on the part of defendants of $12,187. Most of the lots sold by the plaintiff upon land contract were abandoned by the purchasers. In the spring or summer of 1914 a difference arose between plaintiff and

defendants with reference to the sale of the gravel from the subdivision, defendants apparently objecting thereto upon the ground that such sale would militate against the sale of the balance of the subdivision for residence purposes.

It is plaintiff's claim that he was prevented from performing his contract according to its terms by the unreasonable opposition of the defendants, whereas defendants claim that at all times they have been anxious to have plaintiff sell the lots, and have even advised him of their willingness to accept a loss if he could dispose of the property. About a year later plaintiff started this suit, in which he seeks to recover, not his share of the profits of the transaction under the contract, because it is obvious there are no profits, but compensation at $20 per day for 281 days' time which he alleges he spent in and about the platting and improving of the property and endeavoring to market the same. To this declaration defendants filed a plea of the general issue, with a notice thereunder to the effect that they had been induced to enter into the contract through the false and fraudulent representations of the plaintiff; that he had utterly failed to perform his part of the agreement by reason of which defendants had sustained damages to a large amount, which they asked to have certified in their favor.

Upon the trial the learned circuit judge directed a verdict in favor of the defendants upon the ground that plaintiff sustained toward defendants in the transaction a trust relation or agency which required him to exercise in his dealings with the defendants the fullest fairness and frankness; that plaintiff's concealment of the fact that he received $775 of defendants' money as a commission for the sale of the lands was essentially fraudulent, and would operate to prevent recovery, citing the case of *Friar* v. *Smith,* 120 Mich.

411 (79 N. W. 633, 46 L. R. A. 229). From judgment entered in accordance with said direction plaintiff appeals; the only error assigned or argued being that the court erred in directing a verdict in behalf of defendants and refusing to allow the case to go to a jury.

BROOKE, J. (*after stating the facts*). We are of opinion that the learned trial judge made a proper disposition of this case. The record quite clearly demonstrates that the defendants were people of modest means and limited experience in business affairs. The husband had for many years worked as a wood carver in one of the Grand Rapids furniture factories, and had through economy accumulated a small amount of money, which he from time to time invested through the agency of the plaintiff. Plaintiff himself testified that defendants came to him for advice because of the confidential relations that existed between them and him. It is further clear that defendants' original determination not to undertake the investment was changed only upon the assurance of the plaintiff that he would become jointly interested with them in the profits of the transaction, which he told them would be large, and which they understood would be realized only upon his participation in the deal. Although the contract between defendants and Corkins (husband and wife) was dated the same day as the contract between plaintiff and defendants, the latter was executed first. It is clear that defendants regarded both contracts as part of the same transaction in which plaintiff was jointly interested with them. There can be no doubt that through the entire transaction involving the purchase of the land by the defendants the plaintiff acted as their agent, that he sustained toward them a fiduciary relationship, and thus became charged with the duty to deal fairly with them. This he concededly did not do. In the case of *Barrett* v. *Miller*, 144 Mich. 454 (108 N. W. 396), this court said:

"Whether complainant be treated as an associate with defendants in the purchase of lands or a broker to invest their money, his relations were, in either case, fiduciary in character, requiring him to deal openly and truthfully with defendants."

See, also, *Leathers* v. *Canfield*, 117 Mich. 277 (75 N. W. 612, 45 L. R. A. 33); *Friar* v. *Smith*, 120 Mich. 411 (79 N. W. 633, 46 L. R. A. 229); *Woods* v. *Palmer*, 151 Mich. 30 (115 N. W. 242); *McNair* v. *Parr*, 177 Mich. 334 (143 N. W. 42); *Kirby-Sorge-Felske Co.* v. *Doty*, 190 Mich. 553 (157 N. W. 273).

The judgment is affirmed.

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

OSTRANDER, J. (*dissenting*). It is not improbable, but it is not certain, that the jury would have reached a conclusion upon the facts very much like the one declared by the court. I do not find in the record, or briefs, any support for the statement that plaintiff *concedes* that he did not deal fairly with the defendants. I cannot escape the conclusion that a question of fact, and not of law, is involved, and that the plaintiff is entitled to the judgment of a jury.

GRAND RAPIDS TERMINAL BELT RAILWAY CO. *v.* WATERS.

SAME *v.* PERE MARQUETTE RAILROAD CO.

1. RAILROADS—TRACKS—SIDETRACKS.
   Railroad companies are not required to build or maintain tracks to private industries, nor to furnish the right of way or rails by which the traffic of a private industry reaches their lines.

2. SAME—IMPLIED CONTRACTS—USE OF TRACKS.
   Where the president of a cement company constructs a belt line railroad for transfer purposes which is intended for the use of the company and other industries that may be located and organizes a corporation to take over the railroad and owns all the stock therein, except qualifying shares, and cars are transferred to and from such plant only by engines of connecting railroads, there is no implied contract by the railroads to pay for the use of the line, demands for payment being met with refusal or with conduct tantamount thereto.

Error to Kent; Lamb, J., presiding. Submitted June 25, 1917. (Docket Nos. 72, 73.) Decided September 27, 1917.

Assumpsit by the Grand Rapids Terminal Belt Railway Company against Dudley E. Waters and another, receivers of the Pere Marquette Railroad Company, and against the Pere Marquette Railroad Company for trackage service. By stipulation the cases were tried as one. Judgment for defendants. Plaintiff brings error. Affirmed.

Kleinhans, Knappen & Uhl, for appellant.

John C. Bills (*Norris, McPherson, Harrington & Waer* and *Seward L. Merriam,* of counsel), for appellees.

BROOKE, J. The issue in these two cases was tried by the court without a jury, who made the following findings of fact and conclusions of law:

"Findings of Fact.

"The plaintiff is a Michigan corporation, having been organized under and by virtue of our laws in the month of December, 1905. The defendant, the Pere Marquette Railroad Company, is a corporation, and a recognized common carrier in both intra and interstate commerce.

"Early in the year 1905, the Acme Cement Plaster Company completed its Grand Rapids plant. This plant is located about 1¼ miles from the main tracks of the Pere Marquette and Lake Shore railroads. This location of the plant was necessary, because the gypsum deposit on which it was to operate was discovered here. At the time the plant was completed, desiring railway shipping facilities, the Acme Cement Plaster Company made application to the Pere Marquette and Lake Shore railroad companies for tracks to its plant. The railroads declined to build the track applied for at their own expense. The Acme Cement Plaster Company at the time was without funds with which to do it.

"In March, 1905, Samuel Lazarus, a large stockholder in the Acme Cement Plaster Company, and now its president, acquired the right of way for a track from the main line of the Pere Marquette and the Lake Shore railroads to the west line of the property of the Acme Cement Plaster Company. Subsequently thereto, and during the years 1906 and 1907, other right of way was purchased from the Acme Cement Plaster Company and from other parties, which furnished in all a right of way from the Lake Shore and Pere Marquette railroads to the Acme plant, and extending beyond said plant a distance of 2½ miles. The title thereto was taken in the name of Samuel Walker, the then vice president of the Acme Cement Plaster Company. Mr. Lazarus furnished the money to buy the right of way, and Walker, in taking the title, was acting as trustee for Mr. Lazarus. In the summer of 1905 Mr. Lazarus employed the Lake Shore Railroad Company to build the track from its main

line to the plant of the Acme Cement Plaster Company, except the part where it touched the Pere Marquette Railroad Company property, for which construction he paid the Lake Shore Railroad Company the sum of approximately $11,000. The tracks were not laid on the balance of the right of way acquired during the years 1905 to 1907, due to lack of funds and to the fact that no other industries had located along the right of way.

"The immediate object in the mind of Mr. Lazarus in procuring this right of way and causing the track to be constructed was to connect the Acme Cement Plaster Company's plant with the aforesaid railroads. His ultimate object, as he testifies, was the organization and construction of a belt line railroad encircling the city, sufficient to connect with the Pere Marquette and Lake Shore, and finally with the other lines of transportation entering Grand Rapids. Surveys were made of the proposed route, and nearly all of the right of way purchased, together with about 320 acres of lands for factory sites; all purchased with funds furnished by Mr. Lazarus. All conveyances were taken in the name of Samuel Walker, who took title as trustee for Mr. Lazarus. Up to the present time the only track laid is that leading from the Pere Marquette and Lake Shore railroads to the plant of the Acme Cement Plaster Company, and the Acme Cement Plaster Company is the only concern now served thereby; no other plant having been located on these tracks. The original plan has not been abandoned. The plaintiff company is endeavoring to secure other industries to locate on its right of way, and is offering free industrial sites. No track has, however, been built since 1905, and no industries, except the Acme Cement Plaster Company, have located on the track that was built.

"In December, 1905, at the instance of Samuel Lazarus and others, the Grand Rapids Terminal Belt Railway Company was organized, and later the right of way and track, held by Mr. Walker as trustee, was conveyed to it. The plaintiff now has title to the right of way and track which serves the Acme Cement Plaster Company, except that portion of it on land owned by the Plaster Company adjacent to the ware-

house, and as to that the plaintiff is possessed of an easement in the right of way and owns the rails. This track has been kept in repair at the expense of the plaintiff company since it was acquired. The funds therefor were borrowed from Mr. Lazarus, and the amount so expended has reached the sum of $5,300. The receivers of the Pere Marquette Railroad Company made repairs to the tracks of the plaintiff at different times, and on October 25, 1915, sued the plaintiff and the Acme Cement Plaster Company for such repairs. The receivers' bill for such repairs was $274.51, and before the case came to trial this amount was paid by the plaintiff company and the case dismissed.

"The plaintiff company maintains no office in this State, other than the office of Edward H. Christ, in the city of Grand Rapids, president of the plaintiff company, and employed by the plaintiff company to look after its interests. Mr. Christ draws from the plaintiff a salary of $25 a month. He formerly held the title of chief engineer of the plaintiff company, at a salary of $100 a year, and his principal duties have been to look after the necessary repairs to said tracks, and to check up the details of the repair bills rendered by the railroads for keeping this track in shape and to endeavor to sell factory sites along the track. He is a civil engineer, and maintains in Grand Rapids an office for the general practice of that profession. Plaintiff company's affairs are handled from St. Louis, Mo. Its only means of information relative to the use of the track by the Pere Marquette and Lake Shore Railroads is the bills of lading made out by the Acme Cement Plaster Company.

"The plaintiff has no rolling stock, maintains no stations, carries no passengers, receives no freight, and dispatches none—originates no traffic of any kind. It is in no sense a common carrier and has not pretended and does not now pretend to be such. Since the track was put in, in 1905, the Pere Marquette Railroad has used it in going in and placing empty cars for the Acme Cement Plaster Company and in taking them out when loaded, at the instance of the Acme Cement Plaster Company. No express agreement was ever entered into or any understanding had

between the plaintiff and the Pere Marquette Railroad Company, or the receivers thereof, regarding the use of the said track or pay for the same.

"Since July, 1905, the Pere Marquette Railroad has taken 2,876 cars of freight over the track in question from and for the Acme Cement Plaster Company. Of that number, 1,600 were taken out before the railroad was placed in the hands of the receivers, and 1,323 were removed more than six years prior to the commencement of this suit. From the record it appears that the plaintiff company, on the 31st day of December, 1907, sent a statement to the Pere Marquette Railroad Company, asking pay for the use of said track. This demand was refused by letter of March 7, 1908, in which the following paragraph appears: 'We are unable to locate any agreement between this company and the Grand Rapids Terminal Belt Railroad Company, covering the use of tracks and switching service at Grand Rapids. I wish you would give reference to date of contract covering the switching, or, if same is covered by tariff, authority specifying number covering it.'

"On the 25th day of March, 1908, the defendant wrote a letter to the plaintiff company, in which the following paragraph appears:

"'When you have complied with my request, and show authority for this trackage, I will be pleased to render voucher in your favor at our earliest convenience.'

"Nothing further was said or done by the plaintiff until October 6, 1909, when it sent a second written notice and itemized statement of its claimed account. To this communication the defendant, on the 18th day of October, 1909, replied as follows:

"'I do not see how we can recognize any such bill in absence of a filed tariff. The Belt Railroad performs no service whatever for originating the traffic, and under all the existing conditions we would have to decline payment, if bill is presented.'

"In 1910 or 1911, Mr. Lazarus had the matter up with Mr. Cotter, president of the Pere Marquette, in a personal interview, but Mr. Cotter simply referred him to some one else, and so nothing came of it.

"All of the corporate stock of the Grand Rapids

Terminal Belt Railway Company, except sufficient shares to qualify the required number of directors, is held in the name of Samuel Lazarus. He was likewise president of the company up to 1916. He is also president of the Acme Cement Plaster Company, and he and his immediate family own $425,000 of the $1,000,000 capital stock of that company. C. H. Sommer, secretary of the plaintiff company, is an officer of the Acme Cement Plaster Company, and owns one share of stock in said Acme Cement Plaster Company.

"The Acme Cement Plaster Company itself owns none of the stock in the plaintiff company, and has not paid any of its bills, or loaned it any money to construct the road or repair the track. Neither does the Acme Cement Plaster Company exercise any control over the plaintiff company, and no part of the sum claimed for trackage, if recovered, would be turned over to the Acme Cement Plaster Company.

"The Acme Cement Plaster Company does not own the lands adjoining the right of way of the plaintiff company on which tracks are located, other than those lands adjoining that part of the tracks located on the Acme Cement Plaster Company's property. Two hundred acres of land adjoining plaintiff's tracks are owned by the plaintiff company.

"The plaintiff demands from the defendant in this suit and from the receivers in the other suit $1 a car for every car that has been moved by the defendant to and from the plant of the Acme Cement Plaster Company. This, in my judgment, would be a reasonable charge therefor. The total claim against the Pere Marquette Railroad Company for trackage service, not barred by the statute of limitations, is $277, and the total against the receivers of the Pere Marquette Railroad Company is $1,276.

"The total number of cars moved by the Pere Marquette Railroad Company after the notice that payment would be demanded, dated December 31, 1907, is 759 cars, and the total number of cars moved by the receivers after this notice is 1,276 cars. Of the 759 cars moved by the Pere Marquette Railroad Company, all but 277 are barred by the statute of limitations. No demand for payment of any of these charges was ever made upon the receivers of the Pere Mar-

quette Railroad Company until the demand which immediately preceded the bringing of these suits.

"Conclusions of Law.

"I. Under the testimony in this case, the track in question is a plant facility of the Acme Cement Plaster Company, within the reasoning of the following cases: *In the Matter of Transportation of Salt from Hutchinson, Kansas,* 10 Interst. Com. Com'n, 1; *Crane Iron Works* v. *United States,* 209 Fed. 238; *Delray Connection Railroad* v. *Railroads,* vol. 3, No. 2, Orders and Opinions of Mich. Railroad Com. page 80. *In re Chesapeake & Curtis Bay Railroad Company,* Public Utilities Reports 1915F, page 346.

"II. Being a plant facility, any division of the through freight charges, by whatever name it might be called—trackage services or switching charges—would be, in effect, a rebate, and in contravention of the law.

"III. Under the facts found in this case, there can be no recovery based upon an implied contract. Our own court of last resort has so often applied the well-settled doctrine in relation to implied contracts that it is fruitless to go outside of the State for authority. Judge STONE, in the case of *McCain* v. *Smith,* 172 Mich. at page 10 (137 N. W. at page 620), sums up the doctrine as follows:

"'It is a familiar doctrine that neither an express contract, nor one by implication, can come into existence, unless the parties sustain contract relations; that, to constitute either the one or the other, the parties must occupy towards each other a contract status, mutuality of will and interaction of parties, generally expressed, though not very clearly, by the term "privity." Without this a contract by implication is quite impossible.'

"In the old case of *Woods* v. *Ayres,* 39 Mich. 345 (33 Am. Rep. 396), it was held that the 'privity' essential to a contract must proceed from the will of the parties. It is inconceivable that there could be any privity or mutuality of will between the parties to this suit, at least after the claim first sent, in December, 1907, had been refused on the ground that no contractual relations existed. Surely the law will

not imply such privity or mutuality of will, and use it as a basis of recovery for that portion of the claim, at least, which accrued subsequent to the express declaration of the defendant that no such privity or mutuality exists. Pursuing the question from the angle that the claimed services were performed by the plaintiff with the expectation, at the time such services were performed, that they would be paid for by the defendant and that the defendant was charged with notice thereof, we are again confronted by the very basic principle of contracts—mutuality of will, meeting of minds, privity. It will hardly be claimed, much less argued, that whatever services were performed, after the express declaration of the defendant repudiating any contractual relations between it and the plaintiff, were performed by the plaintiff under the implication of a promise on the part of the defendant to pay what it had already expressly refused to pay.

"IV. As I view it, the claim of the plaintiff is not what the law would consider a 'running account.' That being the case, all items charged prior to six years before the commencement of this suit would be barred by the statute of limitations.

"V. In my view of the law, as applied to the facts in these cases, judgment should be entered for the defendant in both; and it is so ordered."

Plaintiff, appellant, filed exceptions to each of the four conclusions of law. From the findings of fact, to which no exception is taken, it appears that early in 1905, upon the completion of the Acme Cement Plaster Company, application was made by said company to the Pere Marquette and Lake Shore Railroads for tracks to its plant. This application was refused by both roads, and, as access to railway transportation was absolutely necessary to the life of the plaster company, Mr. Lazarus, its largest and probably controlling, though not majority, stockholder, undertook to provide the necessary track. He acquired the right of way and paid for the building of the road. Late in the year 1905, he organized a corporation (the plaintiff), which became the owner of all his rights, and of which he was

the sole stockholder, except as to qualifying shares. Over the track so constructed the defendant operated in delivering cars to and receiving cars from the plaster company. This practice continued for something over two years, until December, 1907, when a demand was made upon the defendant for pay for the use of this trackage. Payment was refused, and a second application was made in October, 1909, which was again refused. Thereafter, in 1910 and 1911, some further negotiation was had between Mr. Lazarus and the then president of the defendant company; but it is not claimed by the plaintiff that the defendant at any time ever agreed to compensate plaintiff for the use of the tracks, and it affirmatively appears that at least on two occasions it refused so to do.

Under the undisputed facts in the case, we find it unnecessary to discuss conclusions of law numbered 1 and 2; preferring to base our decision in the case upon conclusion 3. It is settled law in this State that railroad companies are not required to build or maintain tracks to private industries, nor to furnish the right of way or rails by which the traffic of a private industry reaches their lines. *Grand Rapids, etc., R. Co.* v. *Michigan Railroad Commission,* 183 Mich. 383 (150 N. W. 154); 1 Wyman on Public Service Corporations (Ed. of 1911), §§ 820, 821. It is not claimed by the plaintiff that any express contract exists between it and the defendant to pay for the use of the tracks connecting the defendant railway with the plaster company's plant. It seems to us clear that no contract to make such payment can be implied under the conceded facts in this case. Each demand for payment made by the plaintiff upon the defendant was met by a refusal, or by conduct which amounted to a refusal. Under such a state of facts, the law can never imply a promise to do that which in express terms has been refused. *Franck* v. *McGilvray,* 144

Mich. 318 (107 N. W. 886). See, also, *McCain* v. *Smith*, 172 Mich. 1 (137 N. W. 617). The fact that the service rendered, for which suit was brought (*i. e.*, the use of the connecting track), is of incidental benefit to defendant, is not controlling. It was primarily built for the benefit of the plaster company, whose duty it was, under the law, to furnish its own connection with the tracks of the defendant company.

The plaintiff at the present time is in no sense a common carrier, nor is its demand predicated upon the assumption that it is such; it not having filed any tariff with the railroad commission. The claim is based upon the fact that the plaintiff is the owner of the facility created by it for the benefit of the plaster company, whose principal stockholder is the sole owner of the plaintiff, and whose duty it was to itself construct the facility. The use of such a facility by the railroad company for the furtherance of the plaster company's business, with the consent of the plaintiff, in the absence of any express contract, or of conduct on the part of the defendant from which privity or a will to contract might be implied, imposes no obligation upon the defendant.

The judgment is affirmed.

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

SAIER *v.* JOY.

1. NUISANCE—UNDERTAKING ESTABLISHMENT—INJUNCTION.
The maintenance of an undertaking establishment and morgue in a residential section of a city, although not a nuisance *per se*, may be enjoined by nearby apartment owners where it will cause depression to the normal person, lower his vitality, render him more susceptible to disease, and deprive his home of the comfort, repose and enjoyment to which he is entitled, and he will sustain substantial financial loss, because of the depreciation in value of his property, and there is a strong probability that he will be disturbed by noxious odors due to the use of formaldehyde in the summer months when the windows are open.[1]

2. SAME.
The writ of injunction is not one of right, but of grace. It should not issue out of hand, but should issue in cases where the right to such relief is clearly established.

Appeal from Ingham; Collingwood, J. Submitted June 27, 1917. (Docket No. 62.) Decided September 27, 1917.

Bill by William Saier and others against William H. Joy and another to enjoin the maintenance of an undertaking establishment in a residential neighborhood. From a decree dismissing the bill, plaintiffs appeal. Reversed, and decree entered for plaintiffs.

L. B. Gardner and *O. J. Hood*, for plaintiffs.

Cummins & Nichols (*William M. Smith*, of counsel), for defendants.

FELLOWS, J. Townsend street, in the city of Lan-

[1] On the question as to whether an undertaking establishment may be considered a nuisance, see note in 31 L. R. A. (N. S.) 608.

sing, is one of the principal residence streets of the city, and extends south from the Capitol grounds to Main street, a distance of about half a mile. In the second block south from the Capitol grounds, and on the west side of the street, is located the apartment house owned by plaintiffs William and Jessie E. Saier. It is worth approximately $30,000, consists of six apartments, one of which is occupied by Mr. and Mrs. Saier for their home; the balance being occupied by tenants. Adjoining this property on the north is the property of the defendants, known in the record as the Lantz property. Immediately north of the Lantz property is the property and home of plaintiff Flora Johnson. All the houses on these three pieces of property front on Townsend street. In the rear of the Johnson property, and fronting on Washtenaw street, is the property of plaintiff Emma Quarmby, which extends to the Lantz property in the rear. Due to its nearness to the capitol, the property of all the plaintiffs is valuable for use by tenants and roomers. Prior to the purchase of the Lantz property by the defendants, it was used solely for residential purposes; the house being a two-story brick in front, with frame part in the rear. The defendants are undertakers, and prior to their purchase of the Lantz property conducted their business in the business part of the city. They purchased the Lantz property for the purpose of there establishing their business, including the maintenance and conduct of a morgue. On learning this fact plaintiff Saier and others protested. The protest being unheeded, this bill was filed for injunctive relief. Upon the hearing a large number of witnesses, both expert and lay, were sworn and at its conclusion the bill was dismissed.

It is the claim of the plaintiffs, stated without unnecessary detail, that the value and desirability of their property will be materially decreased by the

maintenance of defendants' business at the Lantz property; that there will be great danger from infectious and communicable disease from the bodies of persons dying therefrom taken to defendants' morgue; that disagreeable and noxious odors will permeate the neighborhood; that bodies will be taken there for autopsies and embalming; that bodies of persons meeting accidental death, and the unknown dead, will be taken there and left for some time pending identification; that funerals will be there conducted, and that there will be a frequent coming and going of hearses and dead bodies; that it will create such a constant reminder of death as to depress plaintiffs, their tenants and roomers, rendering them less able to resist disease, and, under the circumstances, rendering the conduct of the business in that location a private nuisance, which should be abated by a court of equity at the suit of an interested property owner.

On the part of the defendants it is insisted that they have for a great many years engaged in their business; that they are licensed embalmers, and always have conducted, and will in the future conduct, their business in accordance with the rules of the State board of health, in a sanitary manner; that bodies of persons dying from communicable disease, other than tuberculosis and typhoid fever, will not be taken to their establishment; that there is no danger to the health of adjacent occupants from these diseases, or from the handling of any other bodies that may be brought there; that no noxious or disagreeable odors will escape the premises; that they purpose to tear down the frame part of the building and erect a brick part for their morgue and business on strictly sanitary lines; that the part of the house fronting on the street will have the appearance of a residence, that the funerals will be infrequent, and that the conduct of their business will in no way de-

press the normal person; that the maintenance of a morgue and their business is not a nuisance *per se;* that it is not, under the circumstances of the case, a nuisance; that both the injury and the damages claimed are purely speculative; and that in a large number of the cities of the State funeral establishments and morgues are located in residential districts.

We are satisfied from the evidence in the case that the value of the plaintiffs' property would be materially decreased by the maintenance of defendants' business at the Lantz property. Many witnesses were called by the plaintiffs on this subject, and the testimony in opposition is very meager. We are convinced that such depreciation in value would be substantial, ranging from one-quarter to one-third of the value. This damage would be actual, and not visionary or speculative.

We do not find the claim of plaintiffs that there is danger of disease being communicated from dead bodies in the morgue to those living in adjoining houses is sustained. The defendants have been in the undertaking business for many years. There is in the entire record no intimation but that they have always conducted their business in a healthful and sanitary manner, in accordance with the rules of the State board of health, and the record satisfies us that, when so conducted, the danger, if not entirely removed, is infinitesimal. The proofs show and are uncontradicted that no bodies of persons dying from communicable disease, other than tuberculosis and typhoid fever, would be taken to the morgue. Some stress is laid on the tuberculosis cases. But we are satisfied from the record, that, notwithstanding the lay opinion of this dread disease, there is no danger of its communication from a dead body to persons in adjoining houses, where proper precautions are taken in accordance with the regular method of embalming.

Physicians seem to agree that not only have decidedly advanced steps been taken in its treatment, but also in prevention of its spread.

We are not so well satisfied that noxious odors will not escape defendants' premises. Formaldehyde is extensively used by them in embalming, deodorizing, and sanitation. The more thorough and complete the sanitation, the more formaldehyde is used. It gives off a pungent odor, and it is quite doubtful to our minds that this odor would fail to reach adjacent houses, situated as close as these houses, especially in the summer time, when the plaintiffs would expect to have, and have a right to have, their windows open. The Saier apartments are within 13½ feet of the house on the Lantz property, and there are 25 windows on the north side. The Johnson and Quarmby houses are very close to the line, and have numerous windows facing the Lantz house.

The defendants have failed to convince us that undertaking establishments with morgues are located in other cities in the strictly residential districts. While testimony tending to support such claim appears in the record, the testimony in rebuttal is persuasive that such establishments either border on, and are close to, business sections, or are in locations where the residential character of the district is giving away and business is breaking in.

The argument revolved quite largely around the question of whether the maintenance of an undertaking establishment and morgue in close proximity to a home would so affect the normal mind as to render its maintenance in a strictly residential district, such as this district is, a private nuisance, and as such abatable by a court of equity. Much testimony, both professional and lay, upon this subject was taken. Whether this may be the subject of opinion evidence is a mooted question. We think it requires no deep

research in psychology to reach the conclusion that a constant reminder of death has a depressing influence upon the normal person. Cheerful surroundings are conducive to recovery for one suffering from disease, and cheerful surroundings are conducive to the maintenance of vigorous health in the normal person. Mental depression, horror, and dread lower the vitality, rendering one more susceptible to disease, and reduce the power of resistance. There is an abundance of testimony in this record confirmatory of this, and it is a matter of common knowledge. The constant going and coming of the hearse (defendants in 11 months had 269 funerals); the not infrequent taking in and out of dead bodies; the occasional funeral with its mourners and funeral airs, held in the part of the house designed for a chapel; the unknown dead in the morgue, and the visits of relatives seeking to identify them; the thought of autopsies, of embalming; the dread, or horror, or thought, that the dead are or may be lying in the house next door, a morgue; the dread of communicable disease, not well founded, as we have seen, but nevertheless present in the mind of the normal layman—all of these are conducive to depression of the normal person; each of these is a constant reminder of mortality. These constant reminders, this depression of mind, deprive the home of that comfort and repose to which its owner is entitled.

We cannot overlook the right to engage in a lawful trade, nor the fact that the conduct of the undertaking business is not only lawful, but highly necessary, nor that it is not a nuisance *per se*. Nor can we overlook the right of the citizen to be protected in his home, and his right to the enjoyment there of that repose and comfort that are inherently his. The question here is not the restraining of defendants' business, but the restraint of its intrusion into a long-established and strictly residential district. The cases

directly in point are meager. The industry of counsel, and such investigation as we have been able to make, disclose but two: *Westcott* v. *Middleton*, 43 N. J. Eq. 478 (11 Atl. 490); *Densmore* v. *Evergreen Camp, No. 147*, 61 Wash. 230 (112 Pac. 255, 31 L. R. A. [N. S.] 608, Am. & Eng. Ann. Cas. 1912B, 1206).

In the New Jersey case the injunction was refused, and the bill dismissed. We are not impressed that the opinion in that case makes clear that the locality involved was exclusively residential in character. From the opinion it does appear that a portion of complainant's house was occupied for business purposes, and defendant had been conducting his business for 11 years in its then present location, which is spoken of as a "populous part" of the city, and the case seems to turn quite largely on the question of whether the business of an undertaker is a nuisance *per se*. The complainant in that case appeared to have been of a supersensitive temperament, while the rights of the parties should be measured by that which affects the normal person—not the supersensitive, on the one hand, or the hardened, inured, on the other.

In the Washington case the injunctive relief was granted, not upon the ground that the undertaking business is a nuisance *per se*, but that by reason of its location it might be or become one, and the right to injunctive relief to restrain the conduct of a business, not a nuisance *per se*, but one by reason of its location and surrounding conditions, is clearly pointed out; the court saying:

"For in this age, when population is becoming more and more congested in the cities, it would be manifestly unfair to grant injunctive relief only in those cases where the object attacked was a nuisance *per se*, when other circumstances or conditions intervene which might tend to destroy the repose and comfort of a part of a city or town given over to homes. In this case, as in that, the element of comfort and re-

pose in the enjoyment of the home becomes an essential element of our inquiry. For it is not only shown by the evidence, but it may be accepted as within the common knowledge of man, that the immediate presence of those mute reminders of mortality, the hearse, the chapel, the taking in and carrying out of bodies, the knowledge that within a few feet of the windows of one's dwelling house, where the family sleep and eat and spend their leisure hours, autopsies are going on, that the dead are there, cannot help but have a depressing effect upon the mind of the average person, weakening, as the testimony shows, his physical resistance, and rendering him more susceptible to contagion and disease."

And the following language from *Ross* v. *Butler*, 19 N. J. Eq. 294 (97 Am. Dec. 654), was quoted with approval:

"The law takes care that lawful and useful business shall not be put a stop to on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or over-refined person. But, on the other hand, it does not allow any one, whatever his circumstances or condition may be, to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by a lawful and useful business carried on in his vicinity. The maxim, '*Sic utere tuo ut alienum non lædas*,' expresses the well-established doctrine of the law."

We are persuaded that the correct result was reached and the proper rule announced by the Washington court. Nor are we able to distinguish in principle the instant case from the recent case of *Barth* v. *Hospital Ass'n*, 196 Mich. 642 (163 N. W. 62). That case was brought to restrain the erection and maintenance of a private insane asylum in a strictly residential district. There, as here, it was contended by the defendants that the maintenance of such an institution was not a nuisance *per se;* that the injury alleged was speculative and imaginary. There, as here,

it was claimed by the plaintiffs that the maintenance of the institution would make living in the vicinity uncomfortable, unpleasant, and unsafe; that the mental condition of the residents would be affected by constant fear, annoyance, and inconvenience. There, as here, there would be no actual danger if the institution was properly conducted. It was there held that, while a hospital is not a nuisance *per se*, it might be so located and conducted as to be a nuisance to people living close to it, and that, when a psychopathic hospital was located and conducted in a strictly residential district, it became such as to the owners of residential property in close proximity. We might well say in this case, as was there said by the Chief Justice, speaking for the majority of the court:

"It must be conceded that the establishment of such an institution in close proximity to the residences of the plaintiffs, which are in a residential section of the city, would destroy the comfort, the well-being, and the property rights of the plaintiffs."

We do not overlook the contention of the defendants that the writ of injunction is not one of right, but of grace. It should not issue out of hand, but should issue in cases where the right to such relief is clearly established. Such we find this case to be. We have here a case of the maintenance of a business which, while not a nuisance *per se*, is such as to these plaintiffs by reason of its location in a strictly residential district; a business which will cause depression to the normal person, lowering his vitality, rendering him more susceptible to disease, and depriving his home of the comfort, repose, and enjoyment to which he is entitled. Coupled with this is the substantial financial loss, due to the depreciation in the value of his property, and the strong probability that added to the other discomforts he will be called upon to suffer will be noxious odors during the summer months.

Such a case appeals to the conscience and discretion of the court, and calls for injunctive relief.

The decree of the court below will be reversed, and one here entered in conformity with the prayer of the bill. Plaintiffs will recover the costs of both courts.

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

OSTRANDER, J. In view of the decision of this court in *Barth* v. *Hospital Ass'n, supra,* I concur in the result.

CROSSMAN *v.* AMERICAN INSURANCE COMPANY OF NEWARK, N. J.

1. INSURANCE—FIRE INSURANCE—TITLE TO REALTY.
   Where one verbally applies for fire insurance and he is not asked as to the state of the title, and he does not act fraudulently, he is not required to disclose the exact condition of the title.

2. SAME—FIRE INSURANCE—BREACH OF CONTRACT—FORFEITURE.
   If an applicant for fire insurance discloses the exact condition of his interest in the property insured in a verbal application to the insurer's agents, the insurer cannot claim a breach of condition so as to work a forfeiture of the contract and render it void from the beginning on the ground that insured was not the sole and unconditional owner of the property.

3. SAME—INSURABLE INTEREST—GAMBLING CONTRACTS.
   Policies of insurance founded upon mere hope and expectation and without some interest in the property, or the

life insured, are objectionable and void as a species of gambling, and are called wagering policies.[1]

4. SAME—FIRE INSURANCE—INSURABLE INTEREST, WHAT CONSTITUTES.

The principal consideration in determining the existence of an insurable interest in property insured against loss by fire is not what is the title of the insured, or whether he has a lien thereon or possession, but whether he will suffer pecuniarily by its loss.

5. SAME—FIRE INSURANCE—OPTIONS.

The possessor of an option for the purchase of property, for which he has paid a considerable sum, has an insurable interest in the property.

Error to Wayne; Cross, J., presiding. Submitted June 22, 1917. (Docket No. 23.) Decided September 27, 1917.

Assumpsit by John M. Crossman against the American Insurance Company of Newark, New Jersey, on a policy of insurance. Judgment for plaintiff. Defendant brings error. Affirmed.

Lucking, Helfman, Lucking & Hanlon, for appellant.

James H. Pound (*Charles H. Hatch,* of counsel), for appellee.

On April 3, 1912, Maria McDonald was the owner of a land contract for the purchase of certain premises in Highland Park, located on Hamilton boulevard, consisting of two stores, with apartments then occupied by her, on the second floor. She was in arrears on her contract, and on this day surrendered it to plaintiff, taking back an option to purchase it at any time within one year upon payment of $5,261, with interest at 6 per cent. By the terms of this option

[1]Authorities passing on the question as to insurable interest of tenant in leased property, see note in 42 L. R. A. (N. S.) 135.

she was to pay $10 per month for the dwelling part of the property, and after May 6th plaintiff was to collect the other rents, for which he was to account on her paying the amount above mentioned. Daniel McDonald, a son of Maria McDonald, was indebted to Donaldson Craig, and on November 20th they came to an accounting, and there was found due Mr. Craig $2,531.28. To pay this sum Mrs. McDonald then assigned and transferred her option on the Hamilton boulevard property to him. He informed plaintiff of this assignment, and learned in the conversation the amount of insurance carried on the building. On January 24, 1913, the policy of insurance here involved was issued through Eliot & Haviland, defendant's local agents. The application for the insurance was verbal, and no inquiry was made as to the condition of the title. Mr. Craig, however, voluntarily and fully told the agents the state of the title as he had learned it, and the policy was issued to him as the assured "on property sold to assured on contract; loss, if any, payable first to John M. Crossman and then to assured as their interest may appear." Mr. Craig did not read the policy, which was the Michigan standard form. After the assignment from Mrs. McDonald to Craig, and after plaintiff knew of it, he gave Mrs. McDonald notice to quit, but nothing further seems to have been done, and she remained in the apartments until the fire. The record discloses that although plaintiff was the owner of the record title of the premises, he had given to one Campbell the right to redeem, on payment of the amount due from Campbell to plaintiff. On January 29, 1913, the fire occurred, and proof of loss was seasonably filed. On April 3, 1913, Craig tendered to plaintiff $5,700, and requested a deed. The parties disagreed as to the amount due, and a bill was filed for specific performance. Pending that suit, by agreement between them,

Craig assigned any interest he might have under the policy of insurance to plaintiff, and this action was brought, resulting in a recovery in the circuit court. Defendant brings the case here.

FELLOWS, J. (*after stating the facts*). It is insisted on behalf of defendant that the policy is not enforceable, because: (1) at the time the policy was issued Craig was not the unconditional and sole owner of the property; (2) that he did not have an insurable interest.

1. The testimony is undisputed that the application for this insurance was verbal, and that Mr. Craig was not inquired of as to the state of his title. There is no claim of any fraud practiced by him, or any deceit on his part. Under the holdings of this court, he was not required, under these circumstances, to show the exact condition of his title. *Brunswick-Balke-Collender Co.* v. *Assurance Co.*, 142 Mich. 29 (105 N. W. 76); *Guest* v. *Insurance Co.*, 66 Mich. 98 (33 N. W. 31); *Hoose* v. *Insurance Co.*, 84 Mich. 309 (47 N. W. 587, 11 L. R. A. 340); *Hall* v. *Insurance Co.*, 93 Mich. 184 (53 N. W. 727, 18 L. R. A. 135, 32 Am. St. Rep. 497). Mr. Craig, however, advised the agents of the company what his interest was, and they therefore knew before the policy was issued that he was not the unconditional and sole owner of the property. Defendant cannot now claim a breach of condition then existent, and then known to it, to work a forfeiture of the contract of insurance, and rendering it void from the beginning. We have so recently considered the question of whether an insurance company may defend on the ground of a breach of condition, which existed at the time the policy was issued, to the knowledge of the agent, and therefore to the knowledge of the company, that we content ourselves with calling attention to that case, and the authorities there cited.

Gordon v. *Insurance Co.*, 197 Mich. 226 (163 N. W. 956).

2. It was pressed upon the court at the argument with vigor that Craig did not have an insurable interest in the property, and for this reason plaintiff must fail in his right of recovery, and the question is fully discussed in the briefs filed. This presents the meritorious question in the case. Policies of insurance founded upon mere hope and expectation and without some interest in the property, or the life insured, are objectionable as a species of gambling, and so have been called wagering policies. All species of gambling policies were expressly prohibited in England by Stat. 19 Geo. II, chap. 37, and have been treated as illegal in this country upon the principles of that statute, without acknowledging it as authority. Here, such contracts of insurance are treated as contravening public policy, and are therefore void. If this policy falls within this class, it is void, and prevents plaintiff's recovery. If it does not, this judgment must be affirmed.

The argument of the defendant is that the assured must have title to the property, either legal or equitable or a lien thereon, in order to have an insurable interest in the property such as is contemplated by the law; that in the instant case Craig's interest was but that of an optionee, and therefore not insurable. In this defendant is in error. An insurable interest does not, of necessity, depend upon ownership of the property. It may be a special interest entirely disconnected from any title, lien, or possession. If the holder of an interest in property will suffer direct pecuniary loss, by its destruction, he may indemnify himself therefrom by a contract of insurance. The question is not what is his title to the property, but rather, would he be damaged pecuniarily by its loss. If he would, he has an insurable interest. That in-

terest may be derived by possession, enjoyment, or profits of the property, security or lien resting upon it, or it may be other certain benefits growing out of or dependent upon it. It was said by Mr. Justice Gray, speaking for the court in *Harrison* v. *Fortlage*, 161 U. S. 57 (16 Sup. Ct. 488):

"It is well settled that any person has an insurable interest in property, by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself."

This case involved a consignment of sugar where, by the terms of the contract, the property did not pass to the buyer until it left the ship's tackle. The case of *Getchell* v. *Insurance Co.*, 109 Me. 274 (83 Atl. 801, 42 L. R. A. [N. S.] 135, Am. & Eng. Ann. Cas. 1913E, 738), involved the question of whether a tenant had an insurable interest in the property. It is an interesting case, and quite fully considers the authorities on the subject. Speaking for the court it was said by Mr. Justice Cornish:

"The crucial question therefore is, Will the insured be directly and financially affected by the loss of the property insured? If so, he has such an interest as the law will recognize. The loss must not be indirect or sentimental, but direct and actual. It is not necessarily an interest in the property in the sense of title, but a concern in the preservation of the property and such a relation to or connection with it as will necessarily entail a pecuniary loss in case of its injury or destruction. This opens a wide field, and the decisions take an extensive range with a growing tendency to expand rather than to contract the scope of the term."

In the case of *Rohrbach* v. *Insurance Co.*, 62 N. Y. 47 (20 Am. Rep. 451), a much-cited case, after considering the writers on this subject, it was said:

"But the result of a comparison of the textwriters above cited is that there need not be a legal or equit-

able title to the property insured. If there be a right in or against the property, which some court will enforce upon the property, a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest."

Mr. Justice Andrews, speaking for the same court in *Riggs* v. *Insurance Co.*, 125 N. Y. 7 (25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716), said:

"It would seem, therefore, that whenever there is a real interest to protect and a person is so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, an insurance on such interest would not be a wager within the statute, whether the interest was an ownership in, or a right to the possession of, the property, or simply an advantage of a pecuniary character having a legal basis, but dependent upon the continued existence of the subject."

It was said by the supreme court of Massachusetts, in the case of *Williams* v. *Insurance Co.*, 107 Mass. 377 (9 Am. Rep. 41):

"And it is now well established that even one who has no title, legal or equitable, in the property, and no present possession or right of possession thereof, yet has an insurable interest therein, if he will derive benefit from its continuing to exist, or will suffer loss by its destruction."

The rule is tersely stated in 14 R. C. L. p. 910:

"It may be said, generally, that any one has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction."

Without further quotation we content ourselves with citing the following: *Berry* v. *Insurance Co.*, 132 N. Y. 49 (30 N. E. 254, 28 Am. St. Rep. 548); *Merrett* v. *Insurance Co.*, 42 Iowa, 11; *Schaeffer* v. *Insurance Co.*, 113 Iowa, 652 (85 N. W. 985) (a tenant at will);

Home Ins. Co. v. *Mendenhall,* 164 Ill. 458 (45 N. E. 1078, 36 L. R. A. 374) (an extreme case); *German Ins. Co.* v. *Hyman,* 34 Neb. 704 (52 N. W. 401); *Graham* v. *Insurance Co.,* 48 S. C. 195 (26 S. E. 323, 59 Am. St. Rep. 707); *Strong* v. *Insurance Co.,* 10 Pick. (Mass.) 40 (20 Am. Dec. 507, and note at page 510); *Commercial Fire Ins. Co.* v. *Capital City Ins. Co.,* 81 Ala. 320 (8 South. 222, 60 Am. Rep. 162); *Cumberland Bone Co.* v. *Insurance Co.,* 64 Me. 466; *Wainer* v. *Insurance Co.,* 153 Mass. 335 (26 N. E. 877, 11 L. R. A. 598); *Hayes* v. *Insurance Co.,* 170 Mass 492 (49 N. E. 754); *People's St. R. Co.* v. *Spencer,* 156 Pa. 85 (27 Atl. 113, 36 Am. St. Rep. 22); *Warren* v. *Insurance Co.,* 31 Iowa, 464 (7 Am. Rep. 160); 1 May on Insurance (4th Ed.), § 80.

The unrippled current of authority is to the effect that title to, or lien upon, property, is not essential to an insurable interest. Measured by the standard fixed in the cases quoted from, and cited, Did Craig have an insurable interest in this property? He had an option upon this property, a right to buy it, an enforceable right, for which he paid over $2,500. Was that right of more value with the building standing than with the building destroyed? Would he suffer direct pecuniary loss in the value of his right by its destruction? Would he be damaged pecuniarily by the loss of the building? To ask these questions is to answer them. Obviously this contract of insurance was not a wagering, gambling contract prohibited by public policy, but was valid and enforceable.

The judgment is affirmed.

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

BOSTON PIANO & MUSIC CO. *v.* SECKINGER.

1. CONTRACTS—GAMBLING CONTRACTS—FRAUD—PUBLIC POLICY.
   A scheme for the sale of groceries as an incident to the giving of certificates in a so-called advertising campaign, which certificates, at the end of the period, are to be counted to determine which one of 100 candidates should have a piano and other various articles, and which scheme is part of a contract of sale of the prizes, is illegal.

2. SAME.
   A contract for the purchase of a piano and other articles to be used to put in operation a so-called advertising campaign by a merchant, including an illegal scheme for the furtherance of such campaign which is the inducement to the contract, is void and unenforceable.

Error to Washtenaw; Kinne, J. Submitted June 21, 1917. (Docket No. 102.) Decided September 27, 1917.

Assumpsit by the Boston Piano & Music Company against Joseph E. Seckinger for goods sold and delivered. Judgment for defendant. Plaintiff brings error. Affirmed.

F. M. Freeman (*Frank A. Stivers* and *Roscoe O. Bonisteel,* of counsel), for appellant.

A. J. Waters (*A. J. Sawyer,* of counsel), for appellee.

FELLOWS, J. The defendant is engaged in the retail grocery business at the village of Manchester, Washtenaw county. On July 14, 1915, the agent of plaintiff called upon him, and the result of such call was a written order, or agreement, signed by defendant for the purchase of a piano, 12 minor articles, and the paraphernalia, literature, circulars, instruc-

tions, etc., necessary to put into operation and conduct a so-called advertising campaign, with the ultimate object of giving the piano and other articles away. The agreed purchase price was $465. It appears from the record that the piano and other 12 articles were worth $200, and we infer that the balance was for the scheme devised by plaintiff and the necessary paraphernalia for its operation. The goods were shipped and a book of instructions, literature, certificates and other necessary paraphernalia were sent. They were refused and later this action was brought, plaintiff counting in a special count on the contract, and also upon the common counts. The case was submitted to the jury, which rendered a verdict for the defendant, and plaintiff brings the case here.

We do not agree with plaintiff's counsel that this case belongs to that class of cases where a lawful article of commerce is afterwards used by the purchaser in an unlawful manner, or in violation of some statute, without the privity of the vendor, and where recovery is had, notwithstanding the unlawful use to which it is put by the purchaser. Here the scheme was a part of the consideration, and an inducement to the contract, and, so far as this particular question is concerned, this case is ruled by *La France* v. *Cullen,* 196 Mich. 726 (163 N. W. 101). It therefore becomes necessary to examine the scheme which the defendant contracted to purchase, together with the methods of its execution. The scheme contemplated that for quite an extended period, nearly a year, defendant should give to his customers certificates to be furnished him by the plaintiff. It contemplated the nomination of 100 candidates, each of whom would seek to get the largest amount of these certificates before the contest closed, with a view of obtaining a free piano. It contemplated the posting of the standing of the candidates weekly on a poster in defendant's store, the

keeping of all the candidates cheered up, and in the race until the last day. Briefly stated, it contemplated the abandonment of the old-fashioned method of selling groceries on their merits, and the substitution of a plan of selling groceries as an incident to giving the certificates, which, at the end of the period, would be counted to determine which one of the 100 candidates should have the piano, which the sparkling diamond weighing one-sixteenth of a carat, which the other minor prizes, and which 87 out of the 100 should get nothing. The contract, as a part of the consideration, required the delivery to defendant of:

"One book giving suggestions for starting the campaign, containing much valuable information and suggestions for starting the campaign, securing organizers and getting them enthusiastically at work, which the retailer may use as he prefers. Copyrighted."

This book was sent on and it appears in the record. To the unsophisticated and the uninitiated in the method of conducting these gift enterprises, it is an interesting production. While it is urged by plaintiff that it is only suggestive of the measures used in conducting these contests, and therefore need not be followed, still it furnished part of the consideration, contained the suggestion of the plaintiff, and was a part of the scheme, and its first admonition is as follows:

"*Dear Mr. Merchant:* This booklet is prepared for your special benefit. It is a personal message to you and contains some facts gained after long experience and as the result of hundreds of similar contests. Piano contests are our specialty, as understanding the quality of leather, flour, cloth, or any other line may be your specialty. We have spent a great deal of time and money in securing information of merchants pertaining to their methods of conducting their contest which resulted so successfully. Your contest can be the means of wonderfully increasing your business and bringing you a very liberal profit, or it can be

conducted in such a way that you will realize no returns from it. The important point is to get it started right; therefore, we say, study these instructions and have clerks study them. Every hour spent in studying our suggestions and carrying them out will mean a big profit to you." * * *

It is suggested that candidates be selected from the different nationalities, and from different locations, suggesting that "a popular school teacher makes a powerful contestant"; that lodges and churches be selected. In this connection the following suggestion is made:

"The same rule which applies to the country districts applies also to the city. There are the church circles, lodge circles, societies, the literary element, saloon element, and many more cliques or groups of people held together by some mutual interest. If the Methodist Sunday school can be enlisted in the work for the piano the entire Methodist church will help, and should no other church in the town enter, many of the people from other churches will pitch in and help."

Under the head "Be honest with them all" occurs the following:

"Should you find that a very strong lodge or church is interested be sure and nominate some other strong lodge or church to work with it. Don't let any one win too easily."

While under the head "How to honorably sustain and accelerate interest in the campaign," in some additional suggestions found in another exhibit, the following suggestion is made:

"When certain contestants seem to be running too far ahead it may be well to suggest to them that they had better not vote their certificates too fast, but hold some back, as it will cause others to work all the harder against them if they advance too rapidly. This is for the benefit of one or two who may be forging away ahead, but as a matter of fact, the others will

keep in the race longer and work harder if one or two do not get too far ahead. Should one get too far ahead, it is liable to discourage others, and the suggestion here given is to help avoid that condition. Quite often, however, the one who spurts ahead at the start is liable to lose interest later and drop out, and you must impress all with the idea that no one is sure of winning until the end and all have an equal chance." * * *

Printed circular letters were furnished to be sent the candidates informing them of their nomination, but not informing them that they have been nominated by the party conducting the contest. This letter states:

"*Dear Friend:* We are pleased to announce that you have been nominated a contestant in our piano advertising campaign, making it possible for you to become the happy possessor of the beautiful upright grand parlor piano now on exhibition in our store absolutely free of cost. This is a strictly high grade, standard instrument manufactured by a reputable factory, is warranted by the makers for a period of ten years, and bears their name on the name plate. It is an instrument of which any home may well be proud. We give free piano certificates to the amount of each purchase at our store, and the person holding the greatest amount of these certificates at the close of the campaign receives the piano entirely free of cost." * * *

Notwithstanding the statement in this letter that certificates are given to the amount of each purchase, after the candidates have been secured and the contest started, it was suggested:

"After the campaign is well started, give due bill cards to those who are behind to sell, showing them how they can get the extra certificates and greatly increase their standing in this way, while you get cash in advance for future trade. When you think it advisable tell them that if they will sell five $5 cards within a given time, say a week, you will give them

double certificates on them. They now see an opportunity to get ahead and get busy and sell a large number of due bill cards, bringing cash to the store and advancing their chances of winning."

And it was further suggested:

"At the right time offer a bonus of from $10,000 to $25,000 as your judgment may dictate, to each contestant who doubles their standing during a given time, say a week or a month, as circumstances may direct. This is an opportunity for the low ones to make a gain, as they can double so much easier than the high ones. This plan has been used very successfully for equalizing the standings of contestants, and it is perfectly fair for all have the same opportunity. Do you get the idea?"

Notwithstanding the representations to the candidates as to the conditions under which the certificates would be issued, made in the letter before referred to, sent for the purpose of inducing them to enter the contest, the scheme contemplated, and the paraphernalia for its execution was furnished, that at some time during the contest it should be arranged that certificates, in addition to those given at the time of purchase, should be given to those agreeing to trade at defendant's store. These were called pledge of patronage cards. So if A. signed a pledge of patronage card, saying that he would trade $5 at defendant's store within the next 30 days, he would be given $5 in certificates. If he went in the next day and bought the $5 worth of goods he would be given $5 worth of certificates additional, making $10 worth of certificates for his candidate on his $5 purchase. The candidates were not to be instructed, so far as this record discloses, in the intricacy of this part of the scheme, but were to be urged to get signed pledge of patronage cards, as well as to "hump, hump, steadily and continuously." Another scheme, within the scheme, and which changed the plan under which the

candidates entered, contemplated that some time after the contest was under way three times the amount of the purchase should be given in certificates through the disposal of undesirable and unsalable stock. This is the eleventh suggestion of the plaintiff found in Exhibit C. We quote from it:

"Make use of the yellow or green tag sale. Pick out such odds and ends of your stock as you wish to get rid of and place same in some convenient place. Tag those you wish to get rid of first with a yellow tag. On this tag will be found the following printed form: Yellow Tag Sale. Triple certificates will be given on goods marked with yellow tag. Price ——. Mark on each tag the price and attach it to the articles you wish to dispose of. The green tag printed in the same way, excepting it provides for double certificates, is used in the same way. The contestants buy goods so marked to get the additional certificates and urge their friends to do likewise. Some dealers put on a green tag sale first and later a yellow tag sale, while others use both kinds of tags for the same sale, marking the articles they wish to dispose of first with a yellow tag. Some dealers dispose of large quantities of dead, undesirable or unsalable stock in this way. The dealer must use his best judgment in all such matters, as well as matters in connection with his contest. It is usually best to conduct a yellow tag sale first and later put on a green tag sale. The contestants who are hungry for certificates will gobble up lots of the goods with these tags to get the extra amount of certificates. It often occurs that large quantities of undesirable stock is disposed of in this way." * * *

It will be unnecessary to quote further from the literature of the plaintiff, or to further detail the scheme which defendant was expected to pay $265 for. Sufficient has been said to show the general character of the transaction and how the so-called advertising campaign was to be conducted.

Plaintiff's counsel is correct in his contention that the scheme is not a lottery, as that word has been

defined by this court in *People* v. *Elliott*, 74 Mich. 264 (41 N. W. 916, 3 L. R. A. 403, 16 Am. St. Rep. 640). In the distribution of the prizes one essential element of a lottery, that of chance, is lacking. But while it may not be a lottery it has all the vices, all the appeals to cupidity, all the seductiveness of a lottery, and more. Without recapitulating all of its vicious elements it will suffice to say that it contemplated obtaining the energy and the services of 100 candidates upon the representations that the piano would go to the one holding the largest amount in certificates at a given time; each dollar of certificates to represent a dollar of purchase at defendant's store; that notwithstanding this understanding with each candidate, defendant was to secretly give to certain of the candidates, those temporarily low, certificates which did not represent purchases at defendant's store, but which were a gratuity pure and simple; further, that by a manipulation of the pledge of patronage cards twice the amount of the purchases were issued in certificates to those knowing how to manipulate this part of the scheme, and further, that by the purchase of undesirable goods, three times the amount of the purchases in certificates were issued; further, that bonuses were to be given, all this to be done after the candidates had been induced to enter on the representation that a dollar certificate represented a dollar purchase, no less and no more. It contemplated that the public and candidates generally should understand that the true and correct standing of all candidates should be posted weekly; but that by a secret arrangement with the high candidates this notice posted in defendant's store should not speak the truth. It contemplated the arraying of class against class, church against church, lodge against lodge, locality against locality, nationality against nationality, the literary element against the saloon element, clique against

clique, in the mad scramble covering nearly a year, by 100 candidates for a cheap piano. We are asked to declare that this scheme is conducive to good morals. We decline to do so. It is infected with deception, freighted with artifice, and permeated with trickery. It is not a lottery, and has not even the respectability of the trading stamp scheme, which has been condemned as against good morals and the public welfare by the legislatures of many of the States of the Union, and which legislation has been sustained by the court of last resort of the Nation in the case to which we shall presently refer, although in the trading stamp scheme each holder of stamps of a stated value received some article of some value.

Nor can the scheme here involved be correctly called an advertising campaign. It is not advertising. It was said by Mr. Justice McKenna, speaking for the court in *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 365 (36 Sup. Ct. 370, 377, L. R. A. 1917A, 421, Am. & Eng. Ann. Cas. 1917B, 455):

"It would be an endless task to cite cases in demonstration, and that the supplementing of the sale of one article by a token given and to be redeemed in some other article has accompaniments and effects beyond mere advertising the allegations of the bill and the argument of counsel establish. Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisition of the article to be sold constitutes the only inducement to its purchase. The matter is simple, single in purpose and motive; its consequences are well defined, there being nothing ulterior; it is the practice of old and familiar transactions and has sufficed for their success. The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity

lure to improvidence. This may not be called in an exact sense a 'lottery,' may not be called 'gaming'; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and of judgment that it is finally within the power of the legislature to make."

The scheme, which was a part and the essential part of the contract between these parties, was bad in morals and against public policy. The contract for its purchase was void and unenforceable. The court should have directed a verdict for the defendant for this reason.

The judgment is affirmed.

KUHN, C. J., and STONE and STEERE, JJ., concurred with FELLOWS, J. OSTRANDER, BIRD, MOORE, and BROOKE, JJ., concurred in the result.

PODKASTELNEA *v.* MICHIGAN CENTRAL RAILROAD CO.

1. STATUTES—CONSTRUCTION.
   Effect should be given to all the provisions of a statute, if possible.

2. SAME—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.
   The workmen's compensation act should not be given a construction which will nullify any of its provisions, unless necessary.

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE OF CLAIM—TIME FOR FILING CLAIMS—"PHYSICAL INCAPACITY."
   The workmen's compensation act (Act No. 10, Extra Session 1912, part 2, § 15, 2 Comp. Laws 1915, § 5445), pro-

viding that no proceedings for compensation may be maintained unless, in the event of physical or mental incapacity, a claim is presented within six months after the removal of such incapacity, does not relate to an incapacity from physical reasons to personally make out and personally mail or deliver the claim.[1]

Certiorari to Industrial Accident Board. Submitted June 11, 1917. (Docket No. 31.) Decided September 27, 1917.

Andrew Podkastelnea presented his claim for compensation against the Michigan Central Railroad Company for injuries received in defendant's employ. From an order awarding compensation, defendant brings certiorari. Reversed.

J. W. Dohany and *Raymond K. Dykema* (*Frank E. Robson,* of counsel), for appellant.

Charles L. Dibble (*Lincoln H. Titus,* of counsel), for appellee.

FELLOWS, J. This proceeding brings up for review the construction placed by the industrial accident board on certain provisions of section 15, pt. 2, of Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5445), commonly called the "employers' liability act." The section involved is as follows:

"No proceedings for compensation for an injury under this act shall be maintained, unless a notice of the injury shall have been given to the employer three months after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity."

[1]On sufficiency of notice of injury under employers' liability act, see note in 21 L. R. A. (N. S.) 233.

The construction placed upon this section by the board is as follows:

"The incapacity referred to is of two kinds, viz., 'physical' or 'mental.' A proper construction of the section requires that both of these words be given effect, and by giving effect to the phrase 'physical incapacity,' it must be held that the six months' period did not commence to run until the applicant was physically able to make out and deliver the claim to respondent."

The facts disclosed on this record, briefly stated, are as follows: On March 2, 1914, claimant was in the employ of defendant putting up ice at Kalamazoo. His foot got into a hole between two cakes of ice, and he fell over, causing an injury to his ankle and limb. No bones were broken. It is claimed plaintiff's foreman was present when this took place. Claimant worked the balance of the day, and walked home about a mile. Arriving there, he found that his foot had started to swell and was quite painful. He did not work the next day, and the second day went to the office and drew his pay. Being unable to work, he remained at home, getting out in the yard some, and applied home remedies. He was not confined to his bed. The forepart of May a doctor was called, who found the joint inflamed, and treated him for it. Later he lanced the ankle and turned out the pus. After that a fibrillar growth appeared in the opening, and claimant was taken to the hospital on June 29th, and this growth was removed. He remained at the hospital until August 24th, when his attending physician considered him sufficiently recovered to be able to come to his office for such further treatment as he might require, and he returned to his home. He had not recovered so as to be able to work at the time of the hearing before the committee on arbitration April 27, 1915.

Claimant does not speak, write, or understand English. About a month after the accident he employed a fellow countryman named Nesho, who understood English, to write to the defendant claiming compensation. Defendant never received this notice, and claimant made no proof of its being sent. Nesho, at the time of the hearing, was in the old country, and his deposition was not taken. On November 19th, more than eight months and a half after the accident, claim for compensation was made through a Mr. Strifling, who was employed by claimant to perform this service. The claim was received by the company on the 20th.

It is the claim of the claimant that the section under consideration should be construed to mean that an employee is physically incapacitated from making claim for compensation, within the provisions of the section under consideration, if he is not physically able to make out the claim and take it to the post office and personally mail it, and the board so held. And it necessarily follows, as we shall presently see, that under the construction of the provision by the board it is of no importance whether such physical incapacity is the cause preventive of giving the notice or not.

We are not inclined to invoke technical rules in the construction of this act, but we cannot overlook the fact that the rights of employers and employees are both safeguarded by its provisions, that the rights of both are designed to be protected by it, and that the provisions of the law, as written, must be given force. It is a well-recognized rule of statutory construction that effect should be given to all the provisions of a statute. We should not give the act such a construction as would nullify any of its provisions unless compelled so to do. The statute deals with accidents. To hold that the injured employee is not required to make

claim for compensation until six months after he has recovered sufficiently to personally make out his claim, and personally take it to the post office, or to his employer, would nullify the purpose and the language of the limitation found in this section. The purpose of requiring a claim for compensation is to give the employer notice, to enable him to employ skilled physicians to treat and care for the employee, thus minimizing his loss, and inuring to the benefit of the employee. It is its purpose to enable him to investigate claims made against him, and to do this when the matter is fresh in the minds of those who saw or knew of the accident, and to prevent the pressing of stale and unfounded claims. These purposes cannot be carried out if we follow the construction given by the board. If such construction is followed, claims for compensation need not be made in case of any accident serious enough to confine the employee to his home until six months after he has recovered. Such construction would give no force to the limitation, would nullify its purpose, and would make the filing of claims within six months after the accident the exception, and not the rule. The whole scheme of the act is designed to work out a speedy adjustment and payment of claims for industrial accidents. The injured employee is given a reasonable time, three months, in which to give notice of the accident, and ample time, six months, to make claim for compensation, with certain exceptions, named in the section. It is not necessary for us to determine in the instant case whether the term "physical incapacity," as used in the section under consideration, contemplates incapacity from physical reasons to direct the making out and sending of the claim as is the usual course pursued. It will be sufficient to say that we cannot agree with the board; that it contemplates only an incapacity

from physical reasons to personally make out and personally mail or deliver the claim.

We have already stated that the claimant could not speak, write, or understand English. It is therefore obvious that, no matter what his physical condition was, he could not have made out the claim in English as he would be required to do; neither could he read it if it was made out for him. His want of knowledge of the English language, not his physical condition, prevented him from making out his claim; it necessitated doing what is done in the great majority of cases, what he finally did when he got Mr. Strifling to make out his claim, and what he ineffectually tried to do when he got Mr. Nesho to look after it for him.

We have examined the authorities cited in the briefs and made such independent investigation as the time at our command permitted, and are unable to find authority in point. The English cases, usually very helpful in cases arising under this act, have to deal, as far as this question is concerned, with different language than found in our act. The provisions of the English act (Stat. 6 Edw. 7, chap. 58, § 2) are as follows:

"Proceedings for the recovery under this act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death: *Provided always,* That the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defense

by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause." * * *

Several of the States have, either in terms or in substance, adopted the provisions of the English act. The legislature of this State has not seen fit to do so. If the provisions of our act are not sufficiently liberal as to making claims for compensation, the question is one for the legislative branch, not for the judicial.

It follows from what we have said that the award must be reversed.

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

DONLIN *v.* DETROIT UNITED RAILWAY.

1. CONTRIBUTORY NEGLIGENCE—AUTOMOBILES—STREET RAILWAYS—RECKLESS DRIVING—COLLISIONS.

   The driver of an automobile who approaches a street railway track, his view of which is obstructed, at so high a rate of speed as to make it impossible to stop before the track is reached, where the sense of seeing is for the first time available, is guilty of contributory negligence, as a matter of law.[1]

2. STREET RAILWAYS—NEGLIGENCE—QUESTION FOR JURY—EVIDENCE.

   It was a question for the jury whether the defendant street railway company was guilty of negligence in the operation of the car, where there was evidence that the car was operated at excessive speed in a densely populated neighborhood; that no gong was sounded, and that the car was not under control.

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[1]As to duty of operator of automobile when near street cars, see note in 38 L. R. A. (N. S.) 493.

3. SAME—AUTOMOBILES—COLLISIONS—PROXIMATE CAUSE—QUESTION FOR JURY.

It was a question for the jury whether the contributory negligence of the driver of the automobile, in driving on the track at such a high rate of speed as to make it impossible to stop before the track was reached, was the proximate cause of the injuries to an occupant of the car.[1]

4. AUTOMOBILES—NEGLIGENCE—RECKLESS DRIVING—IMPUTED NEGLIGENCE—MINORS.

The negligence of the driver of an automobile cannot be imputed to an infant occupying it as a passenger.[2]

5. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence *held*, insufficient to show that the occupant of the automobile, which was driven by another, was guilty of contributory negligence.

6. PARTIES—JOINDER—JOINT TORTFEASORS.

Where there are several tortfeasors, more than one negligently contributing to the injury, an action may be maintained against them jointly or severally.

Error to Wayne; Hosmer, J. Submitted June 25, 1917. (Docket No. 7.) Decided September 27, 1917.

Case by Stanley P. Donlin against the Detroit United Railway and another for personal injuries. Judgment for defendants on a directed verdict. Plaintiff brings error. Reversed as to defendant railway.

Ormond F. Hunt, for appellant.

William G. Fitzpatrick, for appellee.

At the time of the accident which is the basis of this action, plaintiff was over 16 years of age and was living with his parents at 350 Howard street, in the city of Detroit. Their home was about a quarter of a block west of Tenth street. They had a roomer

[1]On the question of evidence as to speed of automobiles or other road vehicles, see note in 34 L. R. A. (N. S.) 778.

[2]On the question of imputed negligence of driver to infant, see note in 8 L. R. A. (N. S.) 669.

named Elder L. Rugg, who was an employee of defendant Home Telephone Company; he drove an automobile for that company, and it was kept in a garage on the premises of plaintiff's father. The Sunday following Christmas plaintiff and his older brother, Wallace, went to church and Sunday school. Wallace had arranged with Rugg to call for them and some girl friends. Plaintiff does not appear to have been a party to this arrangement, but when Rugg came along after church and stopped for them the two boys got into the automobile. The girls had started for home, but were overtaken, and they got in the machine. The girls were first taken to their respective homes, then Rugg and the two boys started for home, going south on Tenth street. Baker street runs east and west. Defendant railway company operates a line on Baker. These streets cross at right angles. On the east side of Tenth street, and running north from Baker, was a high board fence; there was a place in it where there was a drop that gave a view to the east on Baker. In approaching Baker street the driver Rugg made no attempt to slacken his speed, but, on the contrary, increased it to 20 miles per hour, and, so far as the record discloses, did not look up Baker at the drop in the fence, or at any other place before Baker street was reached, or before attempting to cross, to ascertain whether there was a car coming from either direction. A car going west on Baker street collided with the automobile, and the plaintiff was seriously injured. There was testimony given on behalf of plaintiff, tending to show that this car was going at a very high rate of speed, 25 to 30 miles per hour, that no gong was rung to give notice of its approach, and that it was not under control. There was no testimony tending to show that defendant telephone company was in any way connected with the use of the automobile on the day in question, and it

is conceded that a verdict was properly directed in its favor. The court also directed a verdict in favor of the railway company at the close of plaintiff's case, on the ground that the sole and proximate cause of the accident was the negligence of the driver Rugg. From a judgment rendered upon the verdict so directed, the plaintiff brings the case here.

FELLOWS, J. (*after stating the facts*). We conclude, as matter of law, that the driver Rugg was guilty of negligence contributing to the accident. He was not called as a witness; was not available, having left Detroit some time before the trial. If he depended upon his sense of hearing alone—and no other rational explanation of his conduct is permissible—it is not a sufficient excuse. To approach with an automobile the track of a street railway where the vision is obstructed at so high a rate of speed as to make it impossible to stop before the track is reached, where, after the machine has reached the street, the sense of seeing is for the first time available, and without theretofore taking any precautions to ascertain whether a car is coming, is not the exercise of that reasonable care for the protection of the driver himself and other occupants of the automobile as common prudence and the law requires. *Colborne* v. *Railway*, 177 Mich. 139 (143 N. W. 32), and authorities there cited. In that case it was said by Chief Justice STEERE, speaking for the court:

"He could and should have made sure of the safety of proceeding, by looking just before entering upon the track, and at such a point that he could stop his machine if necessary in order to avoid a collision. This rule should be as strictly applied to an automobile as to a pedestrian, and the reasons for its application are more impelling."

But we are unable to agree with the learned circuit judge that under the evidence in the case it may be

said, as matter of law, that the negligence of the driver was the sole and proximate cause of the accident, and that there was no testimony in the case which would justify the jury in finding that the negligence of the defendant railway company contributed thereto. There was testimony in the case tending to show that the car was running at an excessive rate of speed. One witness puts it at 20 miles an hour; another at 20 to 30 miles an hour; another at 25 miles an hour; another, a passenger, said they were going so fast as to cause her to grow nervous. The testimony shows this neighborhood to be densely populated. There was evidence tending to show that the gong was not sounded, and the evidence as to the distance the car ran after the impact would permit the inference that it was not under control. This testimony made the question of the negligence of defendant railway a question for the jury. *Deneen* v. *Railway Co.*, 150 Mich. 235 (113 N. W. 1126, 13 Am. & Eng. Ann. Cas. 134); *Putnam* v. *Railway*, 164 Mich. 342 (129 N. W. 860), and authorities there cited; *Sceba* v. *Railway Co.*, 189 Mich. 308 (155 N. W. 414); *Wavle* v. *Railways Co.*, 170 Mich. 81 (135 N. W. 914).

Whether the negligence of the driver alone, or his negligence, together with that of the defendant railway company, caused the accident was a question of fact to be solved by the jury, not a question of law to be solved by the court.

Defendant's counsel further urges that the negligence of the driver Rugg should be imputed to plaintiff, that Rugg and plaintiff were engaged in a common enterprise, and that plaintiff was guilty of contributory negligence. Had plaintiff been an adult the negligence of the driver would be imputed to him under the uniform holdings of this court, upon the theory or fiction of the law that the relations of principal and agent, or master and servant, existed. But plaintiff,

at the time of the accident, was a minor, incapable of entering into a contract of agency, and the question is ruled by *Hampel* v. *Railroad Co.*, 138 Mich. 1 (100 N. W. 1002, 110 Am. St. Rep. 275). It was there said by Mr. Justice HOOKER, speaking for the court:

"The next question of importance is whether the negligence of the driver is imputable to the plaintiff's intestate. Plaintiff's counsel concede that, had she been an adult, it would be, but earnestly and ably contend that, as she was an infant, she should not be charged with the negligence of the driver. It is urged that the doctrine of negligence rests upon the assumption that the relation of principal and agent or master and servant exists between the passenger and driver, and that, as an infant can be neither principal nor master, the doctrine cannot apply to an infant. The deceased was an infant 13 years old, in a carriage by invitation of its driver, through whose negligence, and without her fault, she was killed. Had she been an adult, his negligence would have been imputable to her, upon the fiction that he was her agent, under the doctrine of *Thorogood* v. *Bryan*, 8 C. B. 115, which is recognized as authority in this State. See *Mullen* v. *City of Owosso*, 100 Mich. 103 (58 N. W. 663, 23 L. R. A. 693, 43 Am. St. Rep. 436). But this infant lacked the capacity to make him her agent, while there is not the least substance of a claim that either party supposed that such relation existed as a matter of fact.

"It is said that the case is covered by *Apsey* v. *Railroad Co.*, 83 Mich. 432, 440 (47 N. W. 319). The question of imputed negligence is not discussed in that case. It may be inferred that it was not raised. The decision in *Mullen* v. *City of Owosso* was carefully limited to cases of adults, by the writer of the opinion, who participated in the decision of the *Apsey Case*. In some jurisdictions the negligence of parents is imputable to children. Whatever the rule in this State may be as to children of very tender years, having no capacity to care for themselves, that doctrine is not sustained as to infants generally. See *Fye* v. *Chapin*, 121 Mich. 679 (80 N. W. 797), citing *Shippy* v. *Village of Au Sable*, 85 Mich. 280 (48 N. W. 584),

and *Mullen* v. *City of Owosso, supra.* Here no question of the parents' negligence is raised, as in the *Apsey Case;* but, if a child is chargeable with its parents' negligence, does it follow that he should be held responsible for that of strangers at whose invitation he rides? The doctrine is at variance with the overwhelming weight of authority here and in England. If the case of *Apsey* v. *Railroad Co., supra,* must be considered an authority for the proposition that the negligence of a driver is imputable to an infant, it should be overruled."

Nor can it be said upon this record that plaintiff and Rugg were engaged in a common enterprise. We have already stated that plaintiff's older brother Wallace made arrangements with Rugg to call for them and the girls after Sunday school. There is no evidence in the record that plaintiff was a party to this arrangement, or knew of it. It therefore becomes unnecessary for us to determine the question of the effect of plaintiff's minority upon an arrangement which it is not shown he entered into.

Plaintiff, so far as the proof discloses, in no way controlled the operation or movement of the automobile; no act of his, or failure to act on his part, is pointed out which shows contributory negligence on his part, and we have already shown that the driver's contributory negligence is not imputable to him.

We have, therefore, before us in the final analysis a case of injury to plaintiff which a jury would be authorized in finding was produced through the concurrent and contributing negligence of defendant railway company and the driver Rugg, the negligence of the driver not being imputed to plaintiff. Where there are several tortfeasors, more than one negligently contributing to the injury, an action may be maintained against them jointly or severally. *Pruner* v. *Railway,* 173 Mich. 146 (139 N. W. 48); *Cuddy* v. *Horn,* 46 Mich. 596 (10 N. W. 32, 41 Am. Rep. 178); *Malmsten* v. *Railroad Co.,* 49 Mich. 94 (13 N. W. 373).

The plaintiff introduced in evidence an ordinance of the city of Detroit, entitled:

"An ordinance to regulate the speed of street railway cars within the corporate limits of the city of Detroit."

The trial court construed this ordinance, giving force to the view that the ordinance was, among other things, designed to promote an efficient and regular service. Plaintiff insists that the construction is erroneous, and calls attention to an ordinance approved April 15, 1904, which it is thought deals with the latter subject. This ordinance, however, is not before us, and we do not deem it wise to determine this question without both ordinances before us.

It follows from what has been said that the case must be reversed, and a new trial ordered. Plaintiff will recover costs.

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

WEIHE *v.* MACATAWA RESORT CO.

1. INJUNCTION—PUBLIC PARKS—EVIDENCE.
   On a bill by lot and cottage owners against a summer resort corporation to restrain the erection of an addition to a hotel owned by defendant on land claimed to be a public park, evidence *held*, to show that such addition was necessary and would not interfere with certain driveways.

2. DEDICATION—INTENTION OF GRANTORS.
   The question of dedication of land for public purposes is one largely of intention.

3. SAME.

Evidence *held*, insufficient to show dedication of land of a summer resort corporation used for hotel purposes for a public park.

4. HIGHWAYS AND STREETS—ESTABLISHMENT BY PRESCRIPTION.

The mere permissive use of a private road by the public, however long continued, will not make it a public highway.[1]

5. CORPORATIONS—INJUNCTION—SCOPE OF AUTHORITY—ULTRA VIRES.

The question of whether the acts of a summer resort corporation are beyond its powers cannot be raised in a suit to enjoin it from making an addition to one of its hotel buildings on the ground that the land on which the hotel is located is a public park.

Appeal from Ottawa; Cross, J. Submitted June 28, 1917. (Docket No. 71.) Decided September 27, 1917.

Bill by William A. Weihe and another against the Macatawa Resort Company to restrain the erection of a hotel. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Wilkes & Stone, for plaintiffs.

Diekema, Kollen & Ten Cate, for defendant.

STONE, J. This case is here upon the appeal of the plaintiffs from a decree of the circuit court in chancery dismissing the bill of complaint. The bill was filed by two lot and cottage owners in Macatawa Park to restrain the defendant from erecting a building on property claimed to be a public park. Some of these cottages face upon a parcel of land designated upon the plat of Macatawa Park as "Hotel Park." The defendant company operates Macatawa Park as a summer resort. The defendant commenced to construct an addition to its hotel building, located on the land desig-

[1]Authorities passing on the question as to public easements acquired by prescription, are collated in a note in 11 L. R. A. 55.

nated as "Hotel Park," and the plaintiffs by their bill of complaint seek to restrain the erection of such building, claiming that the land so designated as "Hotel Park" is in fact a public park, and that the defendant has no right to erect an addition to the hotel building on the same, to the injury of plaintiffs. The learned circuit judge who heard the case upon the issue joined reached the following conclusion:

"From the proofs it appears that the land designated as 'Hotel Park' has been used as a site for a hotel since the plat was made, and that the land so designated as 'Hotel Park' was reserved as a site for the erection of hotels, and was not dedicated as a public park. The land not being a public park, the plaintiffs have no right to complain of the erection of an addition to the hotel now situated on the land designated as 'Hotel Park.'"

The history of Macatawa Park embraces a period of more than 35 years. There have been four corporations or organizations, to wit, the Macatawa Park Association, the Macatawa Park Company, the Macatawa Association, and finally the present company, the Macatawa Resort Company.

The Macatawa Park Association was incorporated in 1881 under Act No. 122, Pub. Acts 1877, entitled "An act for the incorporation of associations for yachting, hunting, boating, fishing, rowing, and other lawful sporting purposes." An examination of this act will show that no provision was there made for platting real estate.

Act No. 69, Pub. Acts 1887, provided for the formation of corporations for the purpose of purchasing, holding, improving, and disposing of lands or lots for summer resorts. This act also provided for the platting of grounds in accordance with chapter 32 of Howell's Annotated Statutes of 1882, and provided that the roads, ways, and avenues should in all respects be deemed private ways, and only open to the public

upon such conditions and restrictions as the trustees should prescribe.

Proceeding as though they were organized under this last-named act, but without any change in their organization, the officers of the Macatawa Park Association, on the 5th day of May, 1888, filed a plat of their grounds, seemingly in accordance with the provisions of this statute, and containing no dedication whatever of the streets, ways, and alleys to the public. All of the above-named corporations have operated the same resort, and have succeeded to all of the rights, privileges, and property of their respective predecessors.

When the Macatawa Park Association transferred its property to the Macatawa Park Company, its successor, the following resolution was adopted by the board of directors of the Macatawa Park Company on January 24, 1890:

"It was resolved to incorporate under the laws of 1889 with a capital stock of $50,000. All stock of present stockholders is to be exchanged, share for share, all to be paid by stock in said new corporation, and that the property of the Macatawa Park Association be conveyed to the new corporation, provided the same is completed and adopted by all the stockholders at a meeting to be held for that purpose January 28, 1890."

In accordance with the above resolution and the action of the stockholders of the Macatawa Park Association, a deed was made to the Macatawa Park Company on June 23, 1890. The Macatawa Park Company thus organized was reincorporated under Act No. 230, Pub. Acts 1897 (2 Comp. Laws 1915, § 10034 *et seq.*) This act repealed the act of 1889 (Act No. 164, Pub. Acts 1889) under which the Macatawa Park Company was organized, but expressly provided in section 22 (2 Comp. Laws 1915, § 10054) that the re-

peal of the act of 1889, and other acts, should not dissolve any corporation formed or existing under them—

"and all corporations of the nature of corporations authorized to be organized under this act, now organized and existing under said several acts in this section mentioned, or either of them, and all corporations which have attempted to organize and are now doing business under said acts, or either of them, shall be deemed and taken to be organizations under this act, and all rights, obligations and liabilities contracted, acquired or incurred by any such corporation thereunder, shall continue of the same force and effect as though such acts or laws had not been repealed, and all such corporations from and after taking effect of this act, shall be subject to all the provisions hereof as fully as though such corporation had been organized hereunder, and such corporations may continue to carry on the business specified in the articles of association, under the provisions of this act, as lawfully as if said acts, mentioned in this section, were not repealed."

Thus it appears that the Macatawa Park Company retained all rights and privileges conferred by the act of 1889, and such additional rights and privileges as were conferred by said act of 1897.

In 1906 the Macatawa Park Company conveyed all of its property to the Macatawa Association. This was done by deed and bill of sale, and all of the shares of stock held by the stockholders in the Macatawa Park Company were deposited in escrow, to be delivered to the new organization as soon as it had been completed. The Macatawa Association thus succeeded to all of the rights, property, and privileges of its predecessor, and was practically a continuation of the same corporation, under a new name. An attempt was made to sell the stock of this new company, but it failed, and later the fourth company, this defendant, was organized, and became the owner and possessor, through deed and bill of sale, of all of the property, rights, and privileges, of the Macatawa Association,

and assumed all of the association's liabilities. The deed contained the following clause:

"Including in and transferring in this conveyance all the statutory rights and control over the property conveyed hereby, and the parks and streets contained within said recorded plats, and also all riparian rights, including docks, landings, bathing, and boathouses, and all easements and privileges; it being the purpose and intent hereof to convey all the property, rights, interests, and claims of said first party."

We think it appears that the defendant is the successor of these former organizations, and possesses the powers and privileges possessed by any of its predecessors. Among those powers and privileges section 4 of said act of 1889 mentions the following:

"Owning, holding, leasing or disposing of in any manner, and subject to any lawful conditions, real estate situated in this State, not exceeding five hundred acres of land, and all personal property and personal estate which may be necessary to enable such company to carry on the operations and business mentioned in their articles of association; and also, that said association shall be capable of improving, draining and ornamenting their lands, erecting and maintaining hotels, churches and other buildings for their own use and those of visitors to such lands, and may construct docks necessary for the business of such association, and make such provision as may be necessary for supplying their lands, and the people thereon, with water for sanitary and fire purposes."

The purpose of the defendant to carry on this business is clearly set forth in article 2 of its articles of association. The power to own and operate a hotel is expressly given. Before the plat of 1888 was in existence, there was another plat of Macatawa Park which was never recorded. Running through "Hotel Park" from east to west there are two walks, the most northerly of which is known as Interlake walk, and the southerly one is known as Michigan walk. These

walks extend from Black Lake on the east to Lake Michigan on the west. The first hotel on "Hotel Park" was built south of Michigan walk before the plat of 1888 was made. Running through this land marked "Hotel Park" there has been a road used by the public and cottage owners. Some of the materials used for buildings located near "Hotel Park" were drawn over this road. There are from 300 to 400 cottages erected in Macatawa Park.

Plaintiffs own lots 45 and 46; and the large hotel known as the Annex, and covering the space between Interlake and Michigan walks, was built after some of the cottages on these lots were erected. The new addition proposed to be built by the defendant to the Hotel Annex would run in a northeasterly direction fronting on Interlake walk, and would be situated immediately south of lot 46. It is the claim of the defendant that this proposed structure would in no way interfere with the driveway running from Bay road to and along the north side of Hotel Annex; that the ground upon which it would stand is wild and unimproved, no improvements having been made between this driveway and Interlake walk; that the driveway running from Bay road through "Hotel Park" to and along the north side of the hotel is 16 feet wide, and it is proposed to bridge this over, so as to leave the driveway undisturbed.

We think that this claim of the defendant is supported by the evidence. As to the necessity for this proposed addition there can be no question under the evidence. The plaintiffs are not stockholders in the defendant corporation.

It is the claim of defendant that "Hotel Park" was never dedicated as a public park; that it was never intended to be a public park, and has always been used for hotel purposes. It is clear from the evidence that a hotel had been erected upon this site before the plat

of Macatawa Park Company was made and filed. That the question of dedication is one largely of intention is supported by the authorities generally. The intent is the vital principle. *Lee* v. *Lake,* 14 Mich. 12 (90 Am. Dec. 220); *Vance* v. *Village of Pewamo,* 161 Mich. 528 (126 N. W. 978). Many authorities in other jurisdictions might be cited.

We are of the opinion that the finding of the trial court is fully sustained by the evidence. In fact, we have examined this record with care, but in vain, to find any evidence that "Hotel Park" was ever dedicated as a public park. It has been used as a site for hotel purposes, and never as a public park.

We have examined the cases cited by plaintiffs upon this question, and think that in their facts they are readily distinguished from the instant case, and therefore not applicable here.

Under our own decisions, it must also be held, upon this record, that there is no public highway through "Hotel Park" extending from Bay road to Lake Michigan. The mere permissive use of a private road by the public, however long continued, will not make it a public highway. *Stickley* v. *Township of Sodus,* 131 Mich. 510 (91 N. W. 745, 59 L. R. A. 287); *South Branch Ranch Co.* v. *Emery,* 191 Mich. 188 (157 N. W. 419).

In our opinion, the question of claimed *ultra vires* acts of the defendant is not before us in this case. The question is not even suggested in the bill, but if it were, it could not be litigated in this case. *International Harvester Co.* v. *Eaton Circuit Judge,* 163 Mich. 55, 67 (127 N. W. 695, 30 L. R. A. [N. S.] 580, Am. & Eng. Ann. Cas. 1912A, 1022).

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

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

WARREN *v.* FEDERAL LIFE INSURANCE CO.

1. CONTRACTS—TERMS AND CONDITIONS—RESCISSION.
   Where a person accepts a contract and acts upon it he is bound to know its terms and conditions, and he cannot accept its benefits, or a part thereof, and reject the balance, or plead ignorance of its conditions.

2. INSURANCE—LIFE INSURANCE—OPINIONS—FRAUD.
   Statements by an insurance company, which has reinsured a life policy, that dividends ought to operate to reduce very materially the charges against the policy, even though they did not entirely offset them, constitute merely an expression of an opinion as to what might occur in the future and cannot be made the basis of an action for fraud, nor for the recovery of the premiums paid.

3. SAME—PAYMENT OF PREMIUMS—VOLUNTARY PAYMENTS.
   Payments of premiums by an insured on a life policy are voluntary, where the insured is during all the period insured and has the benefits of the policy, and they cannot be recovered back.

4. PAYMENT—VOLUNTARY PAYMENTS—PROTEST.
   Payment made under protest does not change a voluntary into an involuntary payment.

5. INSURANCE—LIFE INSURANCE—REINSURANCE—STATUTES.
   A reinsurance contract is not within the provisions of 2 Comp. Laws, § 7217 (2 Comp. Laws 1915, § 9351), providing that life insurance companies shall not make any insurance contract with any citizen of the State which shall not state distinctly the amount of life benefits, manner of payment, period of continuance and amount of premiums, and that any person who may have paid money therefor may recover same back at any time within six years from date of payment.

6. SAME.
   Even if a reinsurance contract is within the provisions of 2 Comp. Laws, § 7217 (2 Comp. Laws 1915, § 9351), it complies with the statute where the original policy states not only the amount of insurance, but the monthly premium, and the insurer assumed all obligations of the

policy, subject to the terms of a reinsurance contract between it and a third insurance company with which the risk had been previously reinsured, and the legality of the contract is unaffected by a demand of a greater than the specified premium.

7. SAME—LIFE INSURANCE—REINSURANCE — NONCOMPLIANCE WITH STATUTE—ESTOPPEL.

In an action against an insurance company, which had reinsured a life risk, to recover premiums paid, *held*, that plaintiff was estopped from invoking the provisions of 2 Comp. Laws, § 7217 (2 Comp. Laws 1915, § 9351), relating to the requirements of life insurance policies and giving the right of action for recovery of premiums paid under policies not complying with the statute.[1]

Error to Eaton; Smith, J. Submitted June 8, 1917. (Docket No. 21.) Decided September 27, 1917.

Assumpsit by Frederick G. Warren against the Federal Life Insurance Company for premiums paid on a policy of insurance. Judgment for plaintiff. Defendant brings error. Reversed, and no new trial ordered.

Cummins, Nichols & Rhoads (*C. A. Atkinson,* of counsel), for appellant.

Frank A. Dean, for appellee.

STONE, J. This is an action in assumpsit to recover premiums paid by plaintiff to the defendant upon a life insurance policy. The case was tried by the court without a jury, and the trial court made a written finding of facts and law, and rendered a judgment for the plaintiff in the sum of $1,559.06, damages, with costs of suit.

The main facts are not in substantial dispute, and they are stated by the defendant and appellant substantially as follows:

On October 15, 1898, the Merchants' Life Insurance

[1]On the question of liability of reinsurer, see notes in 8 L. R. A. (N. S.) 845; 44 L. R. A. (N. S.) 317.

Company of Detroit issued its policy upon the life of the plaintiff for $2,000. The company was what is termed "an assessment company." The premium specified in the policy was $4.20 per month. It contained a clause giving the right to the company, should any emergency arise, through epidemic or otherwise, whereby the premiums should be insufficient to meet the mortuary requirements, to levy additional premiums to meet such emergency. This clause is referred to in the record as the "assessment" or "safety" clause.

On November 1, 1900, the plaintiff was reinsured in the Union Life Insurance Company of Indiana. That company accepted and assumed all liability arising under the policy issued by the first-named company, without any qualifications or restrictions. That was also an assessment company.

On July 16, 1904, the plaintiff was reinsured by the defendant, the Federal Life Insurance Company. It is not an assessment company, but is what is known as an "old-line," or "legal reserve company." The defendant assumed the policy of the Union Life Insurance Company only in accordance with the contract of reinsurance between it and the said Union Life Insurance Company made on the same day. The certificate issued to the plaintiff by the defendant was substantially as follows:

"This policy of reinsurance is issued to Frederick G. Warren, to be attached to certificate or policy No. 5510 of the Union Life Insurance Company of Indiana, and subject to all the provisions of the contract of reinsurance between said Union Life Insurance Company and this company, dated July 16, 1904, constitutes policy No. 7184 of the Federal Life Insurance Company of Chicago, Illinois.

"Whereas, the said Federal Life Insurance Company does hereby assume the foregoing certificate or policy of said Union Life Insurance Company in ac-

cordance with the terms of said reinsurance contract; Now therefore, this policy and the said certificate to which it is to be attached, constitute the holder thereof, a policy holder of the said Federal Life Insurance Company, and the said Federal Life Insurance Company hereby assumes and guarantees any liability which may hereafter be established on account of such original policy or certificate, subject to the terms and conditions hereof, and of said reinsurance contract; provided that all premiums required to maintain such policy or certificate in force shall be paid to said Federal Life Insurance Company, as provided in the said original policy, or certificate, and said reinsurance contract. No change of policy or certificate further than the attachment of this reinsurance policy to said policy or certificate of the said Union Life Insurance Company, is necessary in order to bind the said Federal Life Insurance Company to the payment of the same, subject to the provisions hereof, and of the said reinsurance contract."

The reinsurance contract between the defendant and the Union Life Insurance Company, dated July 16, 1904, was received in evidence, and is contained in the record. Article 22 of this agreement expressly provided that the "assessment" or "safety" clause, above referred to, should be eliminated, thereby placing the policy upon an old-line, or legal reserve basis. Article 21 of said contract provided that the necessary reserve not having been accumulated for the proper protection of the policies reinsured and transferred thereunder, the defendant should be authorized to charge against such policies assumed by it a reserve lien, based upon the American table of mortality, with 3½ per cent. interest. This same clause provided that in cases where the premium or assessment theretofore paid by any policy holder in the Union Life Insurance Company was less than the premium rate of the Federal Life Insurance Company for a policy of the same amount and similar in form, then the defendant was authorized to require the payment in cash of the dif-

ference in premiums, or to charge the same against said policies, as an additional lien, from and after the date of the contract. The plaintiff testified that he accepted all of these policies, including the one issued by the defendant.

On the same day that the insurance contract was made and the certificate of reinsurance issued to the plaintiff, the defendant sent a letter to plaintiff, advising him of his reinsurance, and stating that such reinsurance was subject to the terms of the contract, between the Union Life Insurance Company and the defendant, dated July 16, 1904, and further advising the plaintiff that the defendant was, and always had been, strictly an old-line legal reserve company. This letter the plaintiff admits he received, about the time that he received his policy of reinsurance. On the same date, the Union Life Insurance Company issued a circular letter to its policy holders, advising them of the reinsurance in the defendant company, and stating that the assessment clause above referred to had been eliminated from each policy, and that all such policies were placed upon a legal reserve basis. This letter the plaintiff testified he must have received. It appeared in evidence that the plaintiff was a man of intelligence and business experience, and had been engaged in the life, accident, and fire insurance business.

On August 2, 1904, the plaintiff, in a letter to the defendant, acknowledged the receipt of his policy and stated:

"I see that policy is subject to all the provisions of the contract between the Union Life and your company; hence, not knowing what those provisions are, I would be pleased if you would inform me."

On August 5, 1904, defendant's secretary replied to this letter by a letter which the trial court characterized as of the "spider and fly" grade. The substance of it was as follows:

"We have your favor of recent date making remittance for monthly premium on policy 7184. Proper receipt for the same is herewith inclosed.

"The contract about which you make inquiry was passed upon by a committee named by the policy holders of the Union Life, and on this committee was an expert insurance man and two leading attorneys of the State of Indiana. After a careful and extended consideration, the contract was given the unanimous approval of the committee, and thereafter executed by the officers of the company in compliance with instructions given them by the policy holders in meeting assembled. The assessment or safety clause formerly embraced in the Union Life policies is absolutely eliminated, and everything in connection with the policies will hereafter be based upon definite and specific guaranties. Each policy holder will hereafter be allowed thirty days of grace for the payment of his premiums, without regard to whether this was provided for in his original policy. The operation of the contract is to place each policy, as nearly as possible, upon the same basis, as would have been the case had it been issued originally by our company which is now and always has been a legal reserve company. In placing the Union Life policies upon a legal reserve basis, they are surrounded by all of the protection which the legal reserve laws give to policy holders in 'old-line' life insurance companies."

There was no further correspondence between the parties for nearly a year, and the plaintiff continued to pay the premiums of $4.20 per month as provided in his original policy.

Frank Hill, an agent of the defendant, testified that on April 24, 1905, he visited the plaintiff at Charlotte, and then explained to him fully concerning his policy, the liens thereon, and the difference in the premiums, and the steps which the plaintiff might take to relieve his policy from the liens. He could not remember whether he showed the plaintiff the reinsurance contract or not. He identified certain cards, memorandum, and reports which he made at that time, and

which were filed with the company, in which the figures with reference to the status of the policy, and the liens thereon, and the difference in the premiums between the Union Life and the Federal Life were clearly stated. The plaintiff was at first inclined to deny this claimed visit of Mr. Hill, but afterwards stated that he could not remember it, but it was undisputed that on May 22, 1905, a little less than 30 days after Mr. Hill's claimed visit, the plaintiff made out an application for the removal of the impairment lien. There is no doubt that Mr. Hill visited the plaintiff, and explained these liens; otherwise there is no accounting for the fact that within a month thereafter the plaintiff made formal application to have the impairment lien removed. There was then some correspondence between the plaintiff and the medical examiner of defendant relative to a discrepancy in plaintiff's age. On June 6, 1905, the plaintiff was advised by the defendant that the impairment lien against his policy had been removed, and a credit of $21.60, formerly deducted from such impairment lien, had then been credited to plaintiff's reserve lien. Following this, no further correspondence was had between the parties until on or about February 8, 1907. In the meantime plaintiff continued to pay the old premium of $4.20 per month.

On February 8, 1907, the defendant wrote to the plaintiff, stating that after a careful computation made of the expense of carrying his policy, it had been shown that the cash payment which he had been paying theretofore, which was the old Union Life rate, was insufficient to meet the current cost of carrying his policy, and that the company was obliged to notify the plaintiff that it would be necessary thereafter for him to pay in cash the full Federal premium of $11.92 monthly. In this letter the defendant also stated that the difference between the Union Life and the Federal

Life premiums had been theretofore charged as a lien against the plaintiff's policy, and quoted from article 21 of the reinsurance contract, which granted to the defendant the right to require the payment in cash of the said difference in premiums, or to charge the same against the policy as an additional lien. It was also stated in this letter that if the plaintiff desired to exchange his policy for a new one, with premiums as above indicated, the company would arrange to do so. It is clear from the record that, after receiving defendant's letter of February 8, 1907, the plaintiff replied to such letter, and remitted the increased premium as requested.

The letter of March 5, 1907, from the defendant to the plaintiff, seems to be the letter upon which this action for alleged fraud and deception is based. In this letter the plaintiff was again advised specifically as to the lien for reserve that had been charged against his policy, with interest on the same, and of the lien arising because of the difference in premium between the Union premium and the Federal premium, with the interest on the same. These liens, with the interest at that time, as stated, amounted to $689.46. It is not claimed by plaintiff that these liens were not in strict accord with the reinsurance contract. This letter contained this clause:

"Your policy is a participating policy and not a non-participating policy, as you may suppose. At the end of five years from the date of its reinsurance by this company, we agree to distribute a dividend to the persistent policy holders who are then in good standing, and at the end of each five-year period thereafter. This dividend, in your case, ought to operate to reduce very materially your charges, even though it does not entirely offset them."

The record shows that the plaintiff's policy was afterwards credited with certain dividend additions, amounting to $53.44.

On March 7, 1907, plaintiff replied to defendant's letter of March 5th, stating that he did not fully understand defendant's proposition, saying:

"You say that my insurance is carried upon your books at age 55, that being my age when policy was issued by the Union Life. If I am to pay $11.92 monthly, besides a lien upon my policy, wherein is the benefit to me of continuing the policy?"

The plaintiff in this letter then discussed the question of taking out a new policy, and made some inquiry as to premiums. On March 9, 1907, the defendant replied to this letter, quoting a premium of $123.88 for age 60, stating:

"There would be the reserve for the three years premium past due, which would amount to $263.76. This reserve would be charged against your policy, bearing 5% interest annually."

This same letter stated that if the plaintiff desired to avail himself of such policy, it would be necessary to have the reserve lien placed against the same, as stated. The matter seems to have been dropped at this point, and there was no further correspondence between the parties until December 6, 1915, a period of over 8 years. During all of this time, the plaintiff continued to pay the monthly premiums of $11.92, and made no objection or protest of any kind, as to such payments; and during all of this time, of course, the plaintiff was insured for $2,000, less the liens that existed against the policy. On December 6, 1915, plaintiff addressed a letter to the defendant, asking it to inform him as to the present standing of his policy, and as to the amount of the dividends accrued thereon, etc.

On December 8, 1915, the defendant replied to this letter, advising the plaintiff fully as to the status of his policy. From this letter it appears that the only difference in the condition of the policy on December

8, 1915, and March 5, 1907, was that on December 8, 1915, the policy had been credited with a dividend addition of $53.44, and charged with the accumulated interest on the reserve liens. So that where in 1907 the total charge for liens and accumulated interest against the policy was $689.46, on December 8, 1915, it was $976.86, the difference arising entirely from the items of accumulated interest on the liens against the policy. This letter was replied to by the attorney for the plaintiff, demanding the return of all the premiums paid, and he quoted from the clause in the letter of March 5, 1907, that the dividend in plaintiff's case "ought to operate to reduce very materially his charges, even though it did not entirely offset them," and that the plaintiff, believing these representations to be true, had continued to pay the premiums due on his policy.

The defendant proposed extended amendments to the findings of fact and law, which were all refused by the trial court, and exceptions were duly filed to such refusal. Exceptions were also filed to the findings of fact, for the reason that such findings were against the clear weight of evidence, and also that the findings of fact did not support the judgment. These questions and many others are raised by the assignments of error, on defendant's appeal.

It is said by appellant that the principal questions involved in the case are:

(1) Do the facts in the case give rise to any cause of action on the ground of fraud or misrepresentation, whereby the plaintiff is entitled to recover insurance premiums paid by him?

(2) Is the reinsurance contract of the defendant in violation of section 7217, 2 Comp. Laws (2 Comp. Laws 1915, § 9351), and, if so, has the plaintiff a right to recover premiums by reason thereof?

1. It is urged in argument by the appellant that the policy contract was fair. It clearly appears that the

defendant company was what is known as an old-line company; that is, it was required to maintain a legal reserve. All of the previous companies in which the plaintiff had been insured were assessment companies, containing "assessment" or "safety" clauses. It was provided in the contract that this clause should be eliminated, and that the policies should be placed upon a legal reserve basis. The defendant, under its contract with the Union Life, took over the policy holders at the age at which they were insured in the Union Life. The plaintiff had been carried in the last-named company at the age of 55 for about 4 years, at a rate of premium which would not create any legal reserve for that period of time. It was necessary, therefore, for the defendant, in order to comply with its charter, and the law, to charge plaintiff's policy with a lien equivalent to the legal reserve for that period of time, and which would have been created by the payment of the larger premium had the plaintiff been insured in the defendant company in the first instance.

It appears also that by the terms of the reinsurance contract, the defendant had the right to charge as a lien against plaintiff's policy the difference between the Union Life rate of $4.20 per month and the regular Federal rate of $11.92 per month, or, at the option of the defendant, it might require the difference in premium to be paid in cash. Not only was this contract fair to the plaintiff, but, as the evidence showed, it was necessary in order for the defendant to comply with its charter and the statutes of this State.

Complaint is made by the plaintiff that this policy contract was unfair because the longer plaintiff lived the less his beneficiary would receive. It is manifest that, in all life insurance policies the longer a man lives the less he gets so far as the difference between the face of his policy and his premiums are concerned, and in case there are liens existing against the policy,

and there are no payments of interest on the same it must follow that the longer a man lives and does not pay either the principal or interest on the liens against his policy, the less value will the policy be to his beneficiary upon his death. But that does not make the policy unfair.

It is also the claim of the plaintiff that he was never informed of the terms and conditions of the reinsurance contract referred to. The policy above set forth gave him explicit notice of the existence of such contract, and that his policy was expressly subject to all of its terms and conditions. He was also advised of the general nature of the contract. He was a man of experience and business judgment. When a man accepts a contract, and acts upon it as the plaintiff did in this case, he is bound to know its terms and conditions. He cannot accept the benefits of a contract, or part of it, and reject the balance, or plead ignorance of its conditions. *Converse* v. *Blumrich,* 14 Mich. 109 (90 Am. Dec. 230); *Sanborn* v. *Sanborn,* 104 Mich. 180 (62 N. W. 371); *Moore* v. *Township of Kenockee,* 75 Mich. 332 (42 N. W. 944, 4 L. R. A. 555); *Mishawaka Woolen Manfg. Co.* v. *Stanton,* 188 Mich. 237, 250 (154 N. W. 48, L. R. A. 1917B, 651), and cases there cited.

In his declaration the plaintiff bases his right of action, in so far as fraud is concerned, solely upon defendant's letter of March 5, 1907, and in particular upon that part of it stating that the dividends ought to operate to reduce very materially the charges against his policy, even though it should not entirely offset them. We do not think that such statement was a misrepresentation of any fact. It was but the mere expression of an opinion, and afforded no basis for an action of fraud or misrepresentation of fact. In *Myers* v. *Building Ass'n,* 117 Mich. 389 (75 N. W.

944), Justice MOORE, in speaking of similar statements, said:

"It is claimed on the part of the association that the statements of its officers as to how soon the shares of stock would attain their full value, and how low the rate of interest to the borrower would be, are but matters of opinion, and cannot be treated as fraudulent representations. We think this contention is sustained by the following authorities: *Lake* v. *Loan Ass'n*, 72 Ala. 207; *Hammerslough* v. *Savings Ass'n*, 79 Mo. 80; *American Building & Loan Ass'n* v. *Bear*, 48 Neb. 455 (67 N. W. 500)."

See, also, *Bristol* v. *Braidwood*, 28 Mich. 191.

Counsel for plaintiff claims that the instant case is governed by *Stoddard* v. *Loan Ass'n*, 138 Mich. 73 (101 N. W. 50). A reference to that case will show that the cases are distinguished. In fact that case refers to the *Myers Case* with approval. In Smith on Frauds, § 7, p. 17, that author says:

"Representations having reference to the future merely, however much relied upon, do not constitute a cause of action or a defense."

Many other cases in other jurisdictions are cited by defendant in support of this doctrine. In the very nature of the statement it could be nothing more than the expression of an opinion as to what might occur in the future, and under the law cannot be made the basis of an action for fraud, nor for the recovery of the premiums plaintiff paid to defendant. *Dieterle* v. *Enamel Co.*, 143 Mich. 416 (107 N. W. 79).

We are of the opinion also that under all of the authorities the payments made by the plaintiff were all voluntary payments. He was during all of the period insured, and had the benefits of the policy. Under such circumstances the payments cannot be recovered back. *Wheeler* v. *Hatheway*, 58 Mich. 77 (24 N. W. 780); *Tompkins* v. *Hollister*, 60 Mich. 485 (34 N. W. 551); *Francis* v. *Hurd*, 113 Mich. 250, 256 (71

N. W. 582); *Vereycken* v. *Vanden Brooks,* 102 Mich. 119 (60 N. W. 687).

Payment made under protest does not change a voluntary into an involuntary payment. *City of Detroit* v. *Martin,* 34 Mich. 170 (22 Am. Rep. 512); *Congdon* v. *Preston,* 49 Mich. 204 (13 N. W. 516). Many other cases outside of Michigan might be cited to the same effect.

2. It is the claim of the plaintiff that he has a right to recover by virtue of the provisions of section 7217, 2 Comp. Laws (2 Comp. Laws 1915, § 9351). This statute provides that life insurance companies shall not make any insurance contract with any citizen of this State, "which shall not distinctly state therein the amount of such life benefits, the manner of payment, the period of the continuance thereof and the amount of the annual, semi-annual or quarterly premium" and that:

> "Any person who may have paid moneys therefor, shall be entitled to recover the same back, from the person to whom it was paid * * * by action of assumpsit to be brought at any time within six years after such payment."

It is the claim of the defendant, not only that a reinsurance contract is not within the meaning of this statute, but that if it were, the policy contract in this case complies in every respect with the provisions of the statute. It is urged that the original policy in the Merchants' Life Insurance Company states, not only the amount of the insurance, but the monthly premium; that the certificate of reinsurance which defendant issued assumed all of the obligations of this contract or policy, subject to the terms and conditions of the reinsurance contract between it and the Union Life Insurance Company; that so far as the contract itself was concerned, it specified upon its face the premium to be paid, and that if under its reinsurance

contract with the Union Life, the defendant demanded of the plaintiff more than was specified in the policy contract, that demand, in and of itself, did not affect the legality of the contract in so far as this statute is concerned. We are of the opinion that this position of the defendant is correct, and, further, that under the circumstances of this case the plaintiff should be held estopped from invoking the provisions of the statute.

By section 15 of chapter 18 of the judicature act (Act No. 314, Pub. Acts 1915, 3 Comp. Laws 1915, § 12587), it is provided that in cases tried before the court, either party may file exceptions to the findings of facts, that such findings are against the clear weight of the evidence, and may assign error upon such exceptions, and upon appeal the same shall be reviewed by this court.

The defendant has invoked this statute. We are of opinion that the findings of facts in the court below were against the clear weight of the evidence. For this and the other reasons stated herein the judgment of the court below is reversed, with costs to the appellant, and no new trial will be granted.

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

LIPP *v.* JACOBS.

1. FRAUDULENT CONVEYANCES—EVIDENCE—SUFFICIENCY—STATUTES.
   The requirements of 3 Comp. Laws, § 10203 (5 How. Stat. [2d Ed.], § 12864), relating to a *prima facie* case in suits begun by a bill in aid of execution, are met where plaintiff introduces the judgment in an action against a person exchanging property with plaintiff for fraudulent representations as to the exchanged property as alleged in the bill of complaint, the execution and levy, and the record thereof and the conveyance from plaintiff to the purchaser and her husband, and evidence tending to show that the whole of the consideration paid for the property conveyed by the deed was paid by the purchaser.

2. SAME—BILL IN AID OF EXECUTION—SUFFICIENCY OF ALLEGATIONS—RELIEF.
   Where a judgment at law had been obtained for fraudulent representations as to exchanged property, a bill in aid of execution alleging that the purchaser caused the deed from plaintiff to run to the purchaser and her husband for the purpose of making them tenants by the entirety, so that the premises would not be subject to execution levy, and that title was so taken to hinder, delay, and defraud the creditors of the purchaser, and for the purpose of defrauding plaintiff out of her just dues and demands, and to prevent her realizing upon any judgment she might secure against the purchaser by reason of the fraud practiced upon plaintiff, was sufficient to warrant relief so far as the deed gave any title to the husband of the purchaser.[1]

3. SAME.
   The mere fact that an execution creditor is herself the grantor in a deed does not preclude the maintenance by her of a bill in aid of execution against the purchaser.

4. SAME.
   Evidence *held*, sufficient to show that the conveyance was made to the purchaser and her husband at the request of the purchaser.

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[1]On condition precedent to equitable remedies of creditors in case of fraudulent assignment, see note in 23 L. R. A. (N. S.) 113.

5. SAME.

Under 3 Comp. Laws, § 9167 (3 Comp. Laws 1915, § 12897), providing that all real estate of any debtor, including legal and equitable interests in lands acquired by parties to contracts for sale and purchase of land, including lands fraudulently conveyed with the intent to defeat, delay or defraud his creditors, shall be subject to execution where a contract for the exchange of real estate is entered into and one purchaser takes title to the exchanged property in the names of herself and husband for the purpose of defrauding the seller and other creditors, the interest of the purchaser may be subjected to execution.

Appeal from Lenawee; Hart, J. Submitted June 7, 1917. (Docket No. 11.) Decided September 27, 1917.

Bill in aid of execution by Clara C. Lipp against Carrie Jacobs and another. From a decree for plaintiff, defendants appeal. Affirmed.

Baldwin, Alexander & Russell, for plaintiff.

James W. Helme, for defendants.

STONE, J. The bill of complaint filed in this cause was in aid of execution. Prior to the 8th day of November, 1913, the plaintiff was the owner of a certain house and lot in the village of Blissfield, Mich., and the defendant Carrie Jacobs was the owner of a farm of 120 acres situated in Monroe county. On the date aforesaid the plaintiff and said defendant entered into a contract which was as follows:

"This contract, made and entered into this 8th day of November, 1913, by and between Carrie Jacobs, party of the first part, and Clara C. Lipp of the second part, witnesseth:

"Said first party, for and in consideration of said second party deeding, by warranty deed, the following described property, viz.: The south forty-eight (48) feet of lot No. seventeen (17) of Giles' addition to Blissfield village, according to a recorded plat thereof, and the further payment on March 1, 1914, of two

thousand ($2,000) dollars in cash and the execution of a mortgage for eight thousand ($8,000) dollars payable on or before five (5) years from March, 1914, bearing interest at the rate of five (5%) per cent. per annum, payable annually, with the privilege granted to pay five hundred ($500) dollars or any multiple thereof at any time, hereby agrees to convey by warranty deed and furnish an abstract of title showing a good merchantable title to the following described property, to wit: The west half of the southeast quarter of the southeast quarter of section 34; also the southeast quarter of the southeast quarter of said section 34—both in town seven (7) south, range six (6) east, in Summerfield township, Monroe county, Michigan, and containing one hundred twenty (120) acres of land, more or less, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining. Said first party further agrees to install fourteen (14) stanchions in barn, to repair outside entrance to house cellar, also to repair roof on house, all without cost to second party.

"It is mutually agreed that each of the parties hereto shall pay all taxes for the year 1913 on the respective properties to be by them conveyed, and each party shall on March 1, 1914, deliver to the other party a proper receipt showing that such taxes have been by them paid. It is further agreed and understood that said second party shall have the income from the rental until March 1, 1914, on the property deeded to first party, and that first party shall accept title subject to a certain lease to Stephen H. Leonard which said lease expires April 1, 1914.

"In witness whereof, the respective parties hereto have hereunto set their hands and seals this 8th day of November, 1913.

"CARRIE JACOBS,
"First Party.
"CLARA C. LIPP,
"Second Party."

On the day of the date of this contract plaintiff executed a deed of the house and lot. At the request of the defendant Carrie Jacobs, the deed was made to

her and her husband, Charles A. Jacobs, the other defendant, as husband and wife. Later Carrie Jacobs made a deed of her farm to plaintiff, who paid $2,000 in cash and gave back a mortgage in compliance with the contract. On the 28th day of May, 1915, plaintiff obtained a judgment in the circuit court for the county of Lenawee against defendant Carrie Jacobs for damages in the sum of $1,997.75 and costs, which costs were afterwards taxed at the sum of $100.95.

Counsel for plaintiff in their brief assert that the action was to recover damages resulting from fraudulent representations made by defendant Carrie Jacobs to plaintiff prior to and on November 8, 1913, regarding the farm afterwards conveyed to plaintiff. It is stated by the defendants' counsel that there was no evidence in the case in support of this assertion as to the basis of the judgment. We find the bill definitely makes the claim, and the same is not very distinctly covered by the answer. The circuit judge found in the instant case as follows:

"Plaintiff afterwards brought a suit on the law side of the circuit court for this county [Lenawee] against the said Carrie Jacobs, claiming fraud by the said Carrie Jacobs in the sale of said farm."

We find no evidence in the record upon this subject, and the certificate of the circuit judge was that the record contains the *substance* of all the evidence given or read upon the hearing. An execution was issued out of said court on said judgment, and a levy made on the house and lot, which had been conveyed by said plaintiff to the defendants; said levy having been made June 21, 1915.

The bill of complaint in this case was filed on the 3d day of September, 1915, against the defendants in aid of execution, and prayed that the title to the premises described in the bill may be decreed to be in said Carrie Jacobs, and that said Charles A. Jacobs be

decreed to have no interest therein whatever, and that the sheriff of said county be directed to proceed in the execution of said writ of *fieri facias*, and to advertise and sell the said lands and premises by virtue thereof in due form of law for the payment and satisfaction of said judgment of plaintiff, with interest and costs, and that the purchaser or purchasers at such sale take all the right, title, and interest of the said Carrie Jacobs in and to said lands. It is alleged in the bill of complaint that the said Charles A. Jacobs paid no portion of the purchase price of the said house and lot.

At the close of the plaintiff's proofs counsel for defendants moved to dismiss the bill, "on the ground that plaintiff had submitted no proofs that entitled her to a decree, and that a bill to aid execution was not the proper remedy." No proofs were offered on the part of the defendants. The case was heard upon pleadings and proofs offered by the plaintiff, and the court granted the relief prayed for. The defendants have appealed.

There are two main questions discussed by counsel:

(1) Did the proof offered support the decree entered?

(2) Is a bill in aid of execution the proper remedy?

1. Section 12864, 5 How. Stat. (2d Ed.) provides that in all suits begun by a bill in aid of execution the complainant shall make a *prima facie* case by introducing in evidence the judgment against the principal defendant, the execution, with the levy thereon indorsed, and proof of the conveyance complained of. The burden of proof shall then be upon the judgment debtor, or the person or persons claiming through or under him, to show that the transaction or transactions are in all respects *bona fide*, etc. No proof having been offered by the defendants, it cannot well be said that they had discharged any burden, if there was one resting upon them. The record shows that the plain-

tiff introduced in evidence the judgment as alleged in the bill of complaint, the execution and levy, and the record thereof, and the conveyance from the plaintiff to Charles A. Jacobs and Carrie Jacobs. There was also evidence, beyond what was required of the plaintiff, tending to show that the whole of the consideration paid for the property conveyed by the deed was paid by the defendant Carrie Jacobs. If a bill in aid of execution was the proper remedy, we think the plaintiff satisfied the statute by her evidence.

2. This brings us to the second question, as to whether a bill in aid of execution was the proper remedy. It is urged by defendants' counsel that, the deed complained of having been made by the plaintiff, she had no legal right to file a bill to have the deed set aside on the ground of fraud. It is also urged that the defendant Carrie Jacobs never had any title to the house and lot, and that the conveyance complained of was not made by her. There is much discussion in the briefs of counsel as to whether an attempt is made to set aside the conveyance, or to set aside that part of the conveyance which purports to vest any title in the defendant Charles A. Jacobs. The allegations of the bill are as follows:

"Your oratrix further shows and charges the fact to be that the said Carrie Jacobs caused the deed to said premises, made by your oratrix as aforesaid, to run to the said Charles A. Jacobs and Carrie Jacobs as husband and wife, for the purpose of making them tenants by the entirety, and placing the title to said premises so that said premises would not be subject to execution levy, and said title was so taken to hinder, delay, and defraud the creditors of said Carrie Jacobs, and for the purpose and with the intention of defrauding your oratrix out of her just dues and demands, and to prevent her realizing upon any judgment that your oratrix might secure against the said Carrie Jacobs by reason of the fraud practiced by the said Carrie Jacobs upon your oratrix as aforesaid."

We think the prayer of the bill, already referred to, sufficient to warrant relief in that regard. Really it is not claimed that the entire deed was void, but that that portion of it which gave any title to Charles A. Jacobs was fraudulent and void, and the plaintiff claims that the deed gave Carrie Jacobs a complete title to the premises.

We do not think there is much force in the claim that plaintiff cannot ask and obtain relief as to the deed in question, simply because it was executed by her. If the plaintiff were some other judgment creditor, the same objection would probably be made that the legal title had never been in the defendant Carrie Jacobs. It is urged by defendants' counsel that there was no evidence that the conveyance was made to the two defendants at the request of Carrie Jacobs; but we think that this may be fairly inferred from the circumstances of the case, as the matter inured to their benefit.

It will be noted that the defendant Carrie Jacobs acquired her first interest in the premises by virtue of the contract entered into between her and the plaintiff. The husband, Charles A. Jacobs, is nowhere mentioned in this contract. This was a good and valid contract of purchase of real estate, and gave such an interest to Carrie Jacobs as would be subject to levy on execution. Section 11321, 4 How. Stat. (2d Ed.), 3 Comp. Laws 1915, § 12897, provides, among other things, as follows:

"All the real estate of any debtor, including legal and equitable interests in lands acquired by the parties to contracts for the sale and purchase of lands, whether in possession, reversion or remainder, including lands fraudulently conveyed, with intent to defeat, delay or defraud his creditors, and the equities and rights of redemption hereinafter mentioned, shall be subject to the payment of his debts, liabilities and obligations, and may be levied upon and sold on execution as hereinafter provided."

A subsequent portion of the same section provides:

"That in case of a levy upon the equitable interest of a judgment debtor, the judgment creditor may, before sale, institute proceedings in aid of * * * execution, to ascertain and determine the rights and equities of said judgment debtor, in the premises so levied upon."

It is urged by plaintiff that it is not important that Carrie Jacobs did not have complete title to the premises in question, or that she did not make the conveyance; that she had an interest upon which she has attempted to create a charge, so that it could not be reached by her creditors. Section 11417, 4 How. Stat. (2d Ed.), 3 Comp. Laws 1915, § 11998, is as follows:

"Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and any charge upon lands, goods or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with a like intent, as against the persons so hindered, delayed or defrauded, shall be void."

It is the claim of plaintiff's counsel that her position is sustained by the following cases: *Foster* v. *Whelpley,* 123 Mich. 350 (82 N. W. 123); *Newlove* v. *Callaghan,* 86 Mich. 297 (48 N. W. 1096, 24 Am. St. Rep. 123); *Michigan Beef & Provision Co.* v. *Coll,* 116 Mich. 261 (74 N. W. 475); *St. Louis Hoop & Stave Co.* v. *Danforth,* 160 Mich. 226 (125 N. W. 5). In *Foster* v. *Whelpley, supra,* the judgment debtor, Whelpley, held a part-paid certificate to primary school lands. He assigned an undivided one-half interest in the premises to his wife and later the balance due was paid to the State and the patent issued to the judgment debtor

and his wife as tenants by the entireties. Execution was levied upon the lands in question, and a bill in aid of execution was filed to reach the undivided interest of the judgment debtor and subject it to sale. It was contended by the defendants that, as the judgment debtor had never had the legal title to the lands levied upon, the complainant had mistaken his remedy. Mr. Justice MOORE, in speaking for this court, said:

"It is an answer to the last claim to say that, under the express provisions of the statute and the decisions of this court, the undivided interest which Mr. Whelpley had in the land, prior to the issuance of the patent, could be reached by execution" citing section 1332, 1 Comp. Laws (1 Comp. Laws 1915, § 507); *Kercheval* v. *Wood*, 3 Mich. 509; *Allen* v. *Cadwell*, 55 Mich. 8 (20 N. W. 692).

We think the question is clearly decided in *St. Louis Hoop & Stave Co.* v. *Danforth, supra.* That was a combined creditors' bill and bill in aid of execution. The portion which we here refer to was in aid of execution. The fourteenth paragraph of the bill of complaint in that case was as follows:

"Your orator further shows that after the indebtedness upon which the said several judgments were rendered had accrued, to wit, on the 6th day of December, 1900, said Elmer M. Danforth purchased from Henry A. Macomb and William Stanton, executors of the last will and testament of Mary E. Macomb, deceased, and Stephen K. Stanton, William Stanton and Louise Stanton, his wife, Robert L. Stanton and Grace Stanton, his wife, and De Lagnel Berier the premises described in paragraph 7 herein for the consideration of $2,375; that with the purpose and intention of defrauding your orator and his other creditors, and for the purpose of hindering and delaying your orator in the collection of its just claims, and to prevent a levy and sale of said premises under and by virtue of said writs of *fieri facias*, the said Elmer M. Danforth procured and obtained a deed of said premises to be made and delivered to himself and his wife, Annettie Danforth,

defendant herein, and that the consideration therein mentioned, or at least one-half of said consideration, was paid by the said Elmer M. Danforth, and that the said Elmer M. Danforth is the owner of at least one-half of said premises."

Among the things prayed for in the bill was the following:

"That the said conveyance of the said described property, namely, lot 915, being a part of the Stanton farm, so-called 'private claim 473,' and being so numbered and described by and according to the recorded plat of a portion of said farm recorded in the register's office of the county of Wayne in liber 6 of plats, p. 26, to the said Elmer M. Danforth and Annettie Danforth, may be held and decreed subject to the said levies of your orator, and that the same, or the title and interest of the said Elmer M. Danforth therein, may be sold to satisfy said judgments, costs, and the interests thereof, and the costs of this suit."

The decree below in that case authorized the sale of the entire property. It was in this court modified, so as to provide for the sale of an undivided one-half of the property. It will be observed that in that case the title never had been in Elmer M. Danforth; that he had made a purchase of it, and then procured and obtained a deed of the premises to be made to himself and wife. We think the case almost parallel with the instant case in that respect. It shows that an execution had been levied thereon and was permitted to be sold to satisfy the judgment and costs.

Counsel for the defendants, in support of the proposition that a bill in aid of execution will not lie in this case, has cited the following cases: *Trask* v. *Green,* 9 Mich. 358; *Maynard* v. *Hoskins,* 9 Mich. 485; *Lee* v. *Enos,* 97 Mich. 276 (56 N. W. 550); *French* v. *Newberry,* 124 Mich. 147 (82 N. W. 840); *Bliss* v. *Tyler,* 159 Mich. 502 (124 N. W. 560). We have examined these cases in connection with the other authorities cited, and think that they are readily distinguished on

their facts from the instant case. We think that it cannot be seriously contended that a contract interest in lands is not subject to sale on execution under the statute which we have already referred to. *Welsh* v. *Richards*, 41 Mich. 593 (2 N. W. 920); *Grover* v. *Fox*, 36 Mich. 453, 459.

The learned circuit judge found that the house and lot in question was the sole property of the defendant Carrie Jacobs, in so far as the judgment in evidence was concerned, and that she was the real owner of said house and lot, and that the sheriff might proceed to sell the same upon said execution levy. That defendants did not see fit to introduce any evidence in the case was neither the fault of the plaintiff nor of the court.

We think this bill filed in the aid of execution was the proper remedy, and the decree of the circuit court is affirmed, with costs.

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

DATTNER *v.* WEISZ.

1. JUSTICES OF THE PEACE—APPEALS—PLEADING — LACHES — DISCRETION OF COURT—ABUSE OF DISCRETION.

   Where nearly four months had elapsed after an appeal was taken in an action in the justice's court by one broker against another to recover plaintiff's share of a commission for assisting in the sale of a saloon, stock, fixtures and business before plaintiff filed the notice for trial of the case in the circuit court, and nearly five months

elapsed from the time the appeal was taken to the time of the trial, and during such time defendant took no steps to form an issue, the court did not abuse its discretion in refusing to allow defendant to file a plea of the general issue, with notice of failure of consideration and illegality of contract in place of a plea of the general issue only.

2. SAME—APPEALS—PLEADING—JUDICATURE ACT—COURT RULES.

Under the judicature act, Act No. 314, Pub. Acts 1915, chap. 78, § 17 (3 Comp. Laws 1915, § 14417), providing that on filing the return of a justice of the peace the circuit court shall become possessed of the cause the same as if it had been originally commenced in the appellate court, and Circuit Court Rule No. 23, § 2, providing that any affirmative defense such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, statute of frauds, illegality, that an instrument is either void or voidable, want of consideration and any defense which by other affirmative matter seeks to avoid the legal effect or defeat plaintiff's action as stated in the declaration, and any ground which, if not raised by the pleadings, would be likely to take the other party by surprise, must be set forth in notice added to defendant's plea, the defense of illegality of contract and want of consideration cannot be proved under simply a plea of the general issue in a case in the circuit court appealed from the justice's court.

3. BROKERS — COMMISSIONS — TERMS OF CONTRACT — EVIDENCE — QUESTION FOR JURY.

Where the evidence was conflicting as to whether or not by the terms of the contract plaintiff had agreed to assist defendant broker in the sale of another saloon, and plaintiff had failed to do so, and that in that regard the contract for commissions differed from that testified to by plaintiff, the court erred in directing a verdict for plaintiff.

Error to Wayne; Van Zile, J. Submitted June 21, 1917. (Docket No. 107.) Decided September 27, 1917.

Assumpsit in justice's court by Henry Dattner against Andrew Weisz for moneys had and received. There was judgment for plaintiff, and defendant ap-

pealed to the circuit court. Judgment for plaintiff on a directed verdict. Defendant brings error. Reversed.

Cornelius & Ring, for appellant.

Harry J. Lippman, for appellee.

STONE, J. This case originated in justice's court in the city of Detroit, where the defendant did not appear, and where a judgment was entered for the plaintiff on June 30, 1916. An appeal was taken by the defendant to the circuit court for the county of Wayne, and the justice made return of said appeal on July 1, 1916. The case appears to have been placed on the appeal docket for trial, and came on for trial on November 17, 1916, upon notice by the plaintiff. After a jury was impaneled, counsel for defendant called the court's attention to the fact that there was no issue in the case, and asked the permission of the court to file a plea of the general issue. Counsel for plaintiff consented to the filing of such plea, but defendant's counsel immediately thereafter asked leave to file a plea of the general issue with notice of failure of consideration, and illegality of contract. This was objected to by plaintiff's counsel, he claiming that plaintiff should have some notice, and called attention to the fact that the appeal had been taken by the defendant, after judgment by default. After a colloquy between the court and counsel, it was finally ruled that the plea of the general issue only would be permitted to be filed. This ruling was excepted to by defendant's counsel, and no adjournment or postponement of the trial was asked for by either party, and the trial proceeded.

The declaration was on the common counts in assumpsit, and there was a bill of particulars by the plaintiff for moneys had and received, $250 and in-

terest. The plaintiff gave evidence tending to show that he had assisted the defendant in making a sale of a saloon, stock, fixtures, and business in the city of Detroit, and that they were to divide the commission of $500 equally, and that the defendant had received the commission of $500, but refused to divide the same with the plaintiff, although defendant had given the plaintiff his check for $250, but that payment by the bank had been refused for lack of funds. The defendant sought to show that the sale included the sale of a liquor license, and that the contract was illegal and void, and hence that there was no valid consideration for the promise, if made. The court excluded such proposed evidence, ruling that the same could not be received under the plea of the general issue, to which ruling defendant's counsel excepted. Similar offers and rulings were repeated upon the trial. The defendant further claimed that the plaintiff, as a part of the contract was to assist him in the sale of another saloon, which the plaintiff had failed to do, and claiming that the contract differed from the one testified to by the plaintiff in that regard. Such evidence was received upon the trial.

At the close of the plaintiff's evidence defendant's counsel moved the court for a directed verdict, upon the ground that it conclusively appeared by plaintiff's own testimony that the subject-matter of the sale consisted of a saloon and of a license, and that it was an illegal sale, against public policy, and that the plaintiff could not recover. This motion was denied, whereupon defendant's counsel said that the only testimony he desired to offer was along that line, whereupon the court directed a verdict and judgment to be entered for the plaintiff.

The defendant has brought the case here upon writ of error, and the first assignment of error is that the court erred in refusing to allow defendant to enter a

plea of the general issue with notice of failure of consideration and illegality of contract. There are a number of assignments of error relating to the introduction of evidence, which we do not think contain any merit. The 12th assignment of error is to the effect that the court erred in refusing to permit defendant to introduce evidence to show the illegality of the contract. The 13th assignment of error is that the court erred in refusing to direct a verdict for the defendant at the conclusion of the plaintiff's case, upon the ground that the agreement entered into was illegal. The 14th assignment of error is to the effect that the court erred in refusing to submit to the jury the question of fact raised by the evidence.

1. It is the claim of the defendant that the court erred in refusing to allow him to file a plea of the general issue, with notice of failure of consideration and illegality of contract. We think that this matter was addressed to the sound legal discretion of the trial court, and we cannot say that that discretion was abused. Nearly four months had elapsed from the time the appeal was made before the plaintiff filed the *præcipe* or notice for the trial of the case in the circuit court, and nearly five months elapsed from the time the appeal was taken to the time of the trial of the case. During that time it does not appear that the defendant took any steps to put himself in condition for the trial of the case by the forming of an issue. The court, under the circumstances, and then only by consent of plaintiff's counsel, permitted defendant to file a plea of the general issue. Courts are usually loath to permit amendments at the trial that will make a continuance necessary, or injure the opposite party if compelled to proceed to trial at once. We find no error in the ruling of the court upon this subject.

2. It is apparent that the evidence offered by the defendant, tending to show illegality of contract and

want of consideration, could not have been received under the plea of the general issue, and the court was correct in ruling out such testimony, and in refusing to direct a verdict for the defendant upon that ground. Section 17 of chapter 78 of the judicature act (3 Comp. Laws 1915, § 14417), provides that, on filing the return of the justice, the circuit court shall become possessed of the cause the same as if it had been originally commenced in said appellate court, and subject to the same rules and regulations. Section 2 of Circuit Court Rule No. 23 provides as follows:

"An affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, statute of frauds, illegality, that an instrument or transaction is either void or voidable in point of law, want or failure of consideration in whole or in part, and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the plaintiff's declaration, and any ground which, if not raised on the pleadings, would be likely to take the opposite party by surprise, must be plainly set forth in a notice added to the defendant's plea."

Clearly, the defense of illegality of contract and want of consideration could not be made under a plea of the general issue. There was no error, therefore, in the ruling of the court in this regard.

3. The 14th assignment of error is to the effect that the court erred in refusing to submit to the jury the question of fact raised by the evidence. An examination of the record discloses that there was a disputed question of fact as to whether or not by the terms of the contract the plaintiff had agreed to assist the defendant in the sale of another saloon, which the plaintiff had failed to do, and that in that regard the contract made differed from the one testified to by the plaintiff. Such evidence was received upon the trial. We are constrained to hold, therefore, that the court

erred in directing a verdict for the plaintiff, and in not submitting that question to the jury under proper instructions.

For this error the judgment of the circuit court is reversed, and a new trial granted, with costs to the appellant.

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

TOWNSHIP OF ROCKLAND *v.* OXNAM.

1. HIGHWAYS AND STREETS—PAVING CONTRACTS—TIME—EXTENSION—UNREASONABLE DELAY—BONA FIDES—QUESTION FOR JURY.
   In an action by a township against contractors who had agreed to build a macadam road to recover damages for nonperformance of the contract, where it appeared that in the fall of the year the work was to be done the time for performance was extended to the next summer and the engineer certified the work as being from 93 per cent. to 97 per cent. completed, and a new engineer taking charge in the spring ordered a good deal of the work taken up and done over, and the work not being done within the time allotted, upon a certificate of the engineer that it was being unreasonably delayed, it was completed by the township, as allowed by the contract in case of unreasonable delay, and the first engineer acted in good faith, *held*, that it was a question for the jury whether plaintiff's second engineer acted in bad faith.

2. SAME—PAVING CONTRACTS—INSTRUCTIONS.
   An instruction on the finality of the certificate of the first engineer and that it was a question for the jury whether the second engineer acted in bad faith, *held*, proper as based on sufficient evidence of fraud and bad faith of the second engineer.

Error to Ontonagon; Cooper, J. Submitted June 26, 1917. (Docket No. 29.) Decided September 27, 1917.

Assumpsit by the township of Rockland against James W. Oxnam and others for the nonperformance of a road contract. Judgment for defendants. Plaintiff brings error. Affirmed.

John Jones and *Michael J. Doyle,* for appellant.

Van Slyck & Walsh, for appellees.

STONE, J. This is an action of assumpsit to recover damages for the nonperformance of a contract between the plaintiff and the defendants Oxnam and Adair, by which the latter agreed to build a macadam road for the plaintiff. The declaration contained a special count on the contract, and also the common counts. The plea of the defendants Oxnam and Adair was the general issue, with notice that the engineer, Bacco, when he took charge of the work in the spring of 1914, was fraudulently actuated by a desire not to build the road in accordance with the plans and specifications, but by finding fault with the work of the first engineer, Therrien, and at the expense of said defendants, to build an entirely different and more expensive road; that in making his demands, and in requiring the rebuilding of certain portions of said road, which had been accepted by said former engineer as from 93 per cent. to 97 per cent. completed, he was not acting in good faith; that his conduct constituted a continuing breach of said contract up to the day the work was taken over by said plaintiff; that any delay there may have been was attributable solely to the capricious, wanton and fraudulent demands of said Bacco; and that in issuing his certificate that the work was being unnecessarily delayed he acted in bad faith. There

was also a notice of set-off. At the trial a verdict was directed in favor of the defendant the Title Guaranty & Surety Company. A reversal is here sought of the judgment in favor of the defendants Oxnam and Adair, but no reversal is sought as to the defendant the Title Guaranty & Surety Company.

It appeared that on July 30, 1913, the plaintiff entered into a written contract with the defendants Oxnam and Adair, whereby the latter agreed to build a macadam road, in conformity with certain specifications attached to said contract, and made a part thereof, for the consideration of $20,592. The specifications called for 5 miles of macadam road between certain designated places—the width of the road to be 20 feet; the macadam to be 9 feet wide, and to be 6 inches thick when rolled. Plans, profiles, and cross-sections were made a part of the specifications. All clearing, grubbing, excavations, etc., were to be done by the contractors, who were also to do all leveling, grading, surfacing, etc., and to lay the stone, furnish the materials, and all machinery and implements except roller and grader, to furnish all labor, and to put the road in complete order for use, and leave the ground in a neat condition. The work was to be done under the supervision of an engineer to be hired by the township board. Variations of location, profile, size, and dimensions might be made, as required by the exigencies of construction, pursuant to determination of the engineer. The macadam was to be formed of three courses of stone; the lower or first course being coarse stone, the second course to be of finer stone, and the third course being of finely broken stone, which was intended to bind or cement the other courses together, and to act as a dressing for the road. The engineer had authority to stop any portion of the work, if in his judgment the weather was such as to prevent the same being properly done. The decision of the engineer, on

matters in difference between the contractors and the township board, was to be final and conclusive, and the work was to be done according to his directions. Paragraph 43 of the specifications provided that:

"Monthly payments will be made by the township board to the contractor for the work performed upon presentation by him of the proper certificate of the engineer in a sum not to exceed eighty (80%) per cent. of the amount then due; the remainder of the twenty (20%) per cent. will be paid upon acceptance of work by the township board."

The engineer could order the discharge of incompetent workmen, was authorized to give directions and make determination necessary to give due and full effect to the specifications, and all material and workmanship were subject, at all times, to his inspection, and was required to be repaired or replaced when ordered by him. According to the contract the work was to be completed by December 1, 1913. It was provided, however, in the specifications, that extension of time might be allowed, if the work was stopped by the engineer, because of weather conditions. By paragraph 37 of the specifications it was provided:

"If at any time the work under contract should be abandoned, or if at any time the engineer should judge, and so certify in writing, that said work or any part thereof, is unnecessarily delayed, or that the contractor is executing the same in bad faith, then and in that case the township board shall notify the contractor to discontinue all work under this contract. They may employ other parties to complete the work in such manner as they may decide, and charge the expense of said labor and material to the contractor, which expense shall be deducted from the moneys due him under this contract. In case these expenses shall exceed the sum which would have been payable under contract, if the same had been completed by said contractor, his bondsmen shall pay the amount of excess to the township board."

Work was begun on this road in the summer of 1913, and continued until October 21, 1913, at which time the engineer, Therrien, ordered the work stopped for that year, because of weather conditions, and pursuant to the contract the township board was notified to that effect, whereupon the board extended the time for the completion of the contract until July 15, 1914. On October 22, 1913, said engineer gave the fifth estimate, in which he stated certain portions of the road were 93 to 97 per cent. complete, and pursuant to which said defendants received their last payment in the year 1913. Work was resumed by said contractors in May, 1914, under a new engineer—one Bacco. He required considerable work to be done on those portions of the road which were estimated as from 93 to 97 per cent. completed in the last estimate given in 1913. It was his claim and that of the township board that this work was necessary to bring the road up to a proper cross-section, and that the road was badly rutted, and that the condition had been brought about through traffic over the road during the fall of 1913 and the spring of 1914, and also to some extent by the hauling of rock over this partially completed portion of the road by the contractors.

It was the claim of the contractors on the trial, and there was testimony to that effect, that the work done from section 129 to section 264, practically three miles, had been constructed under the direction and supervision of the first engineer, and had been certified by him as being from 93 per cent. to 97 per cent. completed, and that when the second engineer came on the job in the spring of 1914 he required that this work be torn up and done over. Upon this subject defendant Adair testified:

"*Q.* What did he require you to do to that portion? What did he say and direct you to do to that portion?

"*A.* To put the roller on and rebuild the road. We

had 112 days' rolling on that the year before. We had one roller running night and day until we got 112 days. We had it rounded up nicely so that we got 93 per cent. and 95 per cent. and 97 per cent. on all those sections. He just took a big roller, and put in the spikes, and ground it up, and knocked out 112 days' rolling."

It was the further claim of said defendants that to complete that portion of the road, as done under the direction of the engineer, required the placing of only a small amount of No. 3 rock, which had been placed along the sides of the road ready to be put on as final dressing. Said defendants further claimed upon the trial that said new engineer acted in bad faith in said matter, that he was unreasonable and arbitrary, and was not governed by the plans and specifications, and that this unnecessary work in 1914 cost said defendants approximately $4,000, and that compelling them to do this work was a breach of the contract on the part of the plaintiff. There was also testimony to the effect that the result was to make the road an 8-inch road, instead of a 6-inch road, and that the requiring of work on these portions of the road which had been reported as from 93 per cent. to 97 per cent. completed was a cause of the delay in the completion of the contract. The work was not completed by July 15, 1914. The township board did not compel the contractors to quit work at that time, and work was continued until August 24, 1914, at which time the engineer made and delivered to the township board a certificate to the effect that the work on this road was being unnecessarily delayed. Thereupon the township board notified the contractors, the said defendants Oxnam and Adair, to discontinue work on this contract, and the township board took the job over, and completed it. There was evidence to the effect that some of the men quit work while defendants were in charge, because they had not received their July pay, and refused to

go back to work unless paid, all of which defendants claimed was because of the extra work required by the engineer. The record contains a stipulation to the following effect:

"In this cause, in order to reduce the size of the bill of exceptions herein, and to render it unnecessary to include therein a great amount of testimony bearing only on the respective claims for damages of the plaintiff herein, and the defendants Oxnam and Adair herein, it is stipulated and agreed by the said plaintiff and the said defendants Oxnam and Adair, by their respective attorneys, that at the trial of this cause the plaintiff introduced in evidence certain testimony, which, if believed by the jury, tends to show that the said plaintiff had expended upon the road contemplated by the contract introduced in evidence in this cause, the sum of $3,471.22 over and above the price provided in said contract to be paid to the defendants Oxnam and Adair for building said road, and that the defendants Oxnam and Adair introduced at the trial of said cause certain evidence which, if believed by the jury, tends to show that the said defendants Oxnam and Adair expended, in and about the construction of said road, the sum of $3,765 over and above the said contract price, and that the sum of money so expended by the said defendants Oxnam and Adair, as a reasonable value, was the actual value of the work done."

It appears that at the close of defendants' testimony counsel for the plaintiff said:

"We move for—perhaps not for a directed verdict, but, under my view of the case, I don't see anything at all to sustain anything going to the jury on the questions raised by the special defense. The only question here is whether, under the contract, in good faith, the engineer gave his certificate. I submit, as a matter of law, that your honor should hold that there is nothing impeaching the good faith of that certificate on the evidence as it now stands.

"*The Court:* I think I will leave the matter as a question of fact for the jury.

"*Plaintiff's Counsel:* Then the next question is this:

I take the position that, even if the certificate was in bad faith, for the purpose of argument, the undisputed evidence is that, whether rightly or wrongly given, these contractors assented to it."

Thereupon further testimony in rebuttal was introduced by the plaintiff. There were no requests to instruct the jury by either party. The case was submitted to the jury in a lengthy charge covering the issues, and the trial resulted in a verdict and judgment for the defendants Oxnam and Adair in the sum of $1,063.44 damages. The plaintiff made a motion for a new trial upon the grounds that the verdict was contrary to law and the evidence; that it was against the weight of evidence; that it was excessive; that the undisputed evidence shows that the contract sued on, for breach of which by plaintiff the jury awarded the damages assessed, was voluntarily abandoned by the defendants (Oxnam and Adair), and said contract assumed by the plaintiff, at said defendants' request; that the motion of plaintiff to direct a verdict for plaintiff should have been granted; and that there is no evidence in the case warranting a verdict for defendants Oxnam and Adair, against plaintiff, or in submitting the same to the jury. The learned circuit judge filed his reasons for denying said motion, and held that the verdict was not contrary to law or to the evidence; that it was not against the weight of the evidence, or excessive; that the question of abandonment of the contract by the defendants was a disputed question of fact, properly submitted to the jury; and that there were disputed questions of fact, and the motion of plaintiff to direct a verdict in its favor was therefore properly denied, and there was evidence in the case to sustain the verdict of the jury. To which refusal to grant a new trial plaintiff duly excepted. The plaintiff has brought the case here for review, and assigns error as follows:

"(1) There was no evidence that warranted the trial judge in submitting the case to the jury.

"(2) The undisputed evidence in the case established that the defendants Oxnam and Adair had failed to comply with the conditions of the contract for the diligent prosecution of the work; that the engineer, whose jurisdiction and authority were absolute in the premises, duly certified that the work was not being duly prosecuted by the contractors.

"(3) That thereupon the plaintiff township properly and lawfully took over the completion of the work and finished it; that the cost of such finishing (plaintiff's damage) was $3,471.22. These three propositions are undisputed in the evidence. The trial judge should have directed a verdict for plaintiff, and error is assigned for his failure so to do.

"(4) The undisputed evidence shows that there was no breach of contract on the part of plaintiff—there was no evidence that warranted the trial judge in submitting to the jury the question whether plaintiff breached the contract, and the court erred in submitting that question to the jury.

"(5) The undisputed evidence establishes that in any event the contract was abandoned by the defendants Oxnam and Adair, and taken over by the plaintiff with their consent, and plaintiff assigns error on the court's failure to direct a verdict for plaintiff accordingly.

"(6) The estimates offered in evidence were but 'estimates,' and not final and conclusive, as held by the trial judge, and his instructions to the jury along that line were erroneous.

"(7) The court erred in refusing to grant plaintiff's motion for a new trial."

The appellant claims that there are two questions involved:

(1) Did the court err in submitting to the jury the question whether the engineer, Bacco, in the year 1914, wrongfully or in bad faith required the said defendants to bring those portions of the road, which had been estimated at various percentages of completion by the previous engineer, up to what he claimed was a proper cross-section?

(2) Did the court err in submitting to the jury, as a question of fact, whether the plaintiff had the right to take over the work in August, 1914?

It is urged by counsel for the appellees that no question is raised by appellant in its assignments of error that can be of any avail. No objection or exceptions were taken to the admission of evidence, and it is said that the court was not requested to direct a verdict in the case, and that objection cannot be now raised to such submission, especially as the court's attention was not called to any point here urged by a proper request; and *Stuart* v. *Holt*, 166 Mich. 549 (131 N. W. 1100), is cited. It is also urged that there is no assignment of error to any portion of the charge, and that a general assignment that "his instructions to the jury along that line were erroneous" is too general; and *Plumb* v. *Hecla Co.*, 157 Mich. 562, 572 (122 N. W. 208), is cited.

We think there is much force in these criticisms of the assignments of error, but we are disposed to treat the first question raised upon its merits. In the course of its charge the court said:

"It is the claim of the defendants that the engineer who took charge of this work in the summer of 1914 was unfair, and acted in bad faith, and, acting in bad faith, that he compelled them to do a lot of work over, which had been approved by the engineer of the year before. I charge you, gentlemen, that the engineer of the year before was just as much the engineer of the township as the engineer of the second year. If he did approve of the work as it was done, and so certified, then his action was final; that is, the engineer of the second year had no right to override the action of the engineer of the first year. He had no more authority than the engineer who was acting there the first year. The township, having selected the engineer for the first year, was bound by the work of the engineer of the first year, and could not override it by employing another engineer, and the second engineer disapprov-

ing of the work already approved, if such was the case, by the engineer of the first year. I am simply stating to you, gentlemen, the claim of the defendants. The claim of the defendants is that this was done; that, when the second engineer came there, he did not act in good faith, and that he compelled these defendants to do a lot of work over; that work which had been satisfactory to the first engineer did not meet with the approval of the second engineer, and that he required the defendants, in order to get his approval, and get any money under the contract, to rebuild a large portion of this road. That is really the question in dispute upon this set-off, as to whether or not any such circumstances occurred, and that will be a question entirely for your determination, gentlemen. * * * I refer to these facts only so far as I think it necessary to explain to you the law involved. The question for your determination will be upon that question as to whether or not the second engineer by reason of acting in bad faith, and by reason of what he did there, delayed these defendants from completing the contract, and whether the condition which existed, which the plaintiff finally considered ground for taking over the contract, was the fault of the defendants in this case."

It seems to be the claim of appellant that it was not in any way bound by the estimate, and the following quotation is made from 9 Corpus Juris, p. 778, and notes:

"Where the compensation is payable in installments as the work progresses, the final payment becoming due on the completion of the work, and certificates of approval are required as a condition precedent to the right to demand payment, the certificates given during the progress of the work are not regarded as conclusive that the work therein certified to was properly performed, and the architect may properly refuse a final certificate on the ground that the work has not been properly done."

In our opinion, the foregoing is not inconsistent with the charge of the court, which was dealing with

the question of the claimed bad faith of the second engineer. A reference to some of the cases cited in the volume named, especially the cases of *Hebert* v. *Dewey,* 191 Mass. 403 (77 N. E. 822); and *Ashland, etc., Cement Co.* v. *Shores,* 105 Wis. 122 (81 N. W. 136), will show that the above language might well be qualified, by stating that such certificates are generally treated as final, as to all matters within the knowledge of the engineer at the time of giving them. This, however, does not dispose of the question of the claimed bad faith of the second engineer, which was the question with which the trial court was dealing. We think there was evidence which warranted the instruction given. There was no evidence or claim of any collusion or bad faith on the part of the first engineer. In our opinion, the question could not be disposed of as a matter of law, and there was no error in the instruction given. In support of the charge, counsel for appellee cite *Wildey* v. *School District,* 25 Mich. 419, and *Lamson* v. *City of Marshall,* 133 Mich. 250 (95 N. W. 78). It follows that, had the assignments of error been duly specific, they would not have been availing.

In our opinion the second question was involved in the first, and both questions were dependent upon the good or bad faith of the second engineer. The record discloses sufficient evidence of fraud and bad faith on the part of the said engineer to warrant the charge of the court. The court did not err in refusing a new trial.

We find no reversible error in the record, and the judgment of the circuit court is affirmed.

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

SERGEANT *v.* GRAND RAPIDS & INDIANA RAILWAY CO.

1. MASTER AND SERVANT—PERSONAL INJURIES — RAILROADS — EVIDENCE—QUESTION FOR JURY.

In an action by a railroad switchman to recover for personal injuries due to being caught between the beam at the front of a switch engine and a post in a fence through which a side track passed into a building as he jumped off the footboard of the engine on which he had been riding, *held*, on conflicting evidence, that it was a question for the jury whether the engine was operated at an excessive speed.

2. SAME—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

Recovery could not be denied on the ground of contributory negligence of plaintiff in riding on the footboard of the engine where the only evidence on the subject was that of the engineer that the supposition was that the footboard was a proper place for switchmen to be and that he had a right to expect them there.[1]

3. SAME—PERSONAL INJURIES—NEGLIGENCE—INSTRUCTIONS.

An instruction that the jury would be warranted in finding that it was the duty of the engineer to stop if steam was blowing in his face and obscured his vision for any considerable length of time; that it was defendant's claim that the engineer was exercising due care and was on the lookout for signals and did not see any; that he did not see any and that the engine was not being run at a negligent rate of speed, and that if this was the case, it was for the jury to determine whether it was his duty to stop until his vision was cleared, was correct.

4. APPEAL AND ERROR—EXCESSIVE VERDICTS—DENIAL OF MOTION FOR NEW TRIAL.

Where the question of excessive verdict is raised in a personal injury action, by a motion for new trial, and the motion is denied, and the reasons therefor filed, but no exception is filed, the question will not be considered on appeal.

[1]On contributory negligence of railroad employee in riding on engine, see note in 14 L. R. A. 552.

5. TRIAL—ARGUMENT OF COUNSEL—HARMLESS ERROR.

The misconduct of counsel for plaintiff in a personal injury action, in referring to the circumstances of an accident to a passenger alighting from a train, and relating a conversation with counsel for plaintiff in another action as to the right of recovery and the subsequent death of the plaintiff in such other action, is harmless error where the question of an excessive verdict has not been preserved for review.

6. SAME.

Any misconduct of counsel for plaintiff in an action for damages for personal injuries in referring to the fact that certain persons were fortunate enough to receive their pay from the railroad company, meaning plaintiff's attending physician in particular, is harmless error, where the testimony relating to who had paid plaintiff's medical bill, on which the statement was based, was stricken out by the court and the jury warned to disregard it.

Error to Kalamazoo; Weimer, J. Submitted June 25, 1917. (Docket No. 120.) Decided September 27, 1917.

Case by Ben H. Sergeant against the Grand Rapids & Indiana Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

James H. Campbell, for appellant.

Lombard, Hext & Washburn, for appellee.

STONE, J. This case comes before this court on writ of error to the circuit court for the county of Kalamazoo, to review a judgment in favor of the plaintiff on a verdict of $4,500, damages and costs, in an action to recover damages for personal injuries sustained by the plaintiff on February 2, 1916, in the city of Kalamazoo, about 9:30 o'clock p. m., when he was in the employ of the defendant as a switchman in the yard switching crew, and while engaged with the switch-

ing engine and others of the crew in proceeding to take a car out from the premises of the Kalamazoo Gas Company. The injury occurred when he stepped off the footboard at the front of the engine, as it reached the entrance of the gas company's premises, and was caught between the beam at the front of the engine and the post of the gate at the north side of the engine. The only negligence charged and relied upon against the defendant is that of the engineer, Wadsworth, in that he ran the engine at too great a rate of speed along the side track toward the car to be coupled onto, and failed to slow down or stop, on the signal given by plaintiff.

The switching crew consisted of Wadsworth, engineer; Layne, fireman; Neill and the plaintiff, switchmen. The tracks of the defendant run north and south at the location. The plant of the Gas Company is west of the railroad tracks and on the west side of Pitcher street, which the plant adjoins. Pitcher street runs north and south between the railroad tracks and the gas plant. The width of the street between curbs is 41 feet. There is a fence on the east side of the gas plant, being on the west side of Pitcher street. The side track enters into the premises of the gas plant through an opening or a gate in that fence. The distance from the post at the north side of the gate to the west curb of the paved part of the street was 11 feet 4 inches. The side track connects with another track at a point south of the entrance to the gas premises and east of Pitcher street. From that switch the side track runs northwesterly on a curve across Pitcher street to and onto the gas company's premises. The inside of the curb is on the southerly side of the side track. The distance measured along the side track from the switch to the entrance of the gas plant is 186 feet. The operation in which the plaintiff was injured was in proceeding to take out the car which

stood on the side track on the premises of the gas company, just inside of the entrance to the plant. The plaintiff testified that the car stood 4 or 5 feet inside the gate, while the engineer testified, "probably 2 feet, maybe 3 feet; I wouldn't want to say." The engineer and fireman were on the switch engine. The engine was headed north. The engineer was on the right-hand side of the cab of the engine, and on the outside of the curve facing the front of the engine. The fireman was on the left side, or inside, of the curve. All of the witnesses agree that another car had been moved and placed upon a side track away from the switch; that the engine was then backed south far enough to clear the switch; that the switch was thrown by the plaintiff; that the engine was started from a full stop and run onto the side track to the car to be taken out; that Neill, the other switchman, had been protecting Pitcher street—that is, he stood in the center of the street to warn people who might be passing on the street; that the plaintiff, after throwing the switch, stepped onto the right-hand side of the footboard at the front of the engine as it moved along the side track. He rode there until the engine arrived near the entrance to the gas plant, and then jumped off, and was caught between the beam at the front of the engine and the post at the north side of the entrance, and seriously injured. There was a conflict in the evidence as to the speed of the engine. The engineer testified that when the engine crossed Pitcher street it was moving 2 or 3 miles an hour. The fireman testified that it was going probably 4 miles an hour, which was the highest rate the engine made after leaving the switch, and that when the engine hit the car it was going about 2 miles an hour. Neill, the other switchman, who had stepped onto the footboard in front of the engine at the left side as the engine ran along the side track, and who stepped off before the

plaintiff did, testified that at the time he stepped off the footboard of the engine it was going 5 or 6 miles an hour, he should judge. The following is a part of his testimony:

"*Q.* Now, isn't it a fact that you got off that car because it was going so fast you thought it was going to bump into the other car?

"*A.* Yes, sir; I saw it was going to bump in all right; that is the reason I got off, of course.

"*Q.* How fast was it going? You have some idea how fast that engine was going at that time?

"*A.* Five or six miles an hour, I should judge.

"*Q.* At that time you got off, it was going that fast?

"*A.* I should judge so; yes, sir.

"*Q.* At that time you jumped off from it, what was the distance from the curb to the car?

"*A.* I think it went right up to the fence when I went off.

"*Q.* You went clear up to the fence?

"*A.* I went clear up to the fence. That would be on the left-hand side of the engine. I do not remember whether the engine slowed down any before it hit the car or not. I couldn't say."

The plaintiff testified as follows:

"*Q.* In crossing Pitcher street, did you give the engineer any signals with reference to stopping or slowing down?

"*A.* Yes, sir. The front end of the engine was about the center of the street when I made him the first signal; that was the "easy" signal; that means slow down.

"*Q.* How did you give it?

"*A.* With the lantern (indicating). I was where he could see me at that time. I gave him another signal after we had traveled a few feet. It was done quite quickly; it had to be. I should judge the engine was going about 10 or 11 miles an hour at the time I gave him the signal. It was a little over 2 rods from this standing car. We were towards 2 rods from the standing car when I gave him the stop signal. That was very soon after the other. No attention

whatever was paid to the first signal I gave. No attention whatever was paid to the second signal.

"*Q.* Did the engine continue to keep up its speed?

"*A.* It forged ahead. At the time I jumped off, the speed of the engine was about 12 miles or more.

"*Q.* Why did you jump?

"*A.* To save myself from injury. The danger I jumped to keep away from was so I wouldn't get caught between this engine and this standing car. * * *

"*Q.* In what way were you injured?

"*A.* I was caught between the end of the pilot beam and the gate post, and turned in between, as the engine went by the gate post. When I first discovered the standing car, I was on the footboard of the engine. The car was standing about 4 or 5 feet inside of the gate."

The engineer, in his testimony, denied that he got any signal from the plaintiff to slow down; he testified that he was where he could have seen signals of the plaintiff, had he given any; that he knew the plaintiff was there on the footboard on the right-hand side of the engine. He testified:

"The point at which I saw Sergeant on the running board, he was on the right side in plain view, until we struck the sidewalk; then I could not see him. * * * He was not making any use of his lantern the last time I saw him. I did not see him make any use of it as I approached the car. * * * At the time I proceeded through this gate and up to the car, I supposed that these two men (Neill and Sergeant) were on the running board. I did not see them. The supposition would be that there was the proper place for them to be. I had a right to expect they were there. * * * I was going about 2 or 3 miles an hour when I crossed Pitcher street. Sergeant was on the running board at that time. I saw him at the time we crossed Pitcher street. It was in the open. The steam from the stack on the locomotive prevented my seeing him when we got farther along."

The engineer further testified that he drove the car, when he struck it, possibly 4 or 5 feet; that he pushed

it far enough so that, after he stopped the engine, the other switchman passed between it and the end of the engine to assist the plaintiff.

It is undisputed that the defendant had not, at the time of the injury, nor prior thereto, elected to be governed by the provisions of Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5423 *et seq.*), and in his declaration the plaintiff claimed the benefit of the provisions of said act.

The assignments of error relied upon relate to (1) the negligence of the engineer operating the engine; (2) improper and prejudicial arguments by plaintiff's counsel to the jury.

1. On the subject of the negligence of the engineer, it is urged that the court erred in refusing defendant's first request, that there could be no recovery, and the verdict must be for the defendant. Assignment No. 11, that the court erred in overruling defendant's motion, made at the close of the testimony, to direct a verdict for the defendant. This motion was made as prescribed by Act No. 217, Pub. Acts 1915 (3 Comp. Laws 1915, § 14568 *et seq.*). In its charge to the jury the trial court said:

"The vital question in this case is whether the engineer, Wadsworth, in the operation of the engine, was guilty of negligence; that is, whether he ran the engine towards the standing car in a careless, reckless, and negligent manner, and whether such negligence was the proximate cause of the injury."

Error is assigned upon the following part of the charge:

"You would be justified, if you find that the steam was blowing in the engineer's face, or in his vision, perhaps, I should say, to obscure his vision for any considerable, appreciable length of time, you would be justified in finding it was his duty to stop, and not proceed, when his vision was obscured. But if it was simply a momentary matter, an inappreciable length

of time, an instant, you would not necessarily be bound to say it was his duty to stop."

Also upon the following:

"It is the defendant's claim and theory, as stated through Mr. Wadsworth, that he was exercising due care and caution; that he was not running at a negligent rate of speed; that he was looking out for signals and did not see any; that the plaintiff did not give him any, or, if he did, the view was obscured. If that was the case, and it is for you to say whether or not it was, it was his duty to stop until his vision was cleared; and that would depend upon what you find, from the evidence, the amount of steam to have been, if any, and the duration of time it continued."

It is urged by appellant, in argument, that the controlling fact is that plaintiff had no business to be on the engine at all; that his duty and work did not require that he should ride or be upon the engine; and that he rode there voluntarily, and for his own convenience, rather than walk 186 feet, from the switch to the car to be coupled to. It is argued that:

"If an employee voluntarily stands upon the footboard of an engine moving toward a car to make a coupling, the employer owes to him no greater duty than it would owe to any trespasser, not to wantonly injure him, and would not be liable for any negligence less than gross negligence. The engineer owed no greater duty to the plaintiff. It is not a question of contributory negligence. The question is whether an employee can voluntarily place himself in a position of danger, where he is not required to be, and where he has no business to be, and, if he is injured, not wantonly, impose on his employer or fellow servant a duty and liability such as is sought to be imposed on the defendant in this case. I contend that he cannot. So far as the plaintiff is concerned, it is immaterial whether the engineer came against the car easy or hard, going 2 miles an hour, or 12 miles. He had no business to be on the footboard at all, when the impact was made or at any other time."

We cannot agree with counsel here. It is not necessary for us to say that the court will take judicial notice that switchmen usually ride upon the footboard of a switch engine, and that the footboard is for that purpose; for upon this record the only evidence upon the subject is that of the engineer, who testified that:

"The supposition would be that that [the footboard] was the proper place for them [the switchmen] to be. I had a right to expect they were there."

In our opinion, the only question upon this branch of the case is whether or not the engineer was negligent in the operation of the engine as it approached the car. The negligence predicated, and upon which recovery was based at the trial, was the claimed excessive rate of speed that the engine was operated, as it approached the standing car, because of which claimed excessive rate of speed, and failure of the engineer to obey signals to slow down and stop, given by the plaintiff, he, in an attempt at self-preservation was obliged to jump from the footboard upon which he was standing, rather than be jammed between the engine and the standing car. Upon the rate of speed there was a conflict in the evidence, and hence a question of fact for the jury. There were many circumstances tending to corroborate the testimony of the plaintiff as to the speed of the engine, the effect upon Neill when he alighted, the fact, as testified to by the engineer, that he drove the car when he struck it 4 or 5 feet, all of which circumstances were for the consideration of the jury. We are of the opinion that the court did not err in submitting, or in the manner of submitting, this question of the negligence of the engineer in the particular indicated, to the jury.

2. This brings us to consider the claimed improper and prejudicial arguments by plaintiff's counsel to the jury. In his argument to the jury one of plaintiff's counsel said:

"A short time ago — some years ago — I had the pleasure of sitting with a lawyer in the trial of a case in which a woman had been injured. She was getting off the train, and the train had just started, and she says, 'Why, I want to get off'; and the conductor says, 'Hold on, I will help you off,' and kindly and gently took hold of her hand and assisted her down, and in doing so, gentlemen of the jury, it brought her arm around in that way (indicating) and injured one of those nerves in connection with the spinal cord.

"*Defendant's Counsel:* I will object; I will take an exception to that, and ask for a ruling on it.

"*Plaintiff's Counsel:* It is but an illustration.

"*The Court:* I do not understand counsel claims that for an argument.

"*Plaintiff's Counsel* (continuing): I want to say to you, gentlemen of the jury, when counsel came to me and asked me to assist him in the trial of that case, I said to him, 'Where are the damages in this case; how can you show damages?' He says, 'Wait until the trial is over.' In less than two years from that time, gentlemen of the jury, that woman was asleep in her grave."

Counsel for appellant claim that the above statement was highly prejudicial on a material point, viz., the result of plaintiff's injury. There is no claim here that the verdict was excessive. That question was raised by a motion for a new trial. The motion was denied, and the reasons therefor were filed; but there was no exception filed, as appears by this record. The matter of excessive verdict, therefore, is not before us. The statement in no way has any bearing upon the questions at issue before this court. We doubt if the statement affected the merits of the case in any degree. Whether used as an illustration, or otherwise, it was improper matter; but we do not think it calls for a reversal of the judgment.

Another of plaintiff's counsel in his argument said:

"We find these local people here were, somehow or

another, fortunate enough to receive their pay from the railroad."

This referred to some of the medical testimony, and particularly to that of Dr. Ames, plaintiff's family physician. Upon objection, the court stated that the testimony had been stricken out, and that it was improper to comment upon it. In its charge the court referred to the subject as follows:

"An inquiry was made by counsel for the plaintiff of the plaintiff's family physician, Dr. Ames, as to who had paid the doctor's bill. I instructed you at the time to disregard that, and I am requested now to remind you of it again, and it is proper to do so. So I say to you that it is absolutely immaterial, for the purposes of this case, as to who paid Dr. Ames' bill. It appears that the plaintiff himself did not pay it; therefore he cannot recover for it. If he had paid it himself, it would be a question for you to determine whether or not he should recover for it in this case; but, not having paid it, it does not enter into this case at all, and has no bearing upon the issue here. It is no evidence of liability or negligence on the part of the defendant."

Why counsel for plaintiff referred to this matter, as relating to Dr. Ames, it is difficult to understand, as Dr. Ames was plaintiff's witness and physician. It is said that the reference was to another physician. If so, it might relate to the amount of damages or injury. Even if improper, we think this court would hesitate to reverse a case under the circumstances here shown, in view of the remarks of the trial court and the charge upon the subject.

Upon the whole record we are unable to find reversible error, and the judgment of the court below is therefore affirmed.

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

GOLDBERG *v.* PARKER.

CORPORATIONS—FOREIGN CORPORATIONS—BANKRUPTCY—RECEIVERS—CHATTEL MORTGAGES—ESTOPPEL.

The receiver in bankruptcy of the property of a foreign corporation which is engaged in business in the State without compliance with the law relating to the transaction by foreign corporations of business within the State, is estopped to raise the question of the invalidity of a mortgage of corporate chattels in an action of replevin to recover such chattels, he having no greater rights than the corporation.

Case-made from Ontonagon; Cooper, J. Submitted June 22, 1917. (Docket No. 128.) Decided September 27, 1917.

Replevin by Louis Goldberg, receiver of the Brule Timber Company, a bankrupt, against John Parker. Judgment for defendant. Plaintiff appeals. Affirmed.

John Jones, C. W. Stilson, and *B. M. Goldberg,* for appellant.

Van Slyck & Walsh, for appellee.

STONE, J. This is an action of replevin for the alleged unlawful detention of "two dappled gray mares, two horse collars, and part of one double harness." The facts were all stipulated except the value of the property. Four cases were instituted by the plaintiff against different defendants, but they were all submitted as one case upon the same statement of facts. The finding of the court was as follows:

"It appears from the stipulated facts that the Brule Timber Company, a Minnesota corporation, engaged in business in the State of Michigan without ever having complied with the laws of Michigan relative to

foreign corporations doing business in this State; that such company became indebted to Richard J. Kneebone in the sum of $2,500, and to secure the payment of such debt gave Mr. Kneebone (on May 25, 1915) a chattel mortgage covering the property involved in these cases. Later (and on June 30, 1916) the Brule Timber Company was adjudicated a bankrupt in the State of Minnesota by the Federal court. Kneebone took possession of the property involved in these suits, and these defendants held the property for him at the time the suits were started. Louis Goldberg was appointed receiver of the Brule Timber Company, and started these suits, as such receiver. The claim of the plaintiff is that the chattel mortgage is void because the Brule Timber Company was never authorized to do business in the State and could not make a valid contract in this State. It is conceded by the plaintiff that the corporation itself could not raise the question of the validity of the mortgage, because it could not take advantage of its own wrong, but plaintiff claims that, as the representative of the creditors of the corporation, he can do so. The creditors of the corporation necessarily secured the benefit of the indebtedness of the company to Mr. Kneebone. Twenty-five hundred dollars extended to the corporation would increase its assets to that extent, and therefore the creditors would benefit thereby in bankruptcy.

"The wrong of the Brule Timber Company therefore inured to the benefit of the creditors of such company, and they are not in any better position to take advantage of the wrong of the corporation than the corporation itself would be. There has been but one case cited which covers the question.

"In *Re Naylor Manfg. Co.*, 135 Fed. 206, the identical question involved in these cases was decided, and it was held that the trustee in bankruptcy was in the same position as the company, and could not raise the question of the legality of a contract entered into by a foreign corporation in the State of Pennsylvania, such corporation not having been authorized to do business in that State, and the trustee being the trustee of such corporation in a bankruptcy proceeding.

"A judgment will be entered in each case in favor

of the defendant, and against the plaintiff and his surety on the replevin bond."

A judgment was thereupon entered in the instant case in favor of the defendant for $500 and costs, and it was conceded that there was evidence tending to show the value of the property to be equal to the amount of the judgment. The plaintiff moved for and proposed amended findings of fact and conclusions of law in accordance with his claim, which were refused by the trial court, and exceptions were duly taken. The plaintiff brings the case here for review, by case-made after judgment.

By appropriate assignments of error, the single question involved is raised, viz. whether the chattel mortgage here involved shall be held to be valid and enforceable in this case in favor of the defendant and Mr. Kneebone, as against the attack made herein by the plaintiff upon the validity thereof. It would be well at the outset to inquire what object and reasons are back of the legislation which provides for the admission of foreign corporations to transact local business within this State. Those reasons are well stated in volume 19 Cyc., at pages 1301 and 1302, as follows:

"The object of the statutes is to protect domestic citizens doing business with such corporations, and they are not to be construed, in the absence of clear provision to such effect, as rendering contracts void as against such citizens. To so construe them would render them instruments of fraud and oppression to those for whose protection they were intended. It is not intended to devolve upon persons dealing with such corporations the duty and risk of ascertaining whether the statute has been complied with. Otherwise stated, the doctrine, as laid down in many of the cases, is that, if the State does not intervene, and if the party for whose protection the statute was enacted does not rescind it, the corporation is estopped thus to set up its own violation of the law in avoidance of its contracts."

See *Clay Fire & Marine Ins. Co.* v. *Manufacturing Co.*, 31 Mich. 346.

In *Showen* v. *Owens Co.*, 158 Mich. 321, at page 333 (122 N. W. 640, at page 645), we said:

"The court found, and the evidence warranted the finding, that the defendant through its agent was transacting local business in the State, and the fact that such business upon the showing made was unlawful should not relieve the defendant, but it should be held to assent to the same remedies which would have attached if it had done the business lawfully. It is estopped to set up in its defense the unlawfulness of its transactions. *Ehrman* v. *Insurance Co.*, 1 Fed. 471; *Hagerman* v. *Empire Slate Co.*, 97 Pa. 534; *Sparks* v. *Accident Ass'n*, 100 Iowa, 458 (69 N. W. 678); *Lafayette Ins. Co.* v. *French*, 18 How. (U. S.) 404."

The foregoing case is cited and approved in the case of *Kuennan* v. *Guaranty Co.*, 159 Mich. 122, at page 127 (123 N. W. 799, at page 801), where this court said:

"The same conclusion is arrived at, and for the same reason, when it is considered that the construction company is estopped to assert the invalidity of its contracts made in this State. *Showen* v. *Owens Co.*, 158 Mich. 321 (122 N. W. 640.)"

In *Rough* v. *Breitung*, 117 Mich. 48, at page 56 (75 N. W. 147, at page 149), this court said:

"We are forced to the conclusion from this record that this was a corporate contract, and void under the law above cited. While the corporation might be estopped to plead such a contract in its defense, it cannot maintain an action upon it without annulling the law."

The cases cited by counsel for plaintiff in which a recovery on the contract was denied were cases in which the delinquent corporation sought the aid of our courts in enforcing the contract.

In *Cashin* v. *Pliter,* 168 Mich. 386 (134 N. W. 482, Am. & Eng. Ann. Cas. 1913C, 697), where this court was dealing with Act No. 101, Pub. Acts 1907 (2 Comp. Laws 1915, § 6349 *et seq.*), being "An act to regulate the carrying on of business under an assumed or fictitious name," Justice STEERE said:

"As this act involves purely business transactions, and affects only money interests, we think it should be construed as rendering contracts made in violation of it unlawful and unenforceable at the instance of the offending party only, but not as designed to take away the rights of innocent parties who may have dealt with the offenders in ignorance of their having violated the statute."

By the stipulated facts it appears that the mortgage was made in good faith and for a valuable consideration, and there is nothing to show that Mr. Kneebone had any notice or knowledge that the Brule Timber Company had not fully complied with the law relating to foreign corporations. Our attention has not been called to any authority holding that, in the absence of fraud or bad faith, the receiver occupies any different position than the corporation itself would occupy. The good faith of Mr. Kneebone and the adequacy of the consideration of the mortgage are not questioned.

In *Marine Savings Bank* v. *Norton,* 160 Mich. 614 (125 N. W. 754), the action was brought against a trustee in bankruptcy to reform a chattel mortgage so as to include after-acquired property. The court permitted such reformation, holding that:

"The trustee in bankruptcy, under the bankrupt act, takes the property of the bankrupt at the date of the adjudication, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities imposed upon it in the hands of the bankrupt. *York Manfg. Co.* v. *Cassell,* 201 U. S. 352 (26 Sup. Ct. 481), citing *Thompson* v. *Fairbanks,* 196 U. S. 516 (25 Sup. Ct. 306)."

See, also, *Kalamazoo Trust Co.* v. *Merrill,* 159 Mich. 649 (124 N. W. 597); *Wasey* v. *Whitcomb,* 167 Mich. 58, 85 (132 N. W. 572).

In *Kalamazoo Trust Co.* v. *Merrill, supra,* Justice BROOKE, speaking for this court, quoted with approval the following language from Collier on Bankruptcy (7th Ed.), p. 810*e*.

"It is well settled that a trustee takes, not as an innocent purchaser, but subject to all valid claims, liens, and equities. Thus he has no better title than the bankrupt had, and is affected with every equity which would affect the bankrupt himself, if he were asserting the same rights and interests. A trustee in bankruptcy stands in the shoes of the bankrupt, and has no better title than he, in the absence of fraud, or of attaching or judgment creditors at the time of the filing of the petition. Where a right of action passes to the trustee, any defense, legal or equitable, which might have been raised against the bankrupt's claim may be raised against the trustee."

We think this language is very applicable to the instant case.

The case *In re Naylor Manfg. Co.,* 135 Fed. 206, cited by the learned circuit judge, is in point. While it is not the decision of a court of last resort, it is very persuasive, and is in accord with our own decisions.

The conclusion reached by the trial court was both legal and just, and its judgment is affirmed.

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

RODENHOUSE *v.* DE GOLIA.

1. REAL PROPERTY—LAND CONTRACTS—ASSIGNMENTS—FRAUD—EVIDENCE—SUFFICIENCY.

On a bill by the assignee of a contract for the purchase of land against his assignor for the recovery of the consideration paid, evidence *held*, sufficient to show fraud and misrepresentation by the assignor.

2. SAME—LAND CONTRACTS—TAXATION—STATUTES.

Act No. 91, Pub. Acts 1911, § 8 (1 Comp. Laws 1915, § 4275), providing that no suit may be maintained for the foreclosure of a land contract on which the tax provided by such act has not been paid, being a tax measure, is intended for the purpose of compelling the payment of the tax imposed, and the requirements of the law are fully met where the tax is paid before the decision of the court and the conclusion of the hearing.

3. SAME—LAND CONTRACTS—ASSIGNMENTS—CONSENT OF VENDOR—EVIDENCE—SUFFICIENCY.

Evidence *held*, insufficient to show that the owner of a contract for the sale of real estate consented verbally to a transfer by the contract purchaser to another of such purchaser's interest in the contract.

Appeal from the superior court of Grand Rapids; Dunham, J. Submitted July 26, 1917. (Docket No. 2.) Decided September 27, 1917.

Bill by Albert Rodenhouse against William E. De Golia, Henry H. D. Langereis and others to set aside a deed and sale on the ground of fraud. Defendant Langereis filed a cross-bill for the forfeiture of a land contract. From the decree rendered, defendant De Golia appeals. Affirmed.

Don E. Minor, for plaintiff.

Hartley E. Hendrick, for appellant.

KUHN, C. J. This bill was filed to obtain equitable relief arising from a situation created by the following facts:

On November 1, 1908, H. H. D. Langereis, one of the defendants, was the owner of a certain lot in the city of Grand Rapids, which on that date he sold upon land contract to Sherman B. Thomas and wife for $2,100. Thomas paid $500 down, and was to pay $10 on the first of each month thereafter, with interest at 6 per cent. On August 23, 1913, Thomas and wife sold their interest in this property to Sylvester Vreeland and Celia B. Vreeland for the sum of $2,200. A new contract was made out to the Vreelands, and the contract of Langereis to Thomas was not assigned by Thomas and wife to Vreeland. The terms of this new contract were, $215 to be paid down on the date of the transaction and the balance at the rate of $15 or more on the 23d day of each month thereafter until the balance due was paid, with interest thereon at 6 per cent. Upon the failure to make any payment, the grantors could either declare the contract forfeited or exercise their option to enforce collection thereof in a suit at law. The contract also provided that the Vreelands should not assign nor transfer it, nor lease or sublet said premises, without the previous assent of the Thomases indorsed thereon. It further provided that if the Vreelands violated or neglected to fulfill any of the covenants or agreements therein, they should forfeit all right or claim thereunder and be liable to removal therefrom in the same manner as is provided by law for a tenant that holds over premises contrary to his lease, and notice to quit and of forfeiture were each waived in writing.

Soon after this sale, Thomas and wife sold their interest in this contract to Langereis for $800. The first payment on the contract of August 23d was paid to Langereis instead of to Thomas, and was paid on Sep-

tember 23, 1913. Thereafter the Vreelands continued to pay their monthly payments to Langereis until June, 1914. This payment was not made. On July 23, 1914, Vreeland paid the installment due and payable on the contract for that month, and thereafter kept up the monthly payments until November, 1914, which payment also was not made, and neither the June nor November, 1914, payments had been made up to the date of the hearing of the suit. Payment was then resumed by Vreeland, and on December 21, 1914, he made that monthly payment and each subsequent monthly payment until April, 1915, and this payment was passed. Payment was again resumed, on May 21, 1915, and continued until July 23, 1915, when the last payment was made, leaving unpaid at the time of the suit $45 and interest, being the monthly payments for June and November, 1914, and the April, 1915, payment. There was therefore due at that time upon the contract by its terms these three monthly payments and interest and taxes and all the payments due upon the contract by its terms after the month of July, 1915. On the date of the sale by the Thomases to the Vreelands there was $1,030 still due Langereis, but Langereis paid $800 in his purchase of the Thomas interest in the contract, so that Langereis still had due him for the property $1,830 and some additional interest and taxes.

On October 7, 1915, the Vreelands assigned all their interest in the Thomas contract to William E. De Golia, and on October 15th following, De Golia assigned all his interest in that contract to Albert Rodenhouse, the consideration being a lot in the city of Grand Rapids and an automobile, the total value of the property in question being $700. De Golia also gave to plaintiff, as a part of the consideration, his note for $65, secured by a mortgage back on plaintiff's lot in like amount.

When Langereis learned that De Golia had bought the Vreelands' contract, he called up De Golia and told him to leave the property alone, because he would not consider any transfer whatever, and upon learning that Rodenhouse, the plaintiff, had bought the property from De Golia, he also got into communication with Rodenhouse and told him that he was the owner of the property and that De Golia had no right to sell. Rodenhouse thereupon asked him to be allowed to keep the place and make the payments, but Langereis would not allow this. The plaintiff thereupon sought a return of the lot and automobile from De Golia, and learned that the lot had been transferred to a brother of De Golia's, and that the automobile had been sold to one Jack Williams, one of the defendants. The plaintiff thereupon filed his bill, setting up these facts, and prayed that the lot and automobile be returned to him. Defendant William E. De Golia answered, and Langereis also filed an answer in the nature of a cross-bill, praying that the contract running from the Thomases to the Vreelands be declared forfeited to him, as the assignee and owner, and that De Golia and the plaintiff be declared to have no right, title, or interest therein.

After hearing the case, the trial judge decreed that the defendant Langereis is the owner of the lot in question, free and discharged from any interest, claim, or title thereto or therein by the Vreelands, William De Golia, Frank De Golia, or Albert Rodenhouse, the parties to this suit; that the deed from William E. De Golia to Frank De Golia is void, and that Frank De Golia quitclaim all his right, title, and interest therein to Albert Rodenhouse; that the mortgage by William E. De Golia to Albert Rodenhouse be declared null and void; that the assignments of the contract from the Vreelands to William E. De Golia and from him to Albert Rodenhouse be declared null and void; and the

decree also provided that the court does not, in any manner, dispose of any question between Albert Rodenhouse and De Golia, or any person, so far as the automobile involved in the transaction is concerned. From this decree defendant William E. De Golia is the only one to appeal.

Plaintiff's bill charges the defendant William E. De Golia as being guilty of fraud and misrepresentation, to the deception and injury of the plaintiff. This the trial judge found was fully substantiated by the proofs, and with this conclusion we agree. The record is conclusive that De Golia knew, when he first began to deal with the plaintiff, having a copy of the Vreeland contract in his possession, that he was prohibited by its terms from transferring or assigning, as well as renting, the premises without the consent of Langereis. Notwithstanding this, he told the plaintiff that he had authority to make the transfer. In this connection there should also be considered his haste in closing the deal, for the reason, as he admits, that he did not want the plaintiff to get away; that the note which was taken from the defendant Williams was negotiated and put out of De Golia's hands the following day; and his immediately deeding the lot to his brother, Frank De Golia, for the reason, as he admits, that the plaintiff had told him he was going to try to get the lot back. The bad faith of De Golia appears throughout the entire transaction.

On the trial of the case, the attorney for William E. De Golia made a motion to strike from the record the contract that had been introduced in evidence by the plaintiff, together with all evidence in relation thereto, because it appeared that the mortgage tax provided for in Act No. 91, Public Acts of 1911 (1 Comp. Laws 1915, § 4268 *et seq.*), had not been paid. Langereis testified that he had not paid the tax on the contract because he did not know it was necessary, and the tax

was in fact paid to the county treasurer after the hearing was begun, but before the case was submitted to the court for a decision. We see no merit in the contention that the result reached by the trial judge should be changed because of his failure to grant the motion which was made. It is clear that the purpose of the section referred to, being a tax measure, is to compel the payment of the tax imposed, and, having been paid before the decision of the court and before the conclusion of the hearing, the requirement of the law was fully met. Such was the order of this court in *Nelson* v. *Breitenwischer,* 194 Mich. 30 (160 N. W. 626).

Counsel for the appellant in his brief argues and contends that the record shows that Mr. Langereis had verbally consented to the transfer of this property by the Thomases to the Vreelands, and that by so doing, he waived the right to enforce that clause of the contract without the written consent of Mr. and Mrs. Thomas, and that by passing the payment that had become due from the Vreelands and accepting payments thereafter, he again waived the right of declaring a forfeiture by reason of such past payments. Whether or not Mr. Langereis verbally consented to a transfer of the property is a question of fact which was decided adversely to appellant's contention by the trial judge, with whose conclusion we are in full accord, his reasons therefor being stated as follows:

"It is also the claim of the Vreelands, as well as the claim of De Golia, that Langereis gave his oral consent to the Vreelands to sell their interest in this property that they had therein by virtue of the land contract above mentioned of date August 23, 1913, and De Golia also claims that before he purchased this interest from the Vreelands on October 7, 1915, he had the oral consent of Langereis to purchase this interest from the Vreelands. While this is the testimony in part and in substance of both Vreeland and his wife

and William E. De Golia, there are other portions of their testimony that is much more conclusive that Langereis never gave any such consent thereto. Both the Vreelands, as well as the De Golias, testified, in substance, that Langereis told them that he would consent to nothing with reference to the transfer of the Vreeland contract until everything was squared up, all payments made, and De Golia testified that he agreed with the Vreelands that he would pay all of the amounts due to Langereis, but he did not make such payments, and has never made them, or any part thereof. On October 7, 1915, Sylvester Vreeland and wife assigned their interest in said contract of date August 23, 1913, to William E. De Golia; eight days thereafter William De Golia assigned all his interest under that contract to Albert Rodenhouse.

"To my mind it is clearly apparent, and I so find as a matter of fact, that the Vreelands and De Golia never had the consent of Langereis for the assignment of said contract by the Vreelands to De Golia, and that immediately after October 7, 1915, De Golia knew that Langereis was displeased with such sale and assignment, and that he would not acquiesce therein.

"I also further find that, by reason thereof, De Golia, eight days after receiving his interest in said contract, sold and assigned it to Albert Rodenhouse."

We are unable to agree that any of the contentions advanced by counsel for appellant in his brief would justify us in reversing the decision made in the court below, and therefore affirm the decree, with costs to the appellee.

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

PARSONS *v.* E. I. DU PONT DE NEMOURS POWDER CO.

1. NAVIGABLE WATERS—RIGHTS OF PUBLIC—RIGHTS OF RIPARIAN OWNERS.

   The public has the right to use a navigable stream in its fluid state for navigation purposes and in its frozen state for the purpose of traversing its surface, with due regard to the rights of riparian owners to its use for their own purposes.

2. SAME.

   Frozen navigable rivers are public highways and the traveler ordinarily has the paramount right of passage as necessarily incident to the reasonable enjoyment of his right, but it must be exercised in common with such uses as the frozen surface of the river is adapted to.

3. SAME.

   Where a gas reducing plant discharges warm water into a stream and melts the ice in the winter time for some distance and makes the ice soft around the opening and causes the accumulation on the surface of the open water of a substance resembling ice, the owner must, in the exercise of its rights, proceed in such a manner as to least endanger the lives of skaters on the ice and others.

4. NEGLIGENCE—HOLES IN ICE—BARRIERS—QUESTION FOR JURY.

   In an action against the owner of a gas reducing plant to recover for the death of plaintiff's son, due to falling into the river through soft ice at an open place caused by the melting of the ice by the discharge of warm water from the plant, *held*, that it was a question for the jury whether defendant should not have taken means to provide some barrier or guard, or have given warning of the dangerous condition of the ice.

5. DEATH—WITNESSES—DEATH BY DROWNING—PRESUMPTIONS.

   Where there are no eyewitnesses to the instantaneous death of a boy by drowning by falling through soft ice in a river while skating, it must be presumed that he was in the exercise of due care at the time of his death.

6. NEGLIGENCE—DEATH BY DROWNING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

   In an action against the owner of a gas reducing plant for

the death of a boy seven years old by drowning caused by falling, while skating, through soft ice near an opening in the ice caused by warm water from the plant, there being no eyewitnesses to the accident and it appearing that the scum that gathered on the opening had the appearance of dark ice, it was a question for the jury whether decedent was guilty of contributory negligence.[1]

Error to Bay; Coumans, J. Submitted June 14, 1917. (Docket No. 47.) Decided September 27, 1917.

Case by Amos J. Parsons, administrator of the estate of Verne Oscar Parsons, deceased, against the E. I. Du Pont De Nemours Powder Company for the negligent killing of plaintiff's decedent. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

De Foe & Converse and *C. A. Higgs,* for appellant.

Weadock & Duffy (*Russell H. Neilson,* of counsel), for appellee.

KUHN, C. J. The son of the plaintiff, Verne Parsons, aged 7 years and 3 or 4 months, was drowned while skating on the Saginaw river at Bay City, Mich., in the latter part of the afternoon of January 12, 1915. The Saginaw river is one of the large navigable rivers of this State, and as it passes through Bay City on its course to Saginaw Bay, it divides for a distance into two channels, the east channel being the main channel of the river. The west channel, where the accident occurred, is about 200 feet in width, and is also conceded to be a navigable stream, having been used for a great many years for commercial purposes, and during the winter months has been used by the public generally for skating, fishing, and drawing of logs, hay, and ice. The defendant company

[1]This case will be annotated on the question of liability of one who renders ice unsafe for skating or travel, L. R. A. 1918A.

owns and operates a plant which faces upon the Saginaw river on this west channel. This plant is used for the manufacture, among other things, of charcoal, acetate of lime and wood alcohol. One of the buildings of the plant, which is known as the "still house," is used by the company for the purpose of reducing the gas obtained from the reduction of wood to charcoal, into its various chemical properties. After the gases have been gathered from the retorts, they are conveyed to the still house and passed through a series of condensors, where by the use of water the gases are condensed to a liquid state. The company, in order to properly reduce these gases to a liquid state, have installed 12 pumps, which are used for pumping the water from the Saginaw river, conveying it to the plant, forcing it around the condensors, and then returning it to the river through a sewer. This use of the water raises its temperature from that of the water taken from the river to that of about 70 or 80 degrees. About a million gallons are used each day. By the returning of this amount of warm water to the river during the winter months the ice is melted at the place where the sewer empties into the river, creating an open place, the size of which at the time of the accident was about 65 feet across the river and 115 feet along the shore. At the time of the drowning there were no barriers or guards or notices of any kind around this opening in the ice, and for a distance of 6 or 7 feet from the open water the testimony shows the ice was thin and soft and unsafe. There was also testimony to show that this open water was covered with a tar scum, which did not look unlike the ice, and which was described by one of plaintiff's witnesses, in answer to a question, as follows:

"Q. Give the jury some idea of what that scum or substance laying there is like as you approach it on the ice; what it looks like.

"*A.* Kind of dirty, soapy like stuff, tar mixed with it, floats around on the surface; it looks as though it was good ice."

Plaintiff's decedent, on the day in question, left his home during the absence of his father from the house, but with the permission of his sister, who was at home taking care of him, and went to the river to skate. Upon his father's return, the boy was reported missing, and the father, with others, went to the river to find him. They found the skate tracks on the ice, leading up to the open water, indicating that he had broken through the soft ice as he approached the opening, and after a search, the body was found in the river near where the skate tracks ended.

This action was brought under sections 10427 and 10428, 3 Comp. Laws (3 Comp. Laws 1915, §§ 14577, 14578), known as "Lord Campbell's act," and commonly called the "death act." The trial judge directed a verdict for the defendant on the ground that the plaintiff had not established any negligence on the part of the defendant, or that the plaintiff's decedent was free from negligence at the time of the accident. Whether or not the trial judge was correct in directing a verdict for the reasons stated is the question before us for determination.

That the defendant company had the right to the use of the ice abutting to the land on which its plant was located is not questioned by counsel in this case. In fact, counsel for both parties cite practically the same authorities, and the difficulty rather is in their application to the facts in this case. We cannot accede to the contention that the plaintiff's decedent was a trespasser. This was concededly a navigable stream, and the public had a right to use it in its fluid state for navigation purposes, and also had a right to traverse its surface, when congealed, with due regard to the rights of the riparian owners to its use for their

own purposes. Neither of these rights, however, could be exercised to the exclusion of the other, and the rule seems to be well stated in *Woodman* v. *Pitman,* 79 Me. 456 (10 Atl. 321, 1 Am. St. Rep. 342), where it is said:

"Frozen navigable rivers are public highways, and the traveler ordinarily has the paramount right of passage as necessarily incident to the reasonable enjoyment of his right, but it must be exercised in common with such uses as the frozen surface of the river is adapted to. One such use is the harvesting of ice, a use that may impede travel. Both are common rights, and both may be lawfully exercised; but both cannot be enjoyed at the same spot at the same time, because the one may be there destructive of the other, so that it may be reasonable for that use, giving the larger public benefit to restrict other uses to a narrower compass, but it cannot lawfully monopolize the whole right to the utter destruction of all other rights."

In an early case, *French* v. *Camp,* 18 Me. 433 (36 Am. Dec. 728), Chief Justice Weston said:

"It is contended, that the defendants had an equal right to cut a hole in the ice, to water their horses or other cattle, or for other purposes. Assuming that the defendants have as good a right to the use of the water, as the plaintiff or the public generally had to the right of passage, the use of a common privilege should be such as may be most beneficial and least injurious to all who have occasion to avail themselves of it. To cut a hole in the center of a road upon the ice, or so near it as to entrap a traveler, is a wanton and unnecessary disturbance of the right of passage. It is making an improper use of a part of the river, lawfully appropriated for the time being, to a different purpose. It is a direct violation of that great principle of social duty, by which each one is required so to use his own rights as not to injure the rights of others."

See, also, *Board of Park Com'rs* v. *Diamond Ice Co.,* 130 Iowa, 603 (105 N. W. 203, 3 L. R. A. [N. S.] 1103, 8 Am. & Eng. Ann. Cas. 28); *Pennock* v. *Mitch-*

ell, 17 Ont. L. Rep. 286, 14 Am. & Eng. Ann. Cas. 363.

Applying the principles of these decisions to the facts before us, we think it reasonable to hold that it was the duty of the defendant, in the exercise of its rights, to proceed in such a manner as to least endanger others in the exercise of the rights which the law accorded to them. They, by the operation of their plant, made unsafe a portion of the river which otherwise would have been safe for the public's right of passage thereover, and in our opinion it was at least a question for the jury to determine whether or not, in the exercise of reasonable prudence, the defendant should not have taken means to provide some barrier or guard, or have given warning to the public of the dangerous condition of the ice, which had been created by it.

Neither are we satisfied that we should say, as a matter of law, that the plaintiff's decedent was guilty of contributory negligence. It must be kept in mind that this boy met an instantaneous death, and, there being no eyewitnesses, so far as the record shows, of his death, there is the presumption that he was in the exercise of all due care upon his part. He was still of tender years, and, considering all of the circumstances in the case—the fact that there was testimony to show that the scum which gathered on the opening had the appearance of dark ice; that he did not skate into the opening, but broke through the ice before reaching it—we are of the opinion that this question should have also been submitted to the jury.

The judgment must be reversed, and a new trial granted, with costs to the appellant.

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

SPARKS v. LORD.

1. EVIDENCE — PAROL EVIDENCE — ADMISSIBILITY — CONTRACTS — OMISSIONS.

In an action to recover the balance of the contract price for installing a heating plant in a residence, parol evidence is admissible to supply an omission in the schedule attached to the written contract relating to the degrees of temperature at which the house was to be heated.[1]

2. TRIAL—RIGHT TO OPEN AND CLOSE—PLEADING—COURT RULES—ADMISSIONS.

Under Circuit Court Rule No. 42, § 3, providing that whenever in an action the defendant, by notice accompanying his plea, waives the benefit of the general issue and admits the facts alleged in the plaintiff's declaration, but attempts to defeat plaintiff's recovery by set-off or recoupment, or by affirmative defense which, if true, defeats plaintiff's recovery, such defendant shall have the opening and closing in the taking of testimony and in the argument, where a defendant by plea waives the benefit of the general issue and admits facts alleged in declaration, claims the right to open and close and files notice of recoupment, he does not admit away all right of defense in case and has the right to open and close.

3. APPEAL AND ERROR—SET-OFF AND RECOUPMENT—VERDICTS.

A plaintiff cannot complain of a verdict in favor of defendant on his claim of recoupment for less than the evidence warrants, where the latter does not appeal.

4. SET-OFF AND RECOUPMENT—VERDICTS—MISCARRIAGE OF JUSTICE—STATUTES—REMITTITURS.

In an action to recover the balance of $145 due on a contract, in which the defendant filed a counter claim for $129.80, and there was evidence to sustain the allowance of the counter claim in full, and the jury returned a verdict for $2.14 for defendant, any error of the court in requiring a remittitur of $20 by subtracting the sum of $125 from $145 and of the jury in returning a verdict for the de-

[1]On admissibility of parole evidence to vary, add to, or alter a written contract, see note in 17 L. R. A. 270.

fendant, the latter not having appealed, did not, under Act No. 89, Pub. Acts 1915 (3 Comp. Laws 1915, § 14565), and Act No. 314, Pub. Acts 1915, chap. 50, § 28 (3 Comp. Laws 1915, § 13763), result in a miscarriage of justice except as to the excess sum allowed defendant and the case was affirmed on condition that defendant file a remittitur of the $2.14.

Error to Berrien; Bridgman, J. Submitted June 21, 1917. (Docket No. 104.) Decided September 27, 1917.

Assumpsit by Claud R. Sparks and Jacob F. Schaefer, copartners as Sparks & Schaefer, against John S. Lord for a balance due upon a contract for the installation of a heating plant. Defendant filed a plea and notice of recoupment. Judgment for defendant. Plaintiff brings error. Affirmed, conditionally.

Charles H. Kavanagh, for appellants.

Cady & Andrews, for appellee.

KUHN, C. J. This controversy arises out of a dispute over the installation of a heating plant by the plaintiffs in the house of the defendant. Plaintiffs are copartners in the hardware business in Berrien Springs, Mich., and also install in residences and other buildings hot water boilers and radiators, with equipment, furnished by the American Radiator Company. The connection piping is installed according to plans furnished by the company and made by the Honeywell Heating Specialty Company, of Indiana. In the latter part of the year 1914 the plaintiffs entered into a written contract with the defendant to install a boiler in the defendant's residence and connect the same with radiators into a heating system or plant. The contract price was $437, and various payments were made on the contract until the balance due was reduced to

$145, which amount is admitted by defendant to be still due and unpaid. The contract contained a clause which purports to guarantee the apparatus to be capable of heating the rooms in which the radiators are placed to temperatures mentioned in the schedule attached, during the coldest winter weather. In the schedule attached, although it provided spaces for the insertion of the temperatures, apparently the figures were omitted and nothing appeared in the spaces provided therefor.

After the installation of the plant, the defendant claimed that it did not heat his house to his satisfaction and according to the contract, and after taking the matter up with the plaintiffs, he wrote a letter to the American Radiator Company, making a complaint. A man was sent out by this company to inspect the plant, who reported that there was nothing wrong with it, but found fault rather with the method of firing and because defendant had only burned wood instead of coal. The Honeywell Company also sent an expert to examine the plant, who reported that it was in perfect condition. In November, 1915, the defendant, however, had a plumber tear out the pipes and install some of a larger size, which it is claimed remedied the difficulty, and that thereafter the plant heated the house satisfactorily.

This suit is brought on the written contract for the $145 still due. The defendant in his plea waived the benefit of the general issue and admitted the facts alleged in the plaintiffs' declaration, and filed a plea and notice of recoupment with bill of particulars attached. The proofs tended to show the defendants' counterclaim to be $129.84, which included the cost of installing the new pipe and expenses in connection therewith. The case being submitted to the jury, they returned a verdict of $2.14 in favor of the defendant,

and thereupon the plaintiffs made a motion for a new trial, which was granted, unless defendant consented within 15 days to remit upon the record the sum of $20; the trial judge being of the opinion that there was no evidence that would warrant an allowance of damages to the defendant exceeding $125. The amount of $20 was arrived at as being the difference between $125, the amount which, in the judge's opinion, the defendant had proved, and the $145, being the amount of plaintiffs' claim. The defendant filed a written consent to remit the $20.

Various assignments of error are urged. We will consider those which seem to us of sufficient importance to warrant it.

It is contended that the court erred in admitting evidence of a verbal agreement that the house was to be heated to a temperature of 72 degrees for the purpose of showing what a reasonable temperature should be; that the contract being silent upon the question of temperature, it was not proper to admit any testimony with reference to the same. An examination of the contract is very convincing, however, that in its preparation the degrees of temperature were inadvertently omitted from the schedule therein provided, and we think it was entirely proper to supply this by parol evidence. See *Stahelin* v. *Sowle,* 87 Mich. 124 (49 N. W. 524); *Beld* v. *Darst,* 146 Mich. 143 (109 N. W. 275).

Another question raised is: Did the defendant, by waiving the general issue under subdivision 3 of Circuit Court Rule No. 42 and claiming the right to open and close the case, admit away all his right of defense in the case? We think not, for while the rule itself provides that, by the waiver, the defendant admits the facts alleged in the plaintiff's declaration, it further provides that if the defendant attempts to defeat the plaintiff's recovery by set-off or recoupment, defendant

shall have the opening and closing in the taking of the testimony and in the argument on the trial of the cause. This right was given him on the trial of this case, and we think properly so, under the rule.

It is also urged that the court, under the circumstances of this case, did not have any power or authority to compel a remittance by the defendant upon the record; that the verdict of the jury finds no justification in the evidence; and that the judge should have granted a new trial, instead of compelling the remittance, as he did. The jury assessed the damages in the instant case, and it is, of course, impossible to tell how they arrived at the verdict they did, which, under the evidence, is clearly erroneous. Counsel have had some difficulty, in their argument and briefs, in determining the exact amount that the testimony shows the defendant was entitled to recoup. We are satisfied that there is testimony warranting the jury in awarding the defendant $129.84 damages in the way of recoupment, which is somewhat in excess of the amount that, in the opinion of the trial judge, the defendant was entitled to recoup. However, the defendant raised no question with reference to that, not having appealed, so that the plaintiffs have nothing to complain of concerning this discrepancy. It is likewise clear, however, that the circuit judge should have added to the $20 the sum of $2.14, the amount of the verdict given in favor of defendant. We are very much in doubt about the correctness of the practice here adopted by the circuit judge. The record shows, however, that costs were taxed in favor of the defendant in the sum of $62.50, as, by virtue of the fifth subdivision of section 14392, 5 How. Stat. (2d Ed.), 3 Comp. Laws 1915, § 13688, subd. 5, unless the plaintiff recovers judgment of at least $100, the defendant is entitled to his costs. In our opinion it is made to appear that, by the remittance, the plain-

tiffs are in precisely the same position that they would have been had a verdict been rendered for them in the sum of $20, which should have been, in our opinion, $22.14. It does not appear, therefore, that the plaintiffs have suffered any injury by the verdict being originally wrong or by the action of the trial judge. The principal facts have been determined by a jury. We think it is an instance where the recent statute passed by the legislature (Act No. 89, Pub. Acts 1915, 3 Comp. Laws 1915, § 14565), and also section 28, chap. 50, of the judicature act (Act No. 314, Pub. Acts 1915, 3 Comp. Laws 1915, § 13763), should be applied, and that we should not reverse the case, because it has not been made to affirmatively appear that there has been a miscarriage of justice (*Barras* v. *Barras*, 192 Mich. 584 [159 N. W. 147]), except as to the $2.14 now noted.

A new trial will, however, be granted, unless the defendant consent, within 15 days, to remit the additional amount of $2.14, as indicated in this opinion. In case the amount is remitted, the case will be affirmed.

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

In re SPARKS' ESTATE.

HODGMAN *v.* SEARS.

1. EVIDENCE—ADMISSIBILITY—WITNESSES, CREDIBILITY OF—CROSS-EXAMINATION.

   In a will contest the admission of evidence on cross-examination of one of the contestants and her former husband that a short time prior to the death of the husband the latter took his aged father to his home and procured a deed to himself of all the father's property, and the wife received a deed of part of the property from the husband, and, after the father's death, such deed was set aside in proceedings for its cancellation by other children, for the purpose of showing the character of the witnesses, was not prejudicial error.

2. WITNESSES—CROSS-EXAMINATION—DISCRETION OF COURT.

   In order that the jury may get a proper appreciation of the fairness and reliability of the testimony of witnesses, considerable latitude is generally allowed in the cross-examination of witnesses, the extent of such cross-examination being a matter left largely to the discretion of the trial court.

3. WILLS—MENTAL COMPETENCY—UNDUE INFLUENCE—WITNESSES—EVIDENCE.

   Where a witness in a will contest, a banker, showed by his testimony that he had met decedent on the average of twice a week during a period of ten years preceding testator's death and had observed him in various business transactions in the bank, it was not error to allow witness to testify that decedent was the equal of the average business man and could not be influenced in business transactions against his will.[1]

4. TRIAL—EXCLUSION OF WITNESSES FROM TRIAL—WILLS—DISCRETION OF COURT—ABUSE OF DISCRETION.

   Where, by a consent order, all unsworn witnesses were excluded from the court room during a will contest by

[1]On the question of admissibility in evidence of expert opinion as to sanity and mental capacity, see comprehensive note in 39 L. R. A. 305; 42 L. R. A. 767.

the order of court, and, after counsel for legatee stated that they desired that the latter be allowed to remain in court for the purpose of assisting counsel in the cross-examination of witnesses and that he would not be called for direct examination, and offered to allow him to be cross-examined at once, there was no abuse of discretion by the trial judge in not modifying the order as to the legatee.

5. EVIDENCE—WILLS—FAILURE OF LEGATEE TO TESTIFY—PRESUMPTIONS.

The benefit of the presumption arising from the failure of the legatee to take the stand and testify in his own behalf in a will contest may not be claimed by contestants, where, after a consent order for exclusion of witnesses is made, it is announced that the legatee will not be offered as a witness, and opportunity is given contestants to cross-examine him, which is not done, and it is claimed that legatee's presence in court is necessary and that by his remaining under a modified order of the court he can no longer be called to the witness stand without the consent of the contestants, since the contestants, by their actions, foreclosed him from so doing.

6. SAME—ADMISSIBILITY—WILLS—STATEMENTS OF TESTATOR—UNDUE INFLUENCE.

In a will contest statements of the testator are inadmissible to show undue influence, but are admissible to show the effect that such undue influence had upon the testator in respect to making of the will.

Error to Branch; Knowlen, J. Submitted June 25, 1917. (Docket No. 57.) Decided September 27, 1917.

Willis E. Hodgman presented for probate the will of John Sparks, deceased. The will was allowed in the probate court, and Esther Sears and others appealed to the circuit court. Judgment for proponent, Contestants bring error. Affirmed.

C. C. Johnson and *L. F. Humphrey*, for appellants.

H. H. & B. E. Barlow and *Palmer, Palmer & Palmer*, for appellee.

KUHN, C. J. This is a contest over the will of John Sparks, deceased. The probate of the will is contested by Emma Wright and others of his children who were dissatisfied with its provisions, as by its terms the bulk of the estate was willed by the testator to his son, Edgar. The reasons filed for contesting the will were, in substance, that the testator was mentally incompetent to make the purported will, and also that the instrument was obtained and executed through undue influence exerted upon the testator by his son, Edgar. The only question, however, submitted to the jury was that of undue influence, and upon this question the verdict was against the contention of the contestants and the trial resulted in the will being sustained.

The first group of assignments of error have reference solely to the admission of testimony of witnesses. From the examination of Sarah Wright Brooks, one of the contestants, and her former husband, Jerome Wright, it was made to appear that, within a short time previous to his death Jerome Wright brought his father, a man upwards of 90 years of age, to his home, and there secured from him a deed of all of his father's property; that his wife obtained a deed of 45 acres of this land from her husband; that his father lived seven weeks; and that after his death the other children in the family filed proceedings to set aside the deed, and, after a hearing in court, their contention was sustained. The purpose of this cross-examination was to show the character of the witnesses, and to our minds, in view of the claims made by the contestants in this case and the testimony given by these witnesses, the admission of this testimony was not prejudicial error. In order to get to the jury a proper appreciation of the fairness and reliability of the testimony of witnesses, considerable latitude has always

been allowed in the cross-examination of witnesses, and the extent of such cross-examination is a matter left largely to the discretion of the trial judge. In this case we do not think that this discretion was abused. See *Wilbur* v. *Flood,* 16 Mich. 40 (93 Am. Dec. 203); *Wolverton* v. *Village of Saranac,* 171 Mich. 419 (137 N. W. 211); *Totten* v. *Totten,* 172 Mich. 565 (138 N. W. 257).

Other assignments of error relate to the admission of the testimony of Milton W. Wimer. The question which was asked, and the answer which was allowed to stand, which are the subject of complaint, are as follows:

"*Q.* Now, would you judge him to be a man who could be influenced in any business transaction against his will?

"*A.* I should say no; he was the equal of the average business man."

Before this answer was received, it was made to appear that Mr. Wimer was connected with the bank in which Mr. Sparks did business, and that for a period of ten years and upwards he had seen him as often as twice a week, and had observed him in the transaction of various business matters at the bank, and had had opportunity to observe the general firmness of his mind from a business standpoint. It was not error to allow the witness to testify as he did, after stating the facts upon which his opinion was based. *Paul* v. *Clements,* 176 Mich. 251 (142 N. W. 384).

During the trial, by a consent order, all witnesses who had not been sworn were excluded from the court room by the order of the trial court. The record discloses that the following occurred:

"*Mr. Johnson:* Now, this order, as I understand it, applies to the legatee, Mr. Sparks?

"*The Court:* Yes.

"*Mr. Palmer:* Under our theory of this case, Mr. Sparks is not a competent witness on any question that we would want to call him upon. I do not think that legally he can testify; therefore we shall not put him on the stand. Our theory is that he cannot be sworn as a witness; therefore he won't be called as a witness by us.

"*The Court:* All right. You better look after it, gentlemen, and see that the witnesses who are affected by the consent order understand it.

"*Mr. Humphrey:* If the court please, we, as contestants here, may, and probably will, desire to call Ed. Sparks upon the stand, if he is not put on, and I understand he is not to be, by the proponent, and we ask that he be excluded from the room.

"*Mr. Palmer:* Your honor, it is necessary in the cross-examination of these witnesses to have Mr. Sparks to assist in the trial of this case. If they want to call Mr. Sparks for cross-examination, they may. We consent that they may call him now.

"*Mr. Humphrey:* We will not do it now at the present time the way the testimony stands. We are not determined fully on the subject.

"*The Court:* That puts this thing in a somewhat embarrassing situation. I am not prepared to say just what the court should do under the circumstances. It is a novel proposition you have here.

"*Mr. Humphrey:* Under our consent I supposed we had it arranged.

"*The Court:* You now announce that you may call him.

"*Mr. Humphrey:* Yes.

"*Mr. Palmer:* Then he will be a witness for them, and not us.

"*Mr. Barlow:* We waive the privilege as far as he is concerned.

"*The Court:* Yes; I understand that. I think I will deny that motion, Mr. Humphrey.

"*Mr. Humphrey:* Then is the further motion denied?

"*The Court:* What further motion?

"*Mr. Humphrey:* Then will the further order be set aside as to the other witnesses?

"*The Court:* No, sir; just with respect to Mr. Sparks here."

It is claimed that this ruling of the trial judge was erroneous and prejudicial. The conduct of the trial must, as we have often said, be left largely to the sound discretion of the trial judge. He has the opportunity to observe the character of the witnesses, and is thus enabled to determine what action should be taken under the circumstances to best further the ends of justice. By his action in this case the contestants were not deprived of any substantial right, as they had the opportunity to examine Edgar Sparks immediately after the order of exclusion was made, but this they did not see fit to do. We are of the opinion that it was within the sound discretion of the court, the order having been entered, to determine, taking into consideration all the facts and circumstances before him, whether the order which had been made should be set aside or not. We think that he acted properly under the circumstances.

The court gave the following request to charge:

"The court instructs you that under the laws of this State the contestants to the will in this suit, or any of them, had the right to call Edgar Sparks to the stand as a witness and cross-examine him the same as if he had been called as a witness or taken the stand in his own behalf, and that when so called by the contestants they would not have been bound by his testimony as given. You are therefore further instructed that his failure to take the stand and testify in his own behalf raised no presumption against him or against any testimony that he might or might not have given"

—and refused to give the following of the contestants' requests to charge:

"Contestants request the court to charge the jury as follows: 'It is the privilege and right of the proponent and all persons interested in this contest as heirs at law or legatees to take the stand and testify to such matters as are within their knowledge and involved in this case or connected therewith.

" 'It is claimed on the part of the contestants of this will that that portion of the will making Edgar Sparks the residuary legatee thereof and giving him the greater portion of said estate was made by John Sparks, deceased, through the coercion, duress, threats, and undue influence of said Edgar Sparks, and testimony has been given you upon that subject which you have heard; and I charge you that Edgar Sparks had the right to take the stand in his own behalf and testify to such things within his knowledge as would refute or explain the testimony that has been offered and the charges made against him. He having failed to take the witness stand or make any explanation of the testimony offered and the charges made against him, this being a civil case, his silence and refusal to take the stand raises a strong presumption of the truth of such charges, and must be construed most strongly against him. *Warren* v. *Holbrook*, 95 Mich. 185 (54 N. W. 712, 35 Am. St. Rep. 554).' "

Testimony was admitted to show that Edgar Sparks was accused of many things, the purpose being to show the state of mind of his father toward him and the relations that existed between them. With reference to the refusal of the court to give the request presented, it should be borne in mind that, after the consent order excluding witnesses was made, it was announced that Edgar Sparks would not be offered as a witness by the proponent, and the opportunity was given contestants' counsel to cross-examine him, if they so desired, which was not done; also that proponent's counsel claimed that his presence in court was necessary in order to enable them to consult with him during the progress of the trial, and that by his remaining, under the order of the court, he could no longer be called to the witness stand without the consent of the contestants. Under these circumstances we do not think that the contestants should claim the benefit of the presumption arising from the failure of the legatee to take the stand, when by their action they foreclosed him from so doing.

Complaint is made to the charge of the court with reference to certain alleged statements of the testator, made in the presence of some of the contestants. The court stated, in substance, that these statements of the testator were not admissible to show undue influence, but were admissible to show the effect that such undue influence had, if any, upon the testator in respect to the making of the will. In this the trial court seems to have followed the rule announced in *Bush* v. *Delano,* 113 Mich. 321 (71 N. W. 628), and *Zibble* v. *Zibble,* 131 Mich. 655 (92 N. W. 348).

It has not been made to appear that prejudicial error was committed by the court in the trial of this case, and we therefore affirm the judgment.

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

WILMARTH *v.* MICHIGAN UNITED TRACTION CO.

1. PROXIMATE CAUSE—DEFINITION.

   Proximate cause is such a cause as operates to produce particular consequences without the intervention of any independent unforeseen cause without which the injuries would not have occurred.

2. ELECTRICITY—ANIMALS — LIABILITY FOR INJURIES — PROXIMATE CAUSE.

   The proximate cause of the death of horses killed during an electrical storm because of electricity communicated from a trolley wire to a wire fence along an electric railroad right of way was the failure for three months to repair a "pull off" wire, which, when in its proper

place, ran from the top of a line pole to the trolley wire over the center of the track, but the end of which had in some way become detached and fallen and become entangled with the fence, and the other end of which remained attached to the eye bolt of a span wire on the pole connected with the trolley wire by an insulated "hanger" or circuit breaker, which became charged during the storm, communicating electricity to the fence, and not the electrical storm, since the danger of charging the wire by an electrical storm was a danger which should have been foreseen and guarded against.

Error to Ingham; Wiest, J. Submitted June 15, 1917. (Docket No. 56.) Decided September 27, 1917.

Case by Hugh C. Wilmarth against the Michigan United Traction Company for the negligent killing of plaintiff's horses. Judgment for plaintiff. Defendant brings error. Affirmed.

Sanford W. Ladd (*Charles E. Lewis* and *Warren, Cady, Ladd & Hill,* of counsel), for appellant.

L. B. Gardner and *O. J. Hood,* for appellee.

KUHN, C. J. On August 13, 1914, three horses of the plaintiff's were pastured in a field adjoining the electric line of the defendant company running between Owosso and Lansing. They were grazing in the field together with other stock of the plaintiff's when a rainstorm came up during which there was more or less thunder and lightning, and when the storm had ended the horses in question were found lying against a wire fence separating the field from the defendant's right of way. All were dead and were smoking, as well as a tree to which the fence was attached at this point, and continued to do so until a line crew arrived and cut a wire, one end of which was fastened in some way to the wire fence about 40 rods from where the horses lay, and the other end

of which ran to the top of one of defendant's poles, where it formed a connection with a span wire running from pole to pole overhead across defendant's track and supporting the trolley wire in the center. This wire running to the fence from the top of the pole had originally been installed as what is known as a "pull-off" wire, and when in its proper place ran from the top of the pole to the trolley wire over the center of the track; its purpose being to pull the trolley wire slightly towards the pole so as to adjust it to the curve of the road. The end of this pull-off wire attached to the trolley wire had in some way become detached and had fallen to the ground, where it became entangled, through accident or by some person, in the wire fence. The other end of the wire was connected by an eye bolt to the end of the span wire attached to the pole. The span wire was connected to the trolley wire by an insulated "hanger" or circuit breaker of a type in general use. After the storm this insulator was found to be "shot," so that it no longer restrained the current in the trolley wire which passed through the span wire, the fallen wire, and through the fence. When the line crew arrived shortly after the storm in response to a report of trouble, the fallen wire and the span wire to which it was connected were found hot and charged.

It is the plaintiff's theory of the case, and it was upon this theory that the case was submitted to the jury, that the defendant was negligent in allowing the pull-off wire to fall and remain there for such a length of time; that it should have been discovered in the exercise of ordinary care; and that the defendant had abundant time to remove it after the time in which it should have been discovered had passed. The evidence discloses that the wire had been in this position for a period of about three months prior to the accident. It also appears under the undisputed testimony

that the insulated hanger or circuit breaker was of standard equipment sufficient to insulate for a current of 600 volts in the defendant's line at the time in question, which voltage was the current which ran through the trolley wire necessary for the operation of the cars of the defendant. At the close of plaintiff's proofs, and again at the close of the case, a motion for a directed verdict was made in behalf of the defendant which was denied, and the case was submitted to the jury, resulting in a verdict of $595.76, upon which judgment was duly entered.

The assignments of error practically raise one question. It is the claim of the defendant that there was no actionable negligence on the part of the defendant in not removing the wire running from the pole to the fence, because the accident that really occurred could not have been anticipated, as the proximate cause was the act of God, that the undisputed facts show the fallen pull-off wire was harmless as far as defendant's current was concerned under ordinary and usual conditions, and that it was only the extraordinary accident that occurred during the electrical storm that rendered the wire a dangerous medium. In other words, it is the contention that the proximate cause of the death of the colts was the severe electrical storm, and not the failure to repair the pull-off wire.

The trial judge submitted to the jury these propositions: Whether or not under the circumstances of this case it was a negligent act on the part of the defendant to allow the pull-off wire to remain in the condition that it was; whether or not such a reasonable time had elapsed as to bring notice to the defendant; and did the defendant, after it should have discovered it, have time in which to remedy it. We are of the opinion that these questions were properly for the jury if it can be said that the alleged negligent act on the part of the defendant was the proximate cause

of the damages suffered by the plaintiff. This brings up again the much-discussed and vexatious question of determining under the facts of any particular case what the proximate cause of a particular accident is. Can it be said that an electrical storm that destroyed the insulation on the circuit breaker attached to the wire was such a condition that it can be said the defendant should have anticipated it? In *Detzur* v. *Brewing Co.*, 119 Mich. 282 (77 N. W. 948, 44 L. R. A. 500), the plaintiff was injured by the falling of a pane of glass from an upper window in the defendant's building which stood close to the public street, and there was evidence tending to show that the pane of glass had been in such a condition as to render it likely that pieces would readily be shaken out. This court said:

"Counsel contend that, if the glass fell by means of its being dislodged by the wind, the negligence of the defendant was not the proximate cause of the injury, and they complain of a refusal to instruct the jury that in such event the plaintiff should not be allowed to recover. The negligence complained of is the maintenance of a window in such a condition that the glass was liable to fall out, not necessarily from its own weight, but under the natural conditions and strain to which it was likely to be subjected. It might not be negligent to leave a broken pane, if assurance could be given that it would be undisturbed by wind or by use. But wind is an everyday occurrence. It is a condition, not necessarily a cause, and one which should be taken into consideration before determining that a broken glass is not likely to fall. The wind may have been a concurring circumstance, but it cannot be said to have been the proximate cause, and the broken glass the remote cause."

Again, in *Morrison* v. *City of Ironwood*, 189 Mich. 117 (155 N. W. 477), the plaintiff received her injuries by stepping into a ditch in the public highway which had become filled with snow, and the question

presented was whether the natural accumulation of snow caused by the snowstorm was the proximate cause of the accident. We there said:

"Viewing the testimony as to the construction of the ditch in the light most favorable to the plaintiff's claim, and taking into consideration the weather conditions prevalent in that part of the State at the time of year the accident occurred, we are of the opinion that the fall of snow was not such an independent, unforeseen cause which intervened between the claimed negligent act of the city in constructing the ditch as it did and the time of the injury that it can be said to be the proximate cause of the accident, and that the city should have anticipated the possibility of the fall of snow, and that some injury might therefore result from having the ditch unprotected and uncovered."

Here we have another action of the elements, and we do not think it unreasonable to say that in this climate the defendant should be held to the knowledge that electrical storms are very likely to occur and do the very damage that was done in this case. We are therefore of the opinion that the electrical storm cannot be said to be such an independent, unforeseen cause as to take it from under the rule laid down in the definition given in *Stoll* v. *Laubengayer*, 174 Mich. 701 (140 N. W. 532), where proximate cause is defined as:

"A proximate cause, in the law of negligence, is such a cause as operates to produce particular consequences without the intervention of any independent unforeseen cause without which the injuries would not have occurred. 21 Am. & Eng. Enc. Law (2d Ed.), p. 485."

It follows also that the failure to repair the pull-off wire can reasonably be said to be the immediate, efficient, and direct cause preceding the injury because the defendant, who was guilty of this first act of omis-

sion, might reasonably have anticipated the intervening cause as the natural and probable consequence of his own negligence. Persons must be held to know the ordinary operation of the forces of nature and to use proper means to avert danger, especially when they are dealing with electricity, which is an invisible and impalpable force, highly dangerous to life and property, and are therefore bound to exercise care in proportion to the danger involved. See *Seith* v. *Electric Co.*, 24 L. R. A. (N. S.) 978, and note (241 Ill. 252, 89 N. E. 425, 132 Am. St. Rep. 204); *Paducah, etc., Power Co.* v. *Parkman*, 52 L. R. A. (N. S.) 587 (56 Ky. 197, 160 S. W. 931); *Kruis* v. *Railway Co.*, 190 Mich. 105 (155 N. W. 742); *Southwestern, etc., Telephone Co.* v. *Robinson*, 50 Fed. 810 (1 C. C. A. 684, 16 L. R. A. 545).

We have carefully examined the charge of the court, and are satisfied that the issues involved were submitted with proper instructions, and that there is sufficient evidence of the alleged negligence of the defendant to support the verdict of the jury.

We find no error, and therefore affirm the judgment.

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

MILLER *v.* ACME WHITE LEAD & COLOR WORKS.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF INDUSTRIAL ACCIDENT BOARD—EVIDENCE—SUFFICIENCY.

In proceedings for compensation for the death of an employee under the workmen's compensation act, evidence *held*, by a divided court, sufficient upon which to base the findings of the industrial accident board so as to not warrant the disturbing of their conclusion in favor of claimant.[1]

Certiorari to Industrial Accident Board. Submitted June 11, 1917. (Docket No. 20.) Decided September 27, 1917.

Josephine Miller presented her claim for compensation against the Acme White Lead & Color Works for the accidental death of her husband in defendant's employ. From an order awarding compensation, defendant and the Travelers' Insurance Company, insurer, bring certiorari. Affirmed by a divided court.

Vandeveer & Foster, for appellants.

John Kaminski, for appellee.

OSTRANDER, J. As plaintiff in certiorari says, there is a single point involved in this case, and states the point as "whether or not the testimony was sufficient and legally competent to justify an award to the claimant by the committee on arbitration, and thereafter an affirmance of said award by the industrial accident board."

Claimant's decedent received an injury to his foot June 5, 1916, when a wagon wheel passed over it, or struck it. Such injury as he then received was acci-

[1]On construction and effect of Workmen's Compensation Acts, generally, see notes in L. R. A. 1916A, 23; L. R. A. 1917D, 80.

dental, and the injury arose out of and in the course of his employment. The nature and extent of the injury is, however, uncertain, growing out of the fact, I assume, that because counsel for the employer admitted there was an injury to the foot "as described in the report of the accident, and therefore they need produce no proof on that as there is no question about it," more detailed evidence was not produced. The report was that a truck which he had just finished loading, in turning around, backed over his foot, and the foot was bruised. On the other hand, the claimant, in giving notice to the employer, stated the nature of the injury as follows:

"Whilst loading company's truck, the horses shied, and wheel of truck crushed his right foot. Blood poisoning caused his heart failure."

A physician who saw the injured man June 6th, 7th, and 8th testified that when he first saw him it was evident that first aid had been given to him. He did not examine the injury then. The second time, June 7th, he was complaining of distress in his chest and could not keep quiet, the foot was bothering him and pained him. Then he opened the bandage, and found that the foot "was bruised or crushed more or less." Because he thought his heart was palpitating, and of other symptoms, he gave the patient digitalis and bromide. Among other subjective symptoms was delirium, which the doctor describes as "vague in his ideas and thoughts, and then, if you would call his attention to it, why, he was all right." The record is not clear, but it is understood as meaning that the doctor found high blood pressure and some hardening of the arteries. On June 8th he advised him to go to a hospital, and he went to one, where he died June 16th. The doctor who saw him June 6th, 7th, and 8th never saw him again; except by hearsay knows nothing about the progress of the trouble, the death of the injured

man, or the cause of death. It is upon the testimony of this physician that claimant must rely to support the conclusion of the board that claimant's decedent died as a result of the injury.

Before examining it further, reference is made to the only other medical testimony in the case and the only other testimony which assumes to give details from which a conclusion as to the cause of death can be drawn. It is the testimony of the physician who performed the autopsy upon the direction of the coroner, and who never had seen the patient alive. He testified that the coroner told him to be careful in his examination because there was a history of an injury, and that "he may have died from injury." He found, he says, a large bedsore on the dead man's back, slight abrasion of the right elbow, the right foot discolored and swollen, and some abrasions of the right foot. Internally he found a hardened liver, hypertrophy of the heart and myocarditis, with a lesion of the mitral valve. He reported death from myocarditis. Describing conditions as he found them in greater detail, he said there was a thickening of the mitral valve, with discoloration, the muscle walls of the heart thin, and a fibroid change in the muscle, deposit of little white spots throughout the muscles of the heart, tending to weaken the heart muscle—conditions due to organic trouble. He described myocarditis as follows:

"Myocarditis is a condition of the heart which really means weakened condition of the heart muscle, usually found as a rule in patients past 40; comes on late in life. May be traceable to alcoholism, to hard work, and possibly to syphilis and acute infectious disease, whereby certain organisms are lodged in the heart muscle; sometimes due to valvular disease and hardening of the arteries; sometimes due to a hereditary condition. Sometimes we find families who develop hardening of the arteries very early in life, and that condition very often causes myocarditis. Now, in myocarditis we have an injured heart, a flabby heart; the heart

muscle thins, and a fibrous connective tissue is deposited in the muscles, in place of the muscle tissue, and thereby weakens the heart."

He looked for and found no blood clots, and was unable, he said, to trace the trouble from which the man died to the injury he received. Referring to the injury to the foot, he testified:

"Of course, there would be some change in the foot, because I didn't see him until the 16th, and repair had evidently started to take place, and the foot was in a better condition then than it was when Dr. Jaeger first examined the condition.

"*Q.* There undoubtedly was some pain to that foot?

"*A.* Yes.

"*Q.* There undoubtedly was some fever connected with it?

"*A.* It was possible.

"*Q.* Would those conditions have anything to do with weakening the condition of the heart; would it be apt to make it worse?

"*A.* As I said before, it might aggravate the condition a little."

"*Mr. Vandeveer:* Would that be great or slight, Doctor?

"*A.* Oh, I would not say it would be very great.

"*Q.* Well, it wouldn't need to be very great to kill a person if the heart was in bad shape, would it? Sometimes a slight aggravation there will—

"*A.* That is possible. A slight change might have produced his death.

"*Q.* A slight aggravation in this case would have caused that, wouldn't it?

"*A.* Possibly; yes, sir."

The testimony of this witness was read over to, or was read by, the physician who first examined the injured man, before which time he was told that myocarditis had been given as the cause of the patient's death. He had suggested as a cause of death an embolus, thrombus, blood clot, and suggested no other cause. Upon that subject he gave considerable testimony. Some of it is here set out:

"If an embolus—in other words, I had better put that so you can understand it—an embolus is a clot of blood. For instance, if a clot of matter which may become dislodged from the source of the infection where the primary injury was may have been taken up into the blood stream, pass through the heart and into the coronary arteries, and become lodged in there, and in that way stop the flow of blood by blocking it up. It in itself would form an infection. Of course, there are other things that might cause myocarditis, such as syphilis and tuberculosis, but it is usually from some infected source.

"*Q.* Was this man suffering from syphilis or tuberculosis?

"*A.* No, sir; not that I could tell. I have no evidence of that.

"*Q.* Then the injury that Mr. Miller sustained would cause a thrombus?

"*A.* A thrombus would be— An embolus is a thrombus that is removed from the original source of infection.

"*Q.* An embolism is a floating thrombus?

"*A.* Yes, sir.

"*Q.* And you want us to understand that that is the reason for this myocarditis?

"*A.* Might possibly be the reason.

"*Q.* Would you say it was in this case?

"*A.* As a matter of fact, that is for the man that made the autopsy. He could tell more about that than I could. I didn't see the heart after the autopsy.

* * *

"*Q.* Doctor, as to whether or not this myocarditis was produced as the result of some floating object in the veins, you cannot say?

"*A.* I am not positive of that.

"*Q.* No. Now, if you attempted to say it would simply be a guess upon your part, of course?

"*A.* It would be a tentative diagnosis; yes, sir.

"*Q.* Yes. And not being present at the time the inquest was held a guess of that kind would simply be speculative on your part?

"*A.* Yes; that is speculative.

"*Q.* And the person who could testify more fully upon that point would be the person who performed the autopsy?

"*A.* Yes, sir; taking into consideration the symptoms he had before.

"*Q.* Yes; if death was caused by the floating of a blood clot to that point, the autopsy would disclose it, would it not?

"*A.* It may not disclose the original source of the original embolus, but would show the effects of the embolus by blocking up the coronary arteries; in other words, there would be no blood supplied to that portion of the heart the embolus got caught in. This is, it caught; it was too large to go up into either one of the coronary arteries, and blocked up the opening, which left the muscles of the heart devoid of blood, and the heart stopped.

"*Q.* Does the drinking of alcoholic liquors ever produce a myocarditis condition?

"*A.* It might produce a chronic myocarditis.

"*Q.* And if it did that would be disclosed in the autopsy, would it not?

"*A.* Most likely.

"*Q.* Now, you say it closes off the supply of blood. The cause of this myocarditis, which might have been produced from several different causes, would have a tendency to lessen the supply of blood that went to the brain, would it not?

"*A.* Not in this case; no, sir. It is only the coronary arteries, the arteries that feed the heart muscles direct, only the muscular structure of the heart, that was involved here.

"*Q.* Now, then, if the patient was suffering from a delirious condition, you would not say that that would be due to the fact that a blood clot had stopped the supply of blood to the brain, would you?

"*A.* It is possible.

"*Q.* Well, my understanding was that in this particular case, as you have testified, that if there was a blood clot at that point, it would not affect the supply of blood to the brain?

"*A.* Well, I am not positive whether there was one blood clot or more than one. There may have been one lodged up in the brain, as far as I can state.

"*Q.* But if the myocarditis was due to drinking, would that produce a delirious condition?

"*A.* Well, that is something I don't know much

about. I never ran into a case of myocarditis that was produced by drinking. I have no knowledge of that fact. I would say, though, that myocarditis produced by drinking would be a chronic condition, and would involve the entire heart structure probably, and not only one section. That would be the way out of that.

"*Q.* You weren't present at the autopsy, doctor?

"*A.* No, sir.

"*Q.* And you don't know what it disclosed?

"*A.* I do not, excepting by hearsay.

"*Q.* And, of course, the autopsy would disclose the conditions that existed there at that time?

"*A.* It ought to; no question about that.

"*Q.* And you would place more reliance upon what the autopsy showed than what your opinion might be as to a time prior to the man's death?

"*A.* I certainly would. The autopsy would be direct evidence of what caused his death. * * *

"*Q.* Doctor, when you treated him on the 7th, that is when he had the pain in his chest?

"*A.* Began to show on the 7th and 8th. I didn't discover that on the 6th.

"*Q.* Is it your view of it now, that that was caused by the embolus?

"*A.* I would consider it—considering the outcome of the case that is my opinion.

"*Q.* This is the only thing you can attribute it to?

"*A.* Yes, sir; considering the circumstances and the symptoms when he was alive.

"*Chairman Reaves:* Supposing a man had myocarditis, and he had an injury of this kind, would that aggravate it? Would the pain and the fever from a condition of this kind aggravate the myocarditis?

"*A.* I should think it certainly would aggravate almost any condition there, if he was not normal.

"*Mr. Healey:* Even if there was no embolus?

"*A.* Even so.

"*Chairman Reaves:* Then it seems to be your opinion that the injury was the proximate cause of death. Is that right?

"*A.* I would state that as my own opinion.

"*Chairman Reaves:* That is all.

"*Mr. Vandeveer:* But, of course, doctor, you have to speculate on a good many things as to that?

"*A.* I say it is my opinion, that is all.

"*Mr. Vandeveer:* Your opinion is of a speculative nature in that respect, is it not?

"*A.* Considering the facts, I should say that would cause it.

"*Chairman Reaves:* And you are basing your opinion on the facts as you know them.

"*A.* On the facts as I know them, and on what I heard from the autopsy. * * *

"*Q.* Doctor, that is the testimony that Dr. Brandt gave before the committee?

"*A.* Yes, sir.

"*Q.* And do your views coincide with his upon that?

"*A.* That is a pretty hard proposition. Some things they do, and in others they do not.

"*Examined by Chairman Reaves:*

"*Q.* Well, would you say, Doctor, after hearing the testimony of Dr. Brandt read to you, and from your own testimony, would you not from your own knowledge, would you say now that the injury was the proximate cause of death?

"*A.* In my opinion it was. * * * Of course, I might state here that no two physicians agree on everything.

"*Examined by Mr. Vandeveer:*

"*Q.* Well, Doctor, the person who performed the autopsy would be in a better position to judge as to the cause of death than the physician who was attending him, would he not?

"*A.* He has got the facts right there, but there was nothing in my examination that would have led me to believe he had myocarditis.

"*Q.* The examination of the organ would disclose that, would it not, doctor?

"*A.* In a way it would. There might be a number of things creep in there I am not acquainted with. Here is one thing Dr. Brandt did not state that an embolism of the coronary arteries would have produced this thing.

"*Q.* The testimony discloses that he found absolutely no blood clot.

"*A.* It isn't necessary to have a blood clot. When a person dies, the right heart is usually filled with the blood clot.

"*Mr. Healey:* He said there was no sign of embolism.

"*A.* Well, myocarditis may be produced; he stated right in there that blood passing from one portion of the foot might possibly lodge in the heart, and cause myocarditis.

"*Mr. Healey:* If it did, it would not be an embolism.

"*A.* It might be.

"*Mr. Vandeveer:* Doctor, could these results that Dr. Brandt discovered be produced in ten days' time?

"*A.* Possibly. If the coronary artery was blocked up it doesn't take long for a fibroid change to take place. The fibroid change often is simply a hardening; the muscular structure is destroyed; in other words, scar tissue gets in there.

"*Mr. Vandeveer:* Well, how about the thickening of the walls, doctor?

"*A.* That would be due to the fibroid condition.

"*Mr. Vandeveer:* You take the position that that could be caused in a period of ten days' time?

"*A.* Oh, not entirely so. A fibroid condition might have existed there for some time previous."

I have set out here the testimony most favorable, if any of it can be said to be favorable, to the contention that death was the result of the injury. That it may have been, is not enough. It is true that Dr. Jaeger affirmatively gives the opinion that the injury was the proximate cause of the death. It is obvious, however, when all of his testimony is considered, that the opinion is an expression of his theory which is not sustained by facts. It may, indeed, be said that all proven facts negative his theory and dispute his opinion.

There is no evidence sustaining the award as made, and it should be set aside.

STONE, STEERE, and BROOKE, JJ., concurred with OSTRANDER, J.

MOORE, J. I cannot agree with the conclusion reached by Justice OSTRANDER. Section 12, pt. 3, of the workmen's compensation act (2 Comp. Laws 1915, § 5465), is as follows:

"The findings of fact made by said industrial accident board acting within its powers, shall, in the absence of fraud, be conclusive, but the Supreme Court shall have power to review questions of law involved in any final decision or determination of said industrial accident board." * * *

We have construed this statute repeatedly. Some of the cases are *Rayner* v. *Furniture Co.*, 180 Mich. 168 (146 N. W. 665, L. R. A. 1916A, 22, Am & Eng. Ann. Cas. 1916A, 386); *Bayne* v. *Cartage Co.*, 181 Mich. 378 (148 N. W. 412); *Reck* v. *Whittlesberger*, 181 Mich. 463 (148 N. W. 247, Am. & Eng. Ann. Cas. 1916C, 771); *Estate of Beckwith* v. *Spooner*, 183 Mich. 323 (149 N. W. 971, Am. & Eng. Ann. Cas, 1916E, 886); *Grove* v. *Paper Co.*, 184 Mich. 449 (151 N. W. 554); *Spooner* v. *Detroit Saturday Night Co.*, 187 Mich. 125 (153 N. W. 657, L. R. A. 1916A, 17); *Papinaw* v. *Railway Co.*, 189 Mich. 441 (155 N. W. 545); *Linsteadt* v. *Lumber Co.*, 190 Mich. 451 (157 N. W. 64).

The record shows that Mr. Miller sustained a bad injury to his foot on June 5, 1916. A physician who attended him June 6th, 7th, and 8th advised him to go to a hospital, which advice he followed, dying there on June 16th. This doctor testified on the hearing that in his opinion the injury was the proximate cause of the death. He was still of that opinion after hearing the testimony offered on the part of the employer.

The vital question was one of fact. There was competent testimony upon which to base the findings of the industrial accident board, and we should not disturb their conclusion.

The judgment is affirmed, with costs to claimant.

KUHN, C. J., and BIRD and FELLOWS, JJ., concurred with MOORE, J.

STOMBAUGH *v.* PEERLESS WIRE FENCE CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DISEASE —ACCIDENT.

The death of a servant due to the breaking of an auricle in his heart while he is engaged in unaccustomed, heavy lifting is the result of exercise and not of accident where deceased had suffered from chronic heart disease and the wall of the auricle which burst was in a thin condition and liable to break by exertion.[1]

Certiorari to Industrial Accident Board. Submitted June 14, 1917. (Docket No. 49.) Decided September 27, 1917.

Florence Stombaugh presented her claim for compensation against the Peerless Wire Fence Company for the accidental death of her husband in defendant's employ. From an order awarding compensation, defendant and the Employers' Liability Assurance Corporation, insurer, bring certiorari. Reversed, and award set aside.

Frederick T. Witmire (*Charles A. Wagner*, of counsel), for appellants.

Henry I. Bourns, for appellee.

OSTRANDER, J. It was found by the industrial accident board that Edwin Stombaugh, on May 13, 1916—

"received an accidental injury, namely, rupture of the right auricle of the heart, arising out of and in the course of his employment, which produced death. That the work he was doing for respondents on the day and at the time of death was, to Mr. Stombaugh, heavy and hard work. That he was not used to this heavy work and exertion. That the work he was doing for

[1]On construction and effect of workmen's compensation acts generally, see comprehensive notes in L. R. A. 1916A, 23; L. R. A. 1917D, 80.

respondents at the time of death, and prior thereto, required him to strain, lift, pull, and lower heavy rolls of wire weighing 150 to 160 pounds, from their place in the tier in the car, and at the time of death, about chest high, to the floor, and then roll them to the car door, a distance of about five feet, and into the chute.

"That this straining, lifting, pulling, and handling these heavy rolls of wire weighing 150 to 160 pounds on the average, together with the weakened and thinned condition of the wall of the heart, we are convinced, caused the wall to part and the rupture of the right auricle of Mr. Stombaugh's heart and his death."

All of the foregoing, taken from the opinion of the board, is sustained by some evidence, excepting only the conclusion that there was an *accidental injury*, which conclusion is wholly unsupported by evidence. The man died while doing the work he agreed to do, in the way he intended to do it. The exercise accounts for his death, and if he had been informed about the condition of his heart, he must have known that death was likely to result, at any time, from any considerable physical exercise. There is no evidence of mischance or miscalculation in what was being done, none of anything fortuitous or unexpected in the manner of doing it. There is undisputed evidence that he had a chronic trouble—disease—of the heart, of long standing, the wall of one auricle being so thin that "any exertion at all might have been the cause of its breaking." Death was merely hastened by the exertion. The distinction between this case and *Schroetke* v. *Jackson-Church Co.*, 193 Mich. 616 (160 N. W. 383), is clear. The case, however, cannot be distinguished from *Van Gorder* v. *Motorcar Co.*, 195 Mich. 588 (162 N. W. 107), and

The award must be set aside.

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

BURY *v.* DETROIT UNITED RAILWAY.

1. CARRIERS—STREET RAILWAYS—INJURIES TO PASSENGERS—DEFECTIVE ROADBED—EVIDENCE—ADMISSIBILITY.
   In an action against a street railway to recover for the negligent death of a passenger due to the car, in the vestibule of which deceased was riding, colliding with a car on the opposite track which became derailed, evidence that it was the duty of the city to relay foundations for the track and that it had refused to do so was admissible to explain the condition of the roadbed.

2. SAME—EVIDENCE—SUFFICIENCY.
   Evidence *held*, insufficient to show such a condition of the roadbed as to warrant defendant in refusing to operate cars because of the failure of the city to repair the foundations.

3. SAME—DEFECTIVE ROADBEDS—NOTICE—LIABILITY.
   While a street railway is not responsible for the condition of its roadbed due to the failure of a city to make repairs to the foundation it is chargeable with notice of such condition, and in the operation of its cars is required to exercise the care made necessary by conditions.

4. SAME—OPERATION OF CARS—DEGREE OF CARE REQUIRED.
   The motormen of street cars approaching on opposite tracks, on which derailments have occurred, should govern their cars with reference to all known conditions which make for danger for the loads carried and each observe the other approaching car.

5. SAME—EVIDENCE—QUESTION FOR JURY.
   Evidence *held*, to present a question for the jury whether either or both cars in meeting were handled with the high degree of care required by known conditions.

6. SAME—DERAILMENT OF CAR—NEGLIGENCE—EVIDENCE.
   Derailment of a car, in and of itself, is not evidence of negligence.

7. NEGLIGENCE—RES IPSA LOQUITUR—ACCIDENTS.
   The inference of negligence is not to be drawn from the mere happening of an accident.

8. CARRIERS—STREET RAILWAYS—NEGLIGENCE—EVIDENCE.

If other circumstances, with the fact that an accident has occurred, give rise to an inference of negligence, the inference may be rebutted by showing that the appliances of a street car are in proper condition and order, and that the servants of the carrier did all that a high degree of care required in the conduct of the business.[1]

9. SAME.

Evidence *held*, to support an inference of negligence of defendant street railway.

Error to Wayne; Hosmer, J. Submitted June 19, 1917. (Docket No. 82.) Decided September 27, 1917.

Case by Ludwicka Bury, administratrix of the estate of John Rusala, deceased, against the Detroit United Railway for the negligent killing of plaintiff's decedent. Judgment for defendant. Plaintiff brings error. Reversed.

John H. Dohrman and *William K. Campbell*, for appellant.

William G. Fitzpatrick, for appellee.

OSTRANDER, J. Plaintiff offered testimony tending to prove that her intestate boarded one of defendant's south-bound cars running on Oakland avenue May 5, 1914, at about 6 o'clock a. m., at the corner of Holbrook avenue, and because the car was full was invited to, and did, with three others, go into and ride in the motorman's vestibule. Four blocks farther south, at the corner of Philadelphia avenue, a north-bound car

[1]As to presumption of negligence from injury to street car passenger, see notes in 15 L. R. A. 35; 13 L. R. A. (N. S.) 606; 29 L. R. A. (N. S.) 811.

On liability of street railway company for defects in track or street, see notes in 52 L. R. A. 448; 15 L. R. A. (N. S.) 840; 17 L. R. A. (N. S.) 758.

Generally as to applicability of rule *res ipsa loquitor* in an action for injury by a street car derailment, see note in 43 L. R. A. (N. S.) 598.

running on parallel tracks derailed and ran across the rails on which the said south-bound car was traveling, a collision resulted, many were hurt, and plaintiff's intestate died as a result of his injuries. The derailed car had nearly, if not quite, lost momentum when it was struck by the car going south, but so close were the cars together that the driver of the south-bound car had time to do little, if anything, to stop his car.

It is alleged in plaintiff's declaration to be a duty of defendant to refrain and desist from operating cars upon and along rails, tracks, and roadbed after having notice, knowledge, or information that they are not in a fit and safe condition for the passage of cars, and a breach of this duty is alleged to have occurred upon the occasion in question. It is alleged also that the cars were operated at too high a rate of speed, everything considered, and, specifically, it is alleged:

"That the said rate of speed was not only dangerous to the life and limbs of all the passengers on said car, but that said car or cars were thus carelessly, negligently, and rapidly run on and over a section of defendant's said tracks at or near the intersection of Philadelphia avenue, as aforesaid, without being under proper control, as they should have been, and over a defective and insufficient track and over defective and insufficient rails, and over rails that were depressed and lowered in places, and bulged up in others, and over rails not properly spiked to the cross-ties, by reason of all of which acts of carelessness and negligence on the part of said defendant so done and committed, and without any fault or negligence on the part of this plaintiff's decedent, a certain car of said defendant's at the time and place aforesaid, being operated in a northerly direction on the said Fourteenth avenue line, upon and along Oakland avenue as aforesaid, was by said defendant, its agents, servants, and employees, so carelessly and negligently run, propelled, operated, and managed so as to throw and precipitate

said car from the rails and tracks of said line, and to cause it to derail and leave the said tracks and precipitate itself with great force and violence upon and over the parallel track of said defendant's, upon said street, causing it thereby to violently collide with and strike the car upon which this plaintiff's decedent had so become a passenger, at the invitation and request of said defendant."

The testimony tends to prove that from Euclid avenue, which is farther south than Philadelphia avenue, to the northern terminus at Woodland avenue, the roadbed in Oakland avenue was in poor condition. Defendant introduced, over objection, testimony tending to prove that it was, as between defendant and the city of Detroit, the duty of the city to relay the foundations for its tracks, and maintain such foundations, and that for three successive prior years defendant had notified the city authorities that the foundation under its tracks in the vicinity was defective and requested its repair and restoration, being itself ready and willing to relay its tracks. Over this defective roadbed it was safe, so defendant's witnesses say, to operate the type of cars in use there (single-truck cars seating 28 people) at a rate of speed not exceeding 12 miles an hour—10 to 12 miles an hour. Cars had derailed on this roadbed, on both tracks, rather frequently, six or seven times from October, 1912, to May 5, 1914, and within six or eight weeks before the accident one derailed within a distance of 120 feet south of the derail in question here and on the same track. Cars of the type described run over the wavy roadbed, acquired a considerable dipping and a swaying movement. Properly handled, and it seems that they can be steadied by the proper use of air, they could be operated over this defective roadbed safely at the rate of speed above indicated.

The movement of the south-bound car on the particular occasion was described by witnesses. It left

its northern terminus at 5.55, and arrived at Philadelphia avenue and the place of collision at 5:59. It does not appear how many stops were made. It does appear that the car started with a seated load and acquired passengers as it proceeded until, when plaintiff and his companions boarded it, it was crowded, and they were taken into the front vestibule. One of its passengers estimated the speed of the car at the moment preceding the collision at 25 miles an hour. The motorman who drove it was killed.

Witnesses fixed the speed of the north-bound car, which was carrying from 80 to 100 passengers, at no more than 10 miles an hour. Another witness, however, who was on the north-bound car, testified that the speed maintained on the bad track north of Euclid avenue was the same as that maintained on the good track. There was also testimony tending to prove:

That when the north-bound car "got past Euclid the car jumped up and down." "She hit first in front and up in back, and then we stopped and ran into the other car. She made lots of noise; would go bang down there and hit the front and back."

A witness testified that at the point where the wheels of the north-bound car left the track, as indicated by the impression on the pavement, there was a broken flange on one rail of the track. A wavy condition of the rails, the rails visibly not in alignment, nor in gauge, at about the place where the car left the track, is a condition testified to by a witness who was on the north-bound car.

Testimony for defendant tended to prove that no mark on the car wheel indicated that it had been in contact with the broken lip of the rail, and that the gauge of the rails on the north-bound track was good a very short time, a few hours, after the accident, and that it had been gauged the day previous and found to be in good condition.

Plaintiff had an adverse verdict, and complains here of:

(1) The rulings admitting evidence of the relation of the defendant and the city of Detroit with respect to the laying and maintaining of the roadbed for defendant's tracks at the place in question.

(2) The charge of the court.

(3) The refusal of the court to give plaintiff's request to charge No. 2, except as modified, refusal to give plaintiff's request No. 3, refusal to give plaintiff's request No. 4, except as modified.

(4) The refusal of the court to grant plaintiff's motion for a new trial.

The requests to charge referred to are:

"(2) This duty of the defendant to plaintiff's deceased was the duty by itself and its servants to do all that a high degree of care and prudence required it to do in and about the conduct of the business. This duty, I charge you, is not discharged by the defendant company by a showing on its part that some one else not connected with the contract of safe carriage between plaintiff's deceased and the defendant was known to the defendant to be derelict in its duties (in this instance the city of Detroit), but that such duty of the defendant extended so far as to, if necessary, cease traffic over an admittedly dangerous and unsafe track.

"(3) I charge you in that regard that, if you find from the evidence in this case that the defendant knew or had notice or knowledge by the prior derailments of its cars upon that stretch of track described in the declaration as upon and along Oakland avenue, and which by the evidence in the case is claimed to have been in a general bad condition for the whole distance to Woodland avenue, then it was the duty of the defendant to have found and repaired the place where the derailment occurred and plaintiff's deceased was injured, and its failure to do so was negligence.

"(4) I charge you that it is for you to consider the testimony of the plaintiff tending to show negligence in the operation of the car, by the defendant at the point of derailment, or immediately before; the testimony of the plaintiff that a piece of the groove or lip

of the rail was broken out of the track at or near the place where the car left the track; the testimony of a varying and spreading track at this point in connection with the inference of negligence arising from the derailment itself, all of which is to be weighed by you with the testimony offered by the defendant, and your conclusion is to be arrived at from a consideration of all of this testimony."

Not all of the points which are made under these heads demand elaboration and discussion. Some of them do.

1. Fairly interpreted, the declaration alleges not only that defendant negligently operated cars over a track, the condition of which required great care to be exercised in running cars, but it alleges also, inferentially at least, that defendant is itself responsible for the condition which made extreme care necessary and which even made it the duty of defendant to cease running cars. Unexplained, the evidence of the condition of the roadbed made a case against the defendant likely to affect a jury rather strongly. It is true generally, "*Res inter alios acta alteri nocere non debet,*" but it happens here that the private arrangement of the city and the defendant explains just what defendant, in view of the issue tendered, had, I think, the right to have explained. It was not error to admit the testimony, and, while I think the second request to charge might properly have been given as preferred, it was not error to say to the jury, as was said, in substance, that the evidence in the case did not show such a condition of the roadbed as would warrant the defendant in refusing to operate cars.

While it was not responsible for the condition of the roadbed, defendant was chargeable with notice of that condition, and in the operation of its cars was bound to exercise the care made necessary by conditions. This idea was expressed in the charge when the court said:

"The duty of the defendant to the plaintiff's deceased, was a duty by itself and its servants to do all that a high degree of care and prudence required it to do in and about the conduct of the business. Now, you take that into consideration, gentlemen of the jury, with what you may find the condition of the track, and all I can say with reference to that, having a public duty to operate its road under the ordinance as given by the common council whereby the city of Detroit became responsible for the foundation, it therefore became the duty of the defendant to operate its cars at such a rate of speed as would be consistent with safety, under the existing circumstances."

But the court had already said, among other things, of defendant's duty:

"What the law requires of it is that it shall furnish such service as existing conditions will permit, according to the practices of good railroading, and that, in so far as the jury believe from the evidence it was not responsible for the conditions under which its service was rendered, it should not be accountable for the failure due solely to such conditions."

Immediately preceding this, the court had said that:

"The defendant, under the law, is not bound to furnish a perfect service, nor is it an insurer of the safety of its passengers."

Defendant consents that conditions made operation of cars in the locality relatively hazardous. It is doubtful if from the whole charge the jury would understand the rule to be that defendant's care should measure up with the conditions presented, whether defendant was or was not responsible for the conditions.

2. I have already said, in effect, that the third request to charge was rightly refused. The fourth was not refused, although not given in the form preferred.

3. This instruction was given:

"I am asked to charge you that there is no evidence in this case which would justify the jury in finding the swaying of the north-bound car at any time before the

derailment occurred was unusual in character, or was of such a nature as to be other than incidental to the operation of cars through the streets of the city, and that therefore the motorman of the south-bound car was under no obligation in any way to check or seek to control the speed of his car, because of such swaying. Well, I think, gentlemen of the jury, that is so, unless you should find that the motorman of the car, under the existing circumstances, should have seen—

"*Mr. Fitzpatrick:* Your honor recalls that the motorman of the south-bound car lost his life, he was killed, and the presumption of due care—

"*The Court:* I think that is so, gentlemen of the jury, and I therefore give it."

It is a necessary inference to be drawn from the testimony of defendant's witnesses that it was dangerous, if not reckless, conduct to drive a car over either of the tracks in either direction at a speed of 25 miles an hour. And it is obvious that the faster the south-bound car was driven the less possible would it be to stop it in a given distance. There was testimony that the car on which plaintiff's decedent was riding was driven towards the north-bound passing car at a speed of 25 miles an hour. Independent of this testimony, it is inferable that it had been run, when moving, at a considerable rate of speed. What did a high degree of care for the safety of passengers on both cars require the motormen of cars passing in this neighborhood to do? And if, as testimony tends to prove, the north-bound car, with its heavy human load, was swaying, hitting at both ends, as it teetered on its single truck, what was the obvious duty of the driver of the south-bound car as it approached and passed it? The learned trial judge had in mind, it is clear, an admonition for the jury, an admonition not given because counsel for defendant suggested an inapplicable rule, favorable, if applied, to the defendant, which the court appears to have followed.

Manifestly the true rule to be applied is that both motormen should have governed their cars with reference to all known conditions which made for danger to the loads either carried, and manifestly the duty to observe the other approaching car was imperative.

Applying the rule, it was for the jury to say whether either or both cars in meeting were handled with the high degree of care demanded by known conditions. Every day cars were safely operated over the roadbed. The track was rough and wavy, if not otherwise out of order, but, if driven slowly enough cars could safely make the journey. Speed made danger. In view of the danger of derailment of cars, the speed of either car in meeting and passing another car was matter of importance. And the court did more than once in the course of the charge advert to this fact, saying at one time:

"The defendant company was bound to operate a street railway over that track as it existed, but the question was whether they were bound—whether they should have used the speed under the circumstances they did use."

In eliminating from consideration the speed of the south-bound car, this controlling question was answered, in part and as matter of law, by the court.

Derailment of a car, in and of itself, is not evidence of negligence. *Felske* v. *Railway*, 166 Mich. 367 (130 N. W. 676); *Niedzinski* v. *Traction & Electric Co.*, 160 Mich. 517 (125 N. W. 409). The inference of negligence is not to be drawn from the mere fact of an accident. *Sewell* v. *Railway*, 158 Mich. 407 (123 N. W. 2). And if other circumstances, with the fact that an accident has occurred, give rise to an inference of negligence, the inference may be rebutted by showing appliances in proper condition and order, and that the servants of defendant did all that a high degree of care and prudence required in the

conduct of the business. *Sewell* v. *Railway, supra; Rouston* v. *Railway,* 151 Mich. 237 (115 N. W. 62); *Dolph* v. *Railway Co.,* 149 Mich. 278 (112 N. W. 981).

It is my opinion that the testimony in this case supports an inference of the negligence of defendant which is within the allegations of the declaration, and that the jury was not clearly advised about the high degree of care and prudence required of defendant's servants, and especially did not appreciate from any instruction given that the very condition of the roadbed for which the city was responsible might be found to measure the degree of care owed to plaintiff's intestate.

The judgment is reversed, and a new trial granted.

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

TRAVELERS' INSURANCE CO. *v.* BENJAMIN DOUGLAS CO.

PRINCIPAL AND AGENT—INSURANCE—PAYMENT OF PREMIUM.

Where an agent collects insurance premiums due two different insurance companies which he represented by taking a note payable for convenience to one of the companies without the knowledge of the other, and the note is discounted by the payee and applied, at the agent's request, in liquidation of his personal account and the note is subsequently paid, there is a payment to both companies.

Error to Wayne; Mandell, J. Submitted June 11, 1917. (Docket No. 36.) Decided September 27, 1917.

Assumpsit in justice's court by the Travelers' Insurance Company against the Benjamin Douglas Com-

pany for the amount of premium on a policy of insurance. There was judgment for defendant, and plaintiff appealed to the circuit court. Judgment for plaintiff on a directed verdict. Defendant brings error. Reversed.

Campbell, Bulkley & Ledyard, for appellant.

Vandeveer & Foster, for appellee.

OSTRANDER, J. The facts are stipulated, and, as stipulated, are:

"The Travelers' Insurance Company, plaintiff herein, through its duly authorized agent, George J. Haller, insured the Benjamin Douglas Company, defendant herein, on a contractor's and employer's liability and compensation policy. Haller acted as agent for the Travelers' Insurance Company, with all of the usual powers of soliciting insurance, collecting premiums, etc., and at the same time he represented other insurance and bonding companies, acting in the capacity of agent for some, and in the capacity of broker for others, carrying on a general insurance business. At the time when the facts occurred which caused this present controversy, Haller had desk room in the office of the Wolverine Insurance Agency, doing brokerage work for them; there were open accounts running between them. The Benjamin Douglas Company placed a construction bond with the Wolverine Insurance Agency through Haller.

"At some time subsequent to the taking out of the insurance policy in the Travelers' Insurance Company $250 became due from the Benjamin Douglas Company as premium thereon. At the same time a premium of $265 became due on the Wolverine bond. Owing to a temporary financial embarrassment, Benjamin Douglas Company could not pay the cash covering the premium to Haller, as it had done at times before, but offered to give its six months' note. Haller agreed to accept a note for $515 covering both the insurance and the bond premiums. The note was executed, discounted at the bank, and has subsequently been paid.

"At the request and direction of Haller, the note was made payable to the Wolverine Insurance Agency upon Haller's representations that such procedure would facilitate its discount. It was actually discounted by the Wolverine Insurance Agency and the cash received by it. At Haller's direction, the amount was a credit to him. It was the understanding between Haller and Benjamin Douglas Company that the note was to discharge both debts; in other words, Haller was to credit the Benjamin Douglas Company with $265 on the books of the Wolverine Insurance Company, and with $250 on the books of the Travelers' Insurance Company. This Haller did not do, but instead turned the proceeds of the note over to the Wolverine Insurance Agency to discharge a personal debt due from him to the latter. Later he defaulted and absconded. Inasmuch as he was indebted to the Wolverine Insurance Agency to a considerable amount, the moneys which the note represented were retained by it to offset that indebtedness, and the Benjamin Douglas Company never received credit for the $250 on the books of the Travelers' Insurance Company.

"None of these matters, however, was referred to the office of the Travelers' Insurance Company for approval. The Travelers' Insurance Company office did not know for some time that the Benjamin Douglas Company had given its note for the premium, and neither knew nor approved the manner in which it was made out, nor did it know that the discounted amount had been appropriated, until Haller absconded, embezzling both these and other moneys due the Travelers' Insurance Company. Immediately upon discovering the embezzlement, the Travelers' Insurance Company made claim both against the Wolverine Insurance Agency, and directly against Benjamin Douglas Company. The former claim was dropped; the latter constitutes the case at bar."

Judgment went for plaintiff as upon a directed verdict, and it is assigned as error that:

"(1) The court erred in directing a verdict for the plaintiff.

"(2) The court erred in holding that under the circumstances the giving of a note to Haller, payable

to the Wolverine Insurance Agency, was not in law payment to the Travelers' Insurance Company by the Benjamin Douglas Company.

"(3) The court erred in holding that the Travelers' Insurance Company never received, directly by itself, or through its agent, Haller, the payment of the indebtedness due from the Benjamin Douglas Company to it."

Propositions advanced by the appellant are:

(1) Haller was agent of the plaintiff, and not of the assured.

(2) As agent of the plaintiff, he had power to extend credit for the payment of policy premiums.

(3) Payment to Haller was payment to the plaintiff.

As to the first proposition, appellee admits that Haller was agent for the plaintiff for the purposes of selling insurance, collecting premiums, etc., with the usual and customary powers of an insurance agent. The second proposition is admitted. It is said:

That the third proposition would be true "as to the case at bar if Haller had actually received payment. * * * It is upon the fact that Haller did not receive payment that the plaintiff contends that the judgment below in its favor was a proper one."

Appellee would agree—does agree—that if defendant had at one time paid to Haller cash for both premiums, plaintiff could not recover, and I assume would not think it mattered if payment was made in five bills of $100 denomination and $15 in another form, although obviously it would in that case be necessary to change a bill in order to properly divide the money. Defendant did not pay with money, but with a note, and afterwards paid the note. It is stipulated that upon discounting the note the amount received was "at Haller's direction" credited to him (Haller) by the payee of the note. The necessary inference is that Haller in fact controlled the application of the money

and expressly made disposition of it. Obviously Haller, to the point where he directed the disposition of the money, acted as the agent for the plaintiff. His method, irregular or otherwise, produced the money, without in any manner involving the plaintiff. The money was plaintiff's money, in the control of its agent, who, it is said, misapplied it.

In suing defendant for the money, plaintiff necessarily proceeds upon the theory that the policy remained in force, and that the premium was due and unpaid.

The judgment is reversed, with costs to appellant.

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

WRAY *v.* TILDEN SAW CO.

1. CORPORATIONS—OFFICERS—POWERS—WAIVER—PRESUMPTIONS.
   It will not be assumed that a corporation's president had authority to contract to pay for unearned wages or to waive performance of the contract by an officer.

2. SAME—OFFICERS—SALARY—RIGHT TO RECOVER.
   In an action by an officer of a corporation to recover on a contract for wages earned, where the defendant did not so arrange or force matters that plaintiff was admitted to earn his salary, the result was the same as if defendant had denied plaintiff opportunity to perform the contract, and, even if the contract was for a fixed period, plaintiff could not recover wages as such by a showing that he stood ready to perform, since defendant had the right to terminate the contract at any time.

3. SAME.
   Where plaintiff did not perform any service he did not earn

any salary which could be recovered, and it is immaterial that defendant secured a decree restraining certain persons from in any manner interfering with the management of the business by plaintiff as manager.

Error to Wayne; Hosmer, J. Submitted June 11, 1917. (Docket No. 35.) Decided September 27, 1917.

Assumpsit by Norman F. Wray against the Tilden Saw Company for salary earned. Judgment for plaintiff on a directed verdict. Defendant brings error. Reversed.

McNamara & Scallen, for appellant.

Welsh, De Foe & Kahn, for appellee.

The evidence was undisputed, none being introduced by defendant, both sides asked the court to direct a verdict, and one was directed for the plaintiff. No requests to charge were proposed.

The appellant states the facts as follows:

"This is an action in assumpsit for salary earned. Defendant is a Michigan corporation. At a regular meeting of its board of directors held May 12, 1913, a resolution was adopted by the terms of which two of the directors, Charles D. Todd, the president of the corporation, and James T. Currie, its secretary, were empowered to employ the plaintiff or some other suitable person to act as general manager of the defendant at a salary not to exceed $50 per week, until such time as the board of directors deemed it advisable to remove him.

"Pursuant to this authority, Mr. Todd and Mr. Currie employed plaintiff at a salary of $50 per week. Nothing was said to plaintiff as to how long his employment was to continue. Plaintiff entered upon his said employment, and continued to act as general manager until the night of September 15, 1913. At that time Mr. Currie informed him that they did not want him any longer, and that he should get out—that he was fired. Plaintiff saw Mr. Todd the same evening,

and in company with him went to the plant on the following morning, and was again refused admittance. On the following day he sent a letter to the defendant by registered mail (Exhibit 7), in which he stated that he was then, and would be at any time, ready to assume any part of the agreement. Within a day or two after that Mr. Todd told the plaintiff that he was still manager and to hold himself in readiness and to be ready to go down there at any time. It does not appear that any other officers or stockholders ever told plaintiff anything of the sort. Plaintiff never did any work after that for defendant and never went near the factory after the morning of September 16, 1913, when he was told to get out by Mr. Currie.

"Immediately after these events, on September 19, 1913, a bill of complaint was filed in the Wayne circuit court, by the defendant herein, Tilden Saw Company, and all of its stockholders except Mr. Currie and his son, Jay Currie, who were made defendants, alleging that plaintiff herein had been wrongfully excluded, that such exclusion was menacing the best interests of the corporation, and asking that the defendants be restrained by injunction from interfering with the management of the corporation by said Norman Wray. On the same date a petition for a temporary injunction was filed (Exhibit 3), in which temporary relief of the same nature was prayed, an order to show cause was issued thereon, and a hearing had before Judge Mandell on October 10th, at which it was ordered, adjudged, and decreed:

" 'That the motion of complainants for a temporary injunction be granted, and that the defendants, their agents and attorneys, be, and the same are hereby, restrained and enjoined until the further order of this court from * * * discharging any of its (Tilden Saw Company's) agents, office force, or other employees who have supervisory capacity, without applying to court, with immediate notice to complainant's solicitor.'

"The suit was heard by Judge Codd, and on June 1, 1914, a decree was entered which provided, in substance, that Norman Wray was properly appointed general manager by the board of directors, and that he had never been discharged, and perpetually enjoining defendants:

" 'from interfering in any form or manner whatsoever with the management of the business affairs of the corporation by said Norman Wray while he remains such manager, except in so far as they may have the right as two of the four members of the board of directors, while they are such members, to participate in any action which a majority of the board of directors may take regarding such management.'

"Plaintiff did not report for duty or offer to resume his duties either after the issuing of the temporary injunction or after the decree, and never did a day's work for defendant after the time he was excluded by Mr. Currie.

"On January 6, 1915, plaintiff commenced this suit, and by a special count in his amended declaration sets up that he was regularly appointed general manager of defendant and performed his duties as such until September 20, 1913, on which date certain officers of defendant refused him access to its plant and prohibited and prevented him from performing his said duties as general manager and from participating in its affairs, but that his employment had not been legally terminated, and that he has at all times been ready and willing to act and to perform his duties as general manager, and that by reason thereof there is now due him his salary as such general manager, less what he has earned in the meantime."

It should be added that finally, in September, 1914, the Curries bought the stock of other stockholders, ending controversies, large and small, which existed among officers and stockholders.

Appellant states the questions involved and the manner in which they were raised as follows:

"(1) The direction of the court that the plaintiff holding himself in readiness and awaiting orders was in itself a service for which he was entitled to recover.

"(2) That it was error not to instruct the jury that the failure of plaintiff to offer his services when clothed with power to perform them by injunction of the court bars his recovery.

"(3) That it was error to refuse to permit defendant to give evidence of the incompetency of plaintiff.

"(4) That it was error not to instruct that Mr. Currie's action had been ratified, and that the ratification related back so as to discharge plaintiff in September, 1913."

Plaintiff and appellee says:

"Counsel's whole argument under the first subdivision of their brief is based on the erroneous assumption that plaintiff's right of action arises from a breach of a contract by one of the parties thereto.

"If the plaintiff had been prevented from performing by the act of the defendant, then counsel's position would be well taken, and this action would be for a breach of the contract. We could not sue for a breach of the contract under the facts in this case, however, because there was no breach by the defendant. Whatever Mr. Currie did was without authority, as determined by Judge Codd, and was not the act of the defendant. The defendant could not be held liable for a wrong which it did not commit. The contract was not terminated or breached by either of the parties thereto, both of whom, affirming the continuance of the relation of employer and employee, joined in an action to restrain a third party (Mr. Currie) from interfering with that contractual relation.

"The fact that plaintiff, during this period, rendered but little, if any, actual service to the company, was no fault of his and no fault of the defendant or the majority of its stockholders. Plaintiff therefore had no right of action for a breach of the contract by the defendant, because the defendant never breached the contract. He was told by the defendant that he was still its general manager, and the court so held in the suit referred to. He held himself in readiness to do, and did whatever was required of him. If he was the general manager of the defendant, as held by Judge Codd, and this finding is not disputed in this suit, then the relation of employer and employee continued, and plaintiff was entitled to the wages stipulated in the contract of employment."

OSTRANDER, J. (*after stating the facts*). The contract of the parties was terminable at the will of

either. Plaintiff was performing it when performance was interrupted. He was paid for all services rendered. He seeks in this action to recover his contract salary, as salary, for an indefinite period, during which he performed no service. His theory is that the interruption was without defendant's fault or his fault, and effected no change in the relation of the contracting parties. According to this theory the contract is still in force and the salary running on, since it does not appear that the directors of defendant have, by formal action, terminated it, nor that plaintiff is not now standing ready to perform services when called upon to do so.

Manifestly plaintiff's theory must include the idea that defendant is free from fault, since defendant had the right to terminate the contract at any time. The interruption was sufficient to prevent plaintiff from earning his salary, since, he says, it prevented him from rendering the contract consideration for his salary, which was his services.

There is a suggestion, rather than a claim, or contention, presented to the effect that the president of defendant made with plaintiff some *ad interim* arrangement, or bargain, to the effect that he was to be at the call of defendant. It will not be assumed that defendant's president had authority to contract to pay for unearned wages or to waive performance of the contract by plaintiff. Decisions to which our attention is directed are none of them decisive of the question which is presented. See *Howard* v. *Daly*, 61 N. Y. 362 (19 Am. Rep. 285); *Olmstead* v. *Bach & Son*, 22 L. R. A. 74 (78 Md. 132, 27 Atl. 501, 44 Am. St. Rep. 273); *Keedy* v. *Long*, 71 Md. 385 (18 Atl. 704, 5 L. R. A. 759); *Granger* v. *Brewing Co.*, 25 Misc. Rep. 701, 55 N. Y. Supp. 695; *Kennedy* v. *Lumber Co.*, 102 Wis. 284 (78 N. W. 567); *James* v. *Allen County*, 44 Ohio St. 226 (6 N. E. 246, 58 Am. Rep. 821).

I conceive that, so far as the controlling principle is concerned, the case is not different from one where plaintiff was prevented by the defendant from earning his wages. It is clear that the defendant did not so arrange or so force matters that plaintiff was admitted to earn his salary. The result was the same as if defendant had denied plaintiff opportunity to perform the contract. In such a case, even if the contract was for a fixed period, plaintiff could not recover wages, as such, by a showing that he stood ready to perform. To this effect is the modern law in England and in this country, as the cases cited show.

It is true that defendant, in an effort to compel recognition of plaintiff and enable him to earn his salary, secured a decree of the chancellor restraining certain persons from interfering in any form or manner with the management of the business affairs of the defendant by plaintiff while he remained such manager, reciting, too, that at "the date hereof" (the date of the decree, June 1, 1914) plaintiff "is" the general manager of defendant. It remains that, either because he never thereafter undertook to manage the affairs of defendant, or for some other reason, plaintiff did not perform any service, earned no salary.

The judgment is reversed, with costs to appellant.

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

CAMPAU *v.* BOARD OF WAYNE COUNTY AUDITORS.

MUNICIPAL CORPORATIONS—PLATS, APPROVAL OF—STATUTES.

Under Act No. 251, Pub. Acts 1915 (1 Comp. Laws 1915, § 3350 *et seq.*), mandamus will issue to compel the approval of a proposed plat by a board of county auditors, where such plat conforms to streets and alleys of adjoining plats and does not interfere with any general plan for streets and is disapproved by the board because relator has not provided for, and has refused to provide for, a certain street across his land.

Certiorari to Wayne; Sharpe, J., presiding. Submitted June 12, 1917. (Calendar No. 27,797.) Decided September 27, 1917.

Mandamus by Daniel J. Campau to compel the board of county auditors of Wayne county to approve a plat. From an order denying the writ, plaintiff brings certiorari. Reversed, and writ granted.

Moore & Moore (*Otto Kirchner*, of counsel), for plaintiff.

Charles H. Jasnowski, Prosecuting Attorney, and *Paul W. Voorhies*, Assistant Prosecuting Attorney, for defendant.

OSTRANDER, J. Plaintiff seeks to compel the defendant to approve a plat. The court below refused the writ of mandamus. The proposed plat conforms to the streets and alleys of adjoining plats. It does not interfere with any general plan for streets. It was disapproved because plaintiff had not provided for, and would not provide for, a certain street across his land.

The governing statute is Act No. 251, Public Acts of 1915 (1 Comp. Laws 1915, § 3350 *et seq.*). Plaintiff

is entitled to an approval, and the judgment must be reversed and one entered to this effect. *Campau* v. *Board of Public Works,* 86 Mich. 372 (49 N. W. 39); *Van Husan* v. *Heames,* 91 Mich. 519 (52 N. W. 18); *Owen* v. *Moreland,* 132 Mich. 477 (93 N. W. 1068).

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

FLETCHER PAPER CO. *v.* DETROIT & MACKINAC RAILWAY CO.[1]

ISLAND MILL LUMBER CO. *v.* SAME.

RICHARDSON LUMBER CO. *v.* SAME.

CHURCHILL LUMBER CO. *v.* SAME.

MICHIGAN VENEER CO. *v.* SAME.

1. CARRIERS—FREIGHT RATES—ORDER OF RAILROAD COMMISSION.
   Where the Michigan railroad commission determined that certain rates previously published and exacted from shippers by a carrier were unreasonable and ought not to be exacted, and that other rates were and would be reasonable and proper to be exacted and should thereafter be exacted, there was created a legislative rate, immediately in effect, although liable to be set aside by the courts.

2. SAME—FREIGHT RATES—ILLEGAL CHARGES—STATUTES.
   Upon the railroad commission deciding that a certain rate charged a shipper is unreasonable, and that another is reasonable, a shipper may recover the money illegally exacted through the charging of a higher than the fixed rate, irrespective of whether it declare upon Act No. 300, Pub.

[1]Removed to the Supreme Court of the United States by writ of error January 2, 1918.

Acts 1909, § 10, subd. *g* (2 Comp. Laws 1915, § 8118*g*), and the action of the commission or on the common counts.

3. SAME.

If the charges exacted by a carrier have been duly fixed by the railroad commission, and are attacked, the commission should be first applied to, since it is the rate-maker, and it would be wholly incongruous from an administrative standpoint to have successive juries, or different courts or judges, passing upon the reasonableness of a rate already fixed by the commission.

4. SAME—FREIGHT RATES—VALIDITY.

In an action by a shipper against a carrier to recover the difference between the amount paid under a tariff published by defendant and that designated by the railroad commission, the question of the reasonableness of the exactions was not a proper one for consideration.

5. SAME.

Where rates charged by a railroad are condemned by the railroad commission as unreasonable, and new ones approved as reasonable, the collection of the old rate while a temporary injunction against the new rate is in effect does not legalize the exaction nor prevent recovery of the excess charges by the shipper, upon the representations upon which the injunction was based later being shown to be unfounded.

6. SAME.

An order of the railroad commission fixing rates to apply to a shipper of logs when manufactured product is reshipped via the carrier's line, and, when not so shipped, allowing the collection of an additional charge per thousand feet, to be refunded, however, if shipper later ships out the manufactured product, or some part of it, does not provide for a rebate or discrimination, and is not necessarily unlawful, under Act No. 300, Pub. Acts 1909, § 11 (2 Comp. Laws 1915, § 8119), providing that nothing in the act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances and conditions.[1]

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[1] As to right of carrier to make discriminating rate for material to be employed in manufacture of a finished product which will be shipped over its road, see note in 6 L. R. A. (N. S.) 225.

On recovery back of excessive payments to public service corporations, generally, see note in 18 L. R. A. (N. S.) 124.

7. SAME.

The order of the railroad commission must be construed as referring to tonnage generally of a product similar to that of the logs shipped in and not of particular logs shipped in.

8. SAME—FREIGHT RATES—DOUBLE DAMAGES—STATUTES.

Where a carrier simply refused to put into effect a tariff ordered by the railroad commission which was temporarily suspended by injunction in a court of chancery and the shipper was compensated by the return of the money exacted with interest, double damages will not be awarded a shipper under Act No. 300, Pub. Acts 1909, § 19 (2 Comp. Laws 1915, § 8127).

Error to Bay; Coumans, J. Submitted June 20, 1917. (Docket Nos. 94-98.) Decided September 27, 1917.

Separate actions of assumpsit by the Fletcher Paper Company and others against the Detroit & Mackinac Railway Company for excessive freight charges. Judgments for plaintiffs. All parties bring error. Affirmed.

Edward S. Clark, for plaintiffs.

James McNamara and *Henry & Henry* (*Fred A. Baker* and *Weadock & Duffy,* of counsel), for defendant.

Act No. 312, Public Acts of 1907, required railroad companies to file with the Michigan railroad commission, and to post in their offices and depots, tariff rates. After the act became effective, the Detroit & Mackinac Railway Company, a Michigan corporation, whose main line extended from Bay City on the south northerly through Alpena to Cheboygan, and which had branches and spurs extending into timber sections adjacent to its line of railway, published, pursuant to the act, tariff rates. The schedules of tariff rates were

and are designated by the letters M. R. C., with numbers and other initial designations. February 20, 1909, a rate was published for carload shipments on logs between Alpena and what may be designated as the Fletcher dam, which provided a rate of $5 a car each way, and was designated M. R. C. 217. February 1, 1909, a rate was scheduled and published for carload shipments of logs to Alpena from various places on the lines of defendant railroad each way from Alpena, providing for a minimum of 2,500 feet per car, which fixed a rate on logs to Alpena from designated points north and south at $3 to $3.25 a thousand feet, and for a refund of 50 cents a thousand feet, the provision for the refund being:

"A refund of 50 cents per thousand feet on logs will be made when an equal amount of manufactured product is shipped out via the Detroit & Mackinac Railway."

It was known as M. R. C. 205. February 20, 1909, a rate was in like manner published for hauling logs in carload lots on a mileage basis, without reference to the places from or to which they were transported, and it contained the provision:

"The rates named herein apply only when the manufactured product is to be reshipped via Detroit & Mackinac Ry. and in the absence of tariff naming specific rates."

March 11, 1909, the Fletcher Paper Company filed with the Michigan railroad commission a complaint, alleging that the rate so fixed by M. R. C. 217 was unfair and retaliatory, praying for an order requiring the defendant to desist from violations of the law referred to in the said petition. To this the defendant filed a detailed answer. April 19, 1909, F. W. Gilchrist, the Churchill Lumber Company and Island Mill Lumber Company filed with the commission a complaint, alleging that defendant by its tariff M. R. C.

205 discriminated against Alpena shippers in favor of Cheboygan, and that the tariff was unjust and unduly discriminatory and higher than the rates established by M. R. C. 208, and prayed for an order requiring defendant to cease and desist from violations of the law and to publish and file rates shown on an attached statement. To this the defendant filed its answer. After the filing of the complaints, and before proofs before the Michigan railroad commission had been concluded, defendant published a schedule of rates, designated as M. R. C. 237, abolishing all discriminations in favor of Cheboygan. The testimony of the complaining parties and of the defendant was taken in June, 1909, and on October 22d of that year the commission made an order on the complaint last above referred to, the one made by Gilchrist and others, reciting that the matters alleged in the complaint were substantially true, and that the rates charged for the transportation of logs in carload lots to the said city of Alpena were unjust, unreasonable, and excessive, and ought to be reduced as therein set forth, and providing that the defendant railway company publish and file and put into operation so as to become effective 20 days from the service of the order a tariff for the transportation of logs in carload lots to the said city of Alpena according to rates set out in said order corresponding with M. R. C. 208. Following the statement of rates, the order contains the following:

"Above rates to apply when the manufactured product is reshipped via defendant company's line, and when not to be so reshipped, that defendant company are authorized to collect in addition to said rate, fifty cents (50c) per thousand (1,000) feet, but if later reshipment is made over defendant company's line, they are to refund to such shipper the fifty cents (50c) per thousand (1,000) feet collected."

No provision was made in this order for a minimum

carload lot, and on November 3d following the commission, without any further hearing, made a supplemental order, fixing the minimum at 2,500 feet per car.

Upon the complaint of the Fletcher Paper Company, and on October 19, 1909, the commission made an order, reciting that it appeared that the switching charge of $5 per car between Alpena and the dam (Fletcher dam or Broadwell dam) was unreasonable and unjustly discriminatory, and that a rate of $3.50 per car would be reasonable and just, and they ordered the defendant, within 20 days from the date of service of a copy of this order upon it, to file, publish, and put into force a rate for such switching charge not to exceed $3.50 per car in each direction on all commodities, and ordering that M. R. C. 217 be canceled, and that the defendant cease, after said 20 days, from charging more than $3.50 a car for such switching charges. The order relating to switching charges was served on defendant November 4, 1909, and the final order, relating to freight rates, was served on November 6, 1909. It is from the time they became effective, that is, 20 days after service, that plaintiffs compute their damages.

On June 2, 1909, Act No. 300 of the Public Acts of 1909 (2 Comp. Laws 1915, § 8109 *et seq.*), was approved, and it became effective in September. By its terms Act No. 312 of the Public Acts of 1907 was repealed so far as there was conflict between the two acts. The two acts are generally similar, and not different. As matter of fact, the defendant did not actually file, publish, and put into effect the schedule of rates provided for in the orders which have been referred to, but the schedules, as hereinbefore designated, continued, so far as their publication and enforcement were concerned, unchanged until February 18, 1915.

By Act No. 300, Pub. Acts 1909, § 22, it is provided:

"(*a*) Upon complaint in writing of any person, firm or corporation or association, or of any mercantile, agricultural or manufacturing society, or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission shall notify the common carrier complained of that complaint has been made and shall furnish a copy of the said complaint with said notice, and twenty days after such notice has been given the commission may proceed to investigate the same as hereinafter provided. Before proceeding to make the investigation, the commission shall give the said common carrier and the complainants at least ten days' notice of the time and place when and where such matters will be considered and determined, and said parties shall be entitled to be heard and shall have process to enforce the attendance of witnesses. Such hearings may be continued from time to time in the discretion of the commission. If, upon such investigation, the rate or rates, joint rate or rates, fares, charges or classifications, regulation, practice or service complained of shall be found to be unreasonable, inadequate or unjustly discriminatory, the commission shall have power to and it shall determine and by order fix and order substituted therefor, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which shall be the maximum to be charged in the future, and such classifications, regulation, practice or service as is or are just, reasonable and adequate, and which shall be imposed and followed or service rendered in future in lieu of that found to be unreasonable, inadequate or unjustly discriminatory, and in either case the commission shall make an order that the common carrier cease and desist from such violation, and shall conform to the regulation and practice so prescribed, and it shall cause a certified copy of

each such order to be delivered to an officer or station agent of the common carrier affected thereby, which order shall, of its own force, take effect and become operative twenty days after the service thereof." * * *

By section 25 it is provided that all rates fixed by the commission, and all regulations, practices, and services shall be in force and shall be *prima facie* lawful and reasonable—

"until finally found otherwise in an action brought for the purpose pursuant to the provisions of section twenty-six of this act or until changed or modified by the commission." * * *

Every carrier is required (section 4) to furnish reasonably adequate service, making just and reasonable charges therefor, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. By section 10, subd. *"g,"* it is provided:

"Within six months after the delivery of any shipment of freight at destination any person aggrieved may complain to the commission that the charge exacted for the transportation of such freight between points in Michigan is irregular or exorbitant, and thereupon the commission shall have power to investigate such complaint, and to hear the same and to decide upon the merits thereof, in the manner provided by section twenty-two of this act. If, upon such hearing, the commission shall decide that the rate or charge exacted is irregular or exorbitant it shall find what, in its judgment, would have been a reasonable rate or charge for the service complained of. If the rate or charge so found shall be less than the charge exacted the carrier shall have the right to refund to the person paying such charge the amount so found to be excessive. In case of the refusal of the carrier to make such refund, the party aggrieved thereby may maintain an action in the courts of this State, to recover the amount of such excessive charge as found by said commission, and in the trial thereof the findings of the commission shall be *prima facie* evidence

of the truth of the facts found by it, and no carrier shall be permitted to avail itself of the defense of such action that the shipment involved was in fact made on the published tariff rate in force at the time such shipment was made, but no carrier making a refund upon the order of the commission or pursuant to a judgment of court as herein provided, shall be liable for any penalty or forfeiture, or subject to any prosecution under the laws of this State on account of making such refund."

Section 19 reads:

"If any common carrier shall do, or cause to be done, or permit to be done, any matter, act or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, or by any lawful order made under the provisions of this act by the Michigan railroad commission, such common carrier shall be liable to the person, firm or corporation injured thereby in double the amount of damages sustained in consequence of such violation: *Provided,* That any recovery as is in this section provided shall in no manner affect a recovery by the State of the penalty prescribed for such violation."

By section 26 is provided the method by which the carrier or other party in interest may seek to have set aside, in the circuit court, in chancery, any order fixing any rate or rates, in which proceeding the complaining party has the burden of showing "by clear and satisfactory evidence" that the order of the commission complained of is unlawful or unreasonable. One provision (*b*) of the section is that no injunction shall issue suspending or staying any order of the commission, except upon application to the circuit court, in chancery, or to the judge thereof. Sections 32 and 47 are here set out:

"SEC. 32. Whenever, after hearing and investigation as provided in this act, the commission shall find that any charge, regulation or practice affecting the transportation of passengers or property, or any service

in connection therewith not herein specifically designated, is unreasonable or unjustly discriminatory, it shall have the power to regulate the same as provided in section twenty-two of this act."

"SEC. 47. In addition to all the other remedies provided by this act for the prevention and punishment of any and all violations of the provisions hereof and of all orders of the commission, the commission, and likewise any person, firm or corporation interested, may compel compliance with the provisions of this act and with the orders of the commission by proceedings in mandamus, injunction or by other appropriate civil remedies."

The defendant, following the provision of the statute, on November 20, 1909, filed its bill of complaint in the circuit court for the county of Wayne, in chancery, alleging reasons why the said orders of the Michigan railroad commission should not become effective and operative and why the defendant should not publish a schedule of rates pursuant to such orders. It asserted that the proposed rates were unlawful and unreasonable, were not subject to the regulation or control of the commission, were in conflict with the constitutional provisions and laws of the State, and in violation of the due process of law clause of the 14th amendment to the Constitution of the United States. It prayed, among other things, for a temporary injunction restraining the commission from enforcing, or attempting to enforce, such orders or making them effective. The chancellor made an order requiring the commission to show cause on the 24th of November, 1909, why such an injunction should not issue, and, no one appearing at the time named in the order to show cause, a hearing was had, and, defendant being represented in court, a restraining order was issued, requiring the commission to—

"desist and refrain from putting into operation or making effective three orders of said Michigan railroad commission directed to the Detroit & Mackinac

Railway Company, said complainant, dated respectively October 22, 1909, October 19, 1909, and November 3, 1909, known and set forth in complainant's bill of complaint as Exhibits 1, 2 and 3, which said orders undertake to make a new tariff for the transportation of logs in carload lots to the city of Alpena over the Detroit & Mackinac Railway Company, other than the ones now in force and effect on said complainant's railroad, until the further order of this court."

Later, on December 2, 1909, a stipulation was made in writing, signed by the solicitor for the complainant and the attorney general of Michigan, which, omitting the title, is as follows:

"It is hereby stipulated by and between the attorneys for the respective parties hereto that the application for an injunction and the order to show cause made by said court, and the hearing thereon may be and is hereby continued in its present state until the final determination of said cause upon the merits thereof."

The Fletcher Paper Company, Frank W. Gilchrist, Churchill Lumber Company, and the Island Mill Lumber Company upon their petition were permitted to intervene with the Michigan railroad commission as defendants in the chancery suit, and various parties were, in like manner upon petition, permitted to intervene as parties complainant, and all of such intervening parties, defendants, and the Michigan railroad commission filed answers to the bill of complaint; and, the cause being at issue, proofs were taken, heard, and a final decree dismissing the bill was entered therein, which decree was signed February 11, 1911. As originally submitted, the decree contained a provision for the dissolution of the injunction, which provision was struck out by the judge who signed the same. An appeal was taken from the decree of the Wayne circuit court to the Supreme Court, was heard, and the decree of the lower court was affirmed. *Detroit, etc.,*

R. Co. v. *Railroad Commission*, 171 Mich. 335 (137 N. W. 329). Later a writ of error to the United States Supreme Court having been refused unless defendants would execute a bond for the benefit of interested parties, which the defendants did not do, and an application for a writ of certiorari to the United States Supreme Court having been denied by one of the Justices of that court, the defendant, on August 17, 1912, filed a bill of complaint in the district court of the United States for the eastern district of Michigan, southern division, in equity, asking for a review of the orders of the railroad commission as to their legality and effectiveness, and applying also for a temporary injunction. The commission filed an answer to the bill and to the motion for injunction, and the matter was submitted September 27, 1912, to three Federal judges, who, on the 22d of March, 1913, filed an opinion denying the motion for temporary injunction, from which decision an appeal was taken to the United States Supreme Court, the return on such appeal being filed June 28, 1913. The commission and other defendants moved to dismiss such appeal or affirm the decree, and that court, December 14, 1914, affirmed the decree. *Detroit, etc., R. Co.* v. *Railroad Commission*, 235 U. S. 402 (35 Sup. Ct. 126). A motion of the commission to amend the decree in the principal cause was denied. 178 Mich 250 (144 N. W. 689). June 16, 1914, the Michigan railroad commission petitioned the Supreme Court of Michigan for a writ of mandamus to compel the defendant to file and publish the orders made by the Michigan railroad commission and comply with their provisions, which writ was granted pursuant to the petition July 25, 1914. *Michigan Railroad Commission* v. *Railway Co.*, 182 Mich. 234 (148 N. W. 385). The defendant, on August 15, 1914, published a tariff of rates on the transportation of logs to Alpena, which was not approved, where-

upon contempt proceedings against the defendant were instituted and were disposed of February 4, 1915. *Michigan Railroad Commission* v. *Railway Co.*, 184 Mich. 242 (150 N. W. 861). February 18, 1915, a tariff was published by the defendant, followed by a further motion in the contempt proceeding. Defendant moved to amend and modify the opinion reported in 184 Mich. 242 (150 N. W. 861). These motions were submitted April 6, 1915, and were denied April 22, 1915. *Michigan Railroad Commission* v. *Railway Co.*, 185 Mich. 649 (152 N. W. 193). In the opinion of this court then delivered, one of the contentions of the relators is thus debated and disposed of:

"The second contention of relators again raises the question of the construction of the following paragraph contained in the order of the railroad commission, which was put into effect on February 19, 1915:

"'Above rates to apply when the manufactured product is reshipped via the Detroit & Mackinac Railway Company. And when not to be so reshipped, the railway company will collect in addition to the above rates fifty (50) cents per thousand feet. But if later reshipment is made over the Detroit & Mackinac Railway, the company will refund to such shipper the fifty (50) cents per thousand feet collected.'

"It is shown by relators in this application that the respondents construe this clause as permitting them to charge in all instances the extra 50 cents per thousand feet and to rebate the same only when it is shown that the manufactured product is reshipped via the respondent railway company's lines, and this is urged by relators as a reason why a penalty should be inflicted. The construction given to this clause of the order by the respondents was urged upon the court in the original contempt proceeding, and we there held that their contention was untenable; this for the reason that they were plainly in contempt in failing to comply with the order of this court by putting into effect the orders of the railroad commission, as they were directed by this court to do. Having obeyed the order of the court by filing the rate fixed by the com-

mission, we are of opinion that their contention with reference to its construction may fairly receive consideration. A careful reading of the clause in question will serve to demonstrate its ambiguity. The last sentence of the clause, 'But if later reshipment is made over the Detroit & Mackinac Railway, the company will refund to such shipper the fifty (50) cents per thousand feet collected,' indicates very clearly that, in some instances at least, it was contemplated by the commission that the higher rate should be charged and collected, and the extra 50 cents refunded only after reshipment over respondent railway company's lines had been made. It would not seem reasonable to suppose that the commission intended one rule to apply to one shipper and another to another shipper; and such a result would be of doubtful legality even if intended. These views are based wholly upon the language of the clause in question, and are not predicated upon the contention of respondents that to compel them to carry, in the first instance, all logs at the lower rate, collecting the extra 50 cents only after they could make proof that the product had been reshipped over their line, would entail upon them unnecessary hardship and loss. Without determining that the construction given to the clause by the respondent is correct, we are satisfied that it is so far justified as to warrant us in withholding the infliction of a penalty upon relators' theory that, acting under such construction, respondents still continue in contempt."

April 3, 1915, the Fletcher Paper Company, Island Mill Lumber Company, Richardson Lumber Company, Churchill Lumber Company, and Michigan Veneer Company each began a suit against the Detroit & Mackinac Railway Company in the circuit court for the county of Bay, filing in the said causes, respectively, a declaration, alleging the right to recover from the defendant the difference between the amount paid by them as shippers under the tariff published by the defendant and the tariff designated by the said several orders of the Michigan railroad commission,

counting expressly on such orders, and including in their declarations the common counts in assumpsit. They served with the declarations bills of particulars, consisting of a summary by years of the alleged overcharges and interest thereon. The defendant in each case appeared and demanded a more specific bill of particulars, and moved to dismiss for want of jurisdiction, and thereafter, on May 12, 1915, demurred to each of the said declarations. Six grounds of demurrer were alleged, as follows:

"I. The common-law remedies for irregular, exorbitant, unreasonable or excessive charges or exactions by common carriers for the transportation of freight between points in Michigan have been abrogated and abolished by subdivision '*g*,' § 10, Act No. 300, Public Acts 1909, pp. 704, 715, as re-enacted by Act No. 139, Public Acts 1911, pp. 205, 209, the same being the acts of the legislature of this State, defining and regulating common carriers and creating the Michigan railroad commission.

"II. The plaintiff seeks reparation without having made any complaint to the Michigan railroad commission under said subdivision '*g*'; and the special counts of its declaration do not show that complaint had been made to the commission, or that the commission has made any findings or orders on complaints made under said subdivision.

"III. It appears by the special counts of the plaintiff's declaration that the orders therein set forth of October 22, 1909, and November 3, 1909, were not put in force by filing a schedule or tariff until February 18, 1915, and that the plaintiff's cause of action is for alleged excessive charges before that date.

"IV. It does not appear by the plaintiff's declaration that the order therein set forth of October 19, 1909, was ever put in force by the filing of a tariff or otherwise.

"V. No cause of action is set forth in the special counts of the plaintiff's declaration.

"VI. The plaintiff's bill of particulars shows that it has no cause of action under the common counts of

the declaration, other than the alleged causes of action in the special counts."

The motion to dismiss was denied, and an order overruling the demurrers was entered July 7, 1915. July 12, 1915, an application was made to the Supreme Court for a writ of certiorari to review the order overruling defendant's demurrers, which application, on July 23, 1915, was denied. Thereupon, July 23, 1915, the defendant pleaded, giving notice of certain special and affirmative defenses. A more specific bill of particulars was filed, with certain stipulations of counsel. On December 31, 1915, the following stipulation was filed in the cause:

"For the purpose of facilitating the trial of these cases, it is hereby stipulated as follows:

"A bill of particulars and a more specific bill of particulars have been furnished in the Fletcher Paper Company case, and bills of particulars similar to the more specific bill of particulars in the Fletcher Paper Company case have been furnished in all of the other cases. The more specific bill of particulars in the Fletcher Paper Company case has been checked by defendant, and certain amendments which have been agreed upon will be made by a stipulation to be hereafter filed. In the other four cases, the bills of particulars furnished will be checked over by defendant's accountants as rapidly as possible, and a list of the disputed or incorrect items (if any) will be furnished plaintiff's attorneys in each case as soon as possible, and an effort will be made to ascertain and agree upon the facts in regard to each. A stipulation covering the facts, so far as they can be agreed upon, will be filed in each case, leaving in dispute upon the trial only such items (if any) as cannot be disposed of by such stipulations. In order to satisfy plaintiffs that the work of checking up the bills of particulars is proceeding with reasonable speed, any representative of the plaintiffs may at any time make inquiries at the office of the defendant at Alpena, and will be given information in regard to the rate of progress that is being made.

"Defendant will make all possible efforts to complete the work of checking up the bills of particulars promptly, so that the cases may be tried at the earliest date consistent with the completion of that work. If that work can be completed during the December term of the circuit court for the county of Bay, then the said cases shall be placed upon the docket for that term to be tried as soon as possible thereafter. If there is any unreasonable delay on the part of the defendant, plaintiffs may apply to the court by motion on the usual four days' notice, and the court, on the hearing of said motion, may set the cases for trial or may make such other order as may seem to him proper for the purpose of expediting the preparation and trial of the cases.

"All of the cases shall be consolidated for trial as far as possible in the following manner: All of the cases shall be submitted to the same jury (or to the court) at the same time. If the attorneys for all parties can agree that there are no questions for a jury, a jury will be waived by all parties. The parties will first introduce so much of their evidence as may apply jointly to all of the cases, and will then introduce separately the evidence applying to each one of the cases separately, and the court or jury shall make a separate finding or verdict as to each with the same effect as if they had been separately tried. A separate judgment shall be entered in each case."

The issues joined came on to be tried September 19, 1916, without a jury. Plaintiff's counsel offered in evidence the proceedings in the so-called rate cases, including the files, pleadings, evidence, record and briefs in all of the court hearings hereinbefore referred to, concluding with evidence of computations of the amounts claimed and interest to various periods in the progress of the rate cases proceedings, with other evidence and depositions.

It appeared, among other things, that the Fletcher Paper Company does not manufacture lumber. All forest products received by it are made into paper. In addition to what it receives via defendant's line, it also

receives logs by water. Ninety-eight per cent. of its output goes out over defendant's line. During six years, its average was 1,834 pounds of paper to 1,000 feet of logs. It shipped in by rail 20,481,619 feet of logs and shipped out by rail 117,408,337 pounds of paper. This shipment of paper represents the manufactured product of more than 64,000,000 feet of logs.

All of the manufactured product of the Michigan Veneer Company from logs shipped in by rail went out by rail excepting six boat shipments, during the six years in question. These were more than offset by the product of logs brought in by team.

In the cases of the Michigan Veneer Company and Fletcher Paper Company, the computation of plaintiffs' demand is made by using the flat commission rate, saying nothing about the 50 cents per thousand, and the rate actually paid.

The claims of the other plaintiffs are not materially different from each other. They operated sawmills, shipping out timber by rail and by water.

"Their claims for overcharges are first computed by subtracting from the amount paid on each shipment the commission rate without any allowance for the differential. Outshipments of lumber by rail are then shown, and are subtracted from the total amount of logs shipped in by rail. The difference represents such of the logs shipped in by rail as were not reshipped by rail, and upon this difference the sum of 50 cents per thousand was computed and deducted from plaintiff's claim (in this way being added to the commission rate) as a penalty for failure to reship this part of the manufactured product by rail. In these cases it does not appear, and cannot be made to appear, just how much of the lumber reshipped by rail was sawed out of the individual logs that were shipped in by rail. The logs and the lumber were both necessarily confused in the process of manufacture, but the lumber reshipped was identical in every respect with the lumber manufactured from logs shipped in by rail,

and may have been actually manufactured from those logs."

Defendant made a statement of the defense, giving an outline of events connected with the matter in issue, and moved to dismiss the causes. Before that motion was decided, defendant offered to submit proofs in addition to the documentary evidence and other evidence before the court, which motions were taken under consideration. The offer to prove was calculated to present the issue that the rates fixed in the orders of the Michigan railroad commission were in fact confiscatory and therefore unlawful. Stated otherwise, the position asserted was that the rates collected were in fact fair and reasonable rates. Later, September 27, 1916, a motion was made and filed, praying for an order requiring plaintiffs to elect whether they would rely upon the statutory counts in their declarations, or whether they would rely upon the common counts in assumpsit and seek a recovery under a general common-law remedy. November 13, 1916, the court filed an opinion in the several causes, with findings of fact and conclusions of law, denying defendant's motion to dismiss, refusing proofs under defendant's offer, determining that each of the plaintiffs was entitled to the full amount of its claim, with interest, and directing that judgment should be entered November 20, 1916, in pursuance of said opinion, findings, and conclusions. On the 16th of November, 1916, the plaintiffs moved the court to double the damages indicated by the opinion and findings. This motion was denied, and, on November 27, 1916, judgments were rendered for the plaintiffs for the amounts of said overcharges, respectively, with interest at 5 per cent. from the time such overcharges were respectively made to November 13, 1916. The judgments were: For the Fletcher Paper Company, $25,788.76; Richardson Lumber Company, $28,239.65; Island Mill

Lumber Company, $24,534.33; Churchill Lumber Company, $14,336.13; Michigan Veneer Company, $6,058.19.

A motion for a new trial was made by defendant, which was denied. The defendant excepted to the findings of fact and law, to the refusal to dismiss the proceedings and render a verdict of no cause of action, to the refusal to grant a new trial, and it is not claimed, and it does not appear, that the questions presented and argued upon the appeals are not properly saved. The defendant sued out its writ of error in each of said causes; the plaintiffs, excepting to the refusal of the court to double the damages, are also plaintiffs in error.

Three of the five plaintiffs, Fletcher Paper Company, Richardson Lumber Company, and Michigan Veneer Company, made no complaint to the railroad commission, and no order was ever made by the commission in their behalf upon their application, excepting the order with respect to the Fletcher Paper Company's switching rate. Two of the plaintiffs, Richardson Lumber Company and Michigan Veneer Company, did not intervene in the litigation to fix or enforce the said rates. All plaintiffs have, however, been treated alike in the proceedings had in the court below to the rendition of the judgments.

The principal questions presented and argued for defendant are:

(1) Whether a complaint to the Michigan railroad commission is not a necessary preliminary to any action by a shipper or consignee to recover excessive rates or charges which have been already collected by a carrier.

(2) Whether an injunction issued to prevent an order of the commission from taking effect, no bond being required from the carrier and no order impounding the overcharge, does not prevent the order from having any force or effect until the commission

obtains and serves a mandamus commanding the carrier to put the order into effect. (In this connection the effect of the stipulation entered into by the attorney general is discussed.)

(3) Was the defendant entitled to prove on the trial that the rates and charges it collected were just and reasonable?

(4) Should the court below have required the plaintiffs to elect whether they would seek to recover on common-law grounds or under the statute?

(5) Is the rebate of 50 cents per thousand feet of logs shipped into Alpena on the defendant railroad in case the manufactured product is shipped out thereon a legal discrimination against those who shipped out by water?

(6) Is there any ground on which any of the damages recovered or recoverable by plaintiffs can be doubled?

Plaintiffs state, also, substantially the same questions, as follows:

"(1) Is a freight rate fixed by a State railroad commission considered as the lawful rate, during chancery litigation to determine its legality?

"(2) To what extent is the chancery decree to be considered as *res judicata?*

"(3) Is the general rule changed by the delay of the railroad company in publishing and posting a new tariff in compliance with the orders of the commission?

"(4) Is the general rule affected by delay in the enforcement of the rate by mandamus?

"(5) Is the application of the general rule in this case changed by the injunction issued by the chancery court or the stipulation of the attorney general in respect thereto?

"(6) Is there any distinction between a common-law action and a statutory action in such a case, and has there been any failure to select the proper remedy or to follow any statutory requirements which are necessary preliminaries to such an action? (*a*) In general. (*b*) Defendant's offer of proof.

"(7) What are the plaintiff's rights in respect to an allowance for the outshipment of the manufactured

product? (*a*) Validity of provision for credit on reshipment. (*b*) Construction and application.

"(8) Is the situation in any way affected by the motion for a new trial?

"(9) Plaintiff's motion for double damages and the cross writ of error based thereon. (*a*) Double damages not a penalty. (*b*) Rule to be applied if double damages are considered as a penalty.

"(10) 'Election of remedies.'

"(11) Defendant's demurrer."

OSTRANDER, J. (*after stating the facts*). The Michigan railroad commission determined that certain rates (charges) theretofore published and exacted from shippers by defendant were unreasonable and ought not to be exacted, and that certain other rates (charges) were and would be reasonable and proper to be exacted and should thereafter be exacted. The action of the commission furnished for the benefit of any and every shipper evidence that the old rates were illegal, the new rates reasonable and lawful. Although liable to be set aside by the courts, the result of what the commission did was a legislative rate, immediately in effect. *Michigan Cent. R. Co.* v. *Wayne Circuit Judge*, 156 Mich. 459 (120 N. W. 1073); *Michigan Railroad Commission* v. *Railroad Co.*, 159 Mich. 580 (124 N. W. 564); *Detroit, etc., R. Co.* v. *Railroad Commission*, 171 Mich. 335 (137 N. W. 329); *Michigan Railroad Commission* v. *Railway Co.*, 178 Mich. 230 (144 N. W. 696). See *Detroit, etc., R. Co.* v. *Railroad Commission*, 240 U. S. 564 (36 Sup. Ct. 424).

This point, a vital one, may be restated. The rates fixed by the commission were not effective when, and if, an attack upon them failed, but were effective at once and pending any attack upon them.

Attacks made by defendant upon the action of the commission failed. The commission has not itself modified its determination. It is admitted that defend-

ant has refused to conform to the orders of the commission, and has exacted from plaintiffs rates (charges) higher than those fixed by the commission. It has therefore money which in equity and good conscience belongs to the plaintiffs, which it ought to restore to them. Putting aside the question of the effect of the injunction and the question whether the statute has provided a method for recovering such exactions, no reason appears for denying to plaintiffs, or any other affected shipper, the right to recover from defendant all of the money so illegally taken from them, in an action of assumpsit in which it is wholly immaterial whether they declare upon the statute and the action of the commission or upon the common courts. As was said by Carland, J., in *Love* v. *North American Co.*, 229 Fed. 103 (143 C. C. A. 379):

"The railroad company got this money into its treasury by superseding rates that were fixed by authority of the State. When those rates were sustained, the carrier was bound to restore its excessive exactions. This was a duty not only to the shippers; it was a public duty owing to the State, whose orders had been superseded."

The action of the commission, in any event, furnishes the necessary evidence of the unlawful character of the exaction.

It is clear, I think, that plaintiffs have no statute remedy, and that the statute does not seek to interfere with or amend the remedy at common law. Plaintiffs base their actions precisely upon the action of the commission. Everything essential to a recovery, so far as the character of the exaction is concerned, has been determined by the commission, whose determination they rely upon. If it were otherwise, if the charges exacted by the defendant had been duly fixed according to the act and approved by the commission, and they were attacked, a different question

would be presented. In such a case, the commission, and not the courts, should be first applied to. In the first place, the commission is the ratemaker; in the second place, it would be wholly incongruous from an administrative standpoint to have successive juries, or different courts and judges, passing upon the reasonableness of a rate already fixed by the commission. To this effect are the decisions in *Texas, etc., R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (27 Sup. Ct. 350, 9 Am. & Eng. Ann. Cas. 1075); *Robinson* v. *Railroad Co.*, 222 U. S. 506 (32 Sup. Ct. 114); *Gimbel Bros.* v. *Barrett*, 215 Fed. 1004. These cases are authority, also, for the rulings of the trial court refusing to receive and consider offered evidence, and denying defendant the right to try out in these cases the question of the reasonableness of the exactions it made.

Defendant does, indeed, say that the charges made by it were once approved, and were published as its rates, and, until suspended, were lawful rates; this as a part of an argument which asserts that only the voluntary action of the carrier or the writ of mandamus can put into operation rates fixed by the commission. It makes little difference whether we do or do not say that the new rates were *in effect*, or whether we say they were in effect, but not in operation. The old rates were condemned as unreasonable, and the new ones approved as reasonable by the commission, action which is now, and was when these suits were begun, conclusive upon defendant.

Instead of publishing and collecting the rates fixed by the commission, defendant sought and obtained an injunction restraining the commission from putting into operation its said orders. The statute plainly recognizes the authority of a court of equity to so suspend the operation of the orders of the commission.

The case of the defendant is not, however, that of one prevented from doing something, pleading the prevention in excuse, or bar, of the consequences of its enforced nonaction. On the contrary, it is pleading its own action, pleading the injunction it sought for and secured upon representations held to be unfounded, as an excuse for retaining an exaction at all times *prima facie* unlawful, and, finally, in its own suit, conclusively determined to be unlawful. The temporary injunction permitted defendant, notwithstanding the orders of the commission, to continue to take what its published tariffs called for, but it is not apparent, and is not pointed out, how it legalized the exaction. See *Pacific Gas & Electric Co.* v. *San Francisco,* 211 Fed. 202; *Spring Valley Water Co.* v. *San Francisco,* 165 Fed. 667; *In re Arkansas Railroad Rates,* 168 Fed. 720; *Bellamy* v. *Railway Co.,* 220 Fed. 876 (136 C. C. A. 442); *State, ex rel. Barker,* v. *Railroad Co.,* 265 Mo. 646 (178 S. W. 129, L. R. A. 1916C, 309).

It will be perceived that the order of the commission fixes freight rates to apply when manufactured product is reshipped via defendant's line, and, when not so reshipped, the defendant is permitted to collect 50 cents per thousand feet additional, to be refunded, however, if shipper later ships out the manufactured product or some of it. Ambiguous the order in some respects is, but not, I think, in respect to the rate. The order made a rate of $1 a thousand for logs in car loads moving 10 miles or less, and varying rates as the distance was increased. To them defendant was permitted to add 50 cents a thousand, no matter what the length of haul, if the product was not shipped out by its line. Defendant could take nothing from these rates. What it did was to enforce its old tariff of $3 and $3.25 per thousand feet, which tariff contained the provision for a refund of 50 cents per thousand when an "equal amount of manufactured prod-

uct" was shipped out over its line. Defendant says that:

"The rebates offered by the railroad company and the provision to the same effect in the order of the railroad commission"

—are a plain violation of the act. If a rebate was intended, or was provided for, a discrimination in favor of particular shippers, no difference of opinion would exist. This provision was not questioned in the bill filed by the defendant. In my opinion, there is no rebate, no discrimination, provided for in the order. A uniform rate is established, and with it a milling in transit rate, not necessarily unlawful and not shown here to be unlawful. Watkins on Shippers and Carriers (2d Ed.), § 169; *In re Transportation of Wool, Hides, and Pelts,* 23 I. C. C. R. 151; *Transit Case,* 24 I. C. C. R. 340; *Laurel Cotton Mills* v. *Railroad Co.,* 84 Miss. 349 (37 South. 134, 66 L. R. A. 453). The statute, section 11 (2 Comp. Laws 1915, § 8119), reads:

"Nothing in this act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances and conditions." * * *

Defendant says, however, that to entitle any of the plaintiffs to the flat mileage rate fixed by the commission, they must have proved, not only that the manufactured product reshipped equaled the product of the logs shipped in by rail, but also that it was actually made from the logs shipped in by rail. This contention is not debated in the briefs for defendant. A reasonable interpretation of the language sustains the conclusion that tonnage generally, and not the tonnage of particular logs, was intended. In operation, the tariff, so interpreted, will not necessarily conflict with the law if the product shipped out is identical

with the product of logs which were actually shipped in, logs which moved into the transit point under the transit rate. We are required here to go no further than this. The subject generally has, however, had the attention of the interstate commerce commission, which, first adopting a governing rule, later abolished the same as inadequate, and thereafter treated each case as it arose. *In the Matter of the Investigation into the Substitution of Tonnage at Transit Points*, 26 I. C. C. R. 204. See *Sondheimer Co.* v. *Railroad Co.*, 20 I. C. C. R. 606; Watkins on Shippers and Carriers (2d Ed.), § 169. The conclusion of the trial court is not out of harmony with the views of the interstate commerce commission upon this point. I have not overlooked the North Carolina cases (*Hilton Lumber Co.* v. *Railroad Co.*, 136 N. C. 479 [48 S. E. 813]; *Hilton Lumber Co.* v. *Railroad Co.*, 141 N. C. 171 [53 S. E. 823, 6 L. R. A. (N. S.) 225]), cited by defendant, nor the claim of defendant that this court, in *Michigan Railroad Commission* v. *Railway Co.*, 185 Mich. 649, 653 (152 N. W. 193), held directly, or by implication, that the 50 cents differential here in question is not recoverable by plaintiffs as an excessive charge. I find nothing in these decisions to sustain any contention made here by defendant.

With the computations, upon which the verdicts and judgments are based, we have nothing to do, since counsel have agreed that, if the method followed is the correct one, the results of the computations are correct. The defendant's exceptions must be overruled.

What remains is the question of the right of the plaintiffs to have their damages, or any of them, doubled by the court. I shall not consider whether the statute provision for double damages is a provision for a penalty or for compensation. I am of opinion that it should not be applied in the cases at bar. The

carrier, the defendant, has neither done, nor permitted to be done, anything prohibited by the act, or by it declared to be unlawful, beyond this, that while questioning it has refused to put a tariff into operation, conduct approved by the court of chancery when it suspended by its process the operation of the orders of the commission. I have held that defendant may not profit by its said conduct, or by the said action of the court. And, on the other hand, what damages have been suffered by plaintiffs? Clearly, they are no other or different in kind than those suffered by any other shipper from whom the illegal charges were exacted. They have lost the use of money, of which defendant has had the use. Return of the sums exacted and interest is compensation. For this, the judgments, respectively, provide.

The judgments are affirmed. Neither party will recover costs of the appeal as against the others.

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

OCTOBER TERM, 1917.

BERNARD *v.* MICHIGAN UNITED TRACTION CO.

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION LAW — ACCEPTANCE BY EMPLOYER—RETROACTIVE EFFECT.

An employer is within the operation of the workmen's compensation act, by the provisions of section 6, part 1, thereof (2 Comp. Laws 1915, § 5428), from the date of the filing of his statement of acceptance if the approval of the industrial accident board be subsequently given, such approval operating retroactively to accomplish this result.

2. SAME.

The common-law defenses withdrawn by section 1 thereof are open to the employer under section 3, part 1, of the act (2 Comp. Laws 1915, § 5425), when he is under the act and the employee either voluntarily or involuntarily is not under it.

3. SAME.

The purpose of the legislature in making the industrial accident board's approval of the employer's acceptance of the workmen's compensation act operate retroactively so as to place the employer under the act from the date of the filing of his statement was to prevent the penalizing of the employer by the denial to him of his common-law defenses after he had indicated his desire to come under the act during the short period which must elapse between the filing of the acceptance and its approval by the board.[1]

Error to Jackson; Parkinson, J. Submitted April 11, 1917. (Docket No. 72.) Decided December 27, 1917.

[1]On construction and effect of workmen's compensation acts, generally, see notes in L. R. A. 1916A, 23; L. R. A. 1917D, 80.

Case by Charles N. Bernard against the Michigan United Traction Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Sanford W. Ladd (*Charles E. Lewis* and *Warren, Cady, Ladd & Hill,* of counsel), for appellant.

Price & Whiting, for appellee.

BROOKE, J. This case has been before this court before. The opinion will be found reported in 188 Mich., at page 504 (154 N. W. 565). When first considered in the court the sole question for determination was whether under an undisputed statement of facts the circuit court had jurisdiction to try the case, or whether plaintiff's sole remedy was under Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5423 *et seq.*), commonly known as the workmen's compensation act.

By its plea to the jurisdiction defendant asserted that, by operation of law, plaintiff at the time the accident happened was under the act, and *second,* that if this was not so plaintiff had placed himself under the operation of the act by voluntarily filing a claim with the industrial accident board for compensation under the act.

We there held that inasmuch as the 30 days within which plaintiff, an employee, might have elected whether or not he would come under the terms of the act, had not expired at the time of the accident, he was not bound by its terms. We further held that his conduct in voluntarily seeking compensation under the act did not work an estoppel. The judgment overruling the plea in abatement was affirmed. Upon a new trial upon the merits, which this court had ordered, defendant was denied the right to introduce any defenses to the action, and the case was submitted to the jury simply for the purpose of computing plain-

tiff's damages which were assessed at the sum of $9,000. The judgment entered upon such verdict is now here for review.

Section 1 of the act is as follows:

"In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injuries so sustained, it shall not be a defense:

"(*a*) That the employee was negligent, unless and except it shall appear that such negligence was wilful;

"(*b*) That the injury was caused by the negligence of a fellow employee;

"(*c*) That the employee had assumed the risks inherent in or incidental to, or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances."

Section 2 provides that the provisions of section 1 shall not apply to actions to recover damages for personal injuries sustained by household domestic servants and farm laborers.

Section 3 is as follows:

"The provisions of section one *shall not* apply to actions to recover damages for the death of, or for personal injuries sustained by employees of any employer who has elected, with the approval of the industrial accident board hereinafter created, to pay compensation in the manner and to the extent hereinafter provided."

Section 6 is in part as follows:

"Such election on the part of the employers mentioned in subdivision two of the preceding section, shall be made by filing with the industrial accident board hereinafter provided for, a written statement to the effect that such employer accepts the provisions of this act, and that he adopts, subject to the approval of said board, one of the four methods provided for the payment of the compensation hereinafter specified. The filing of such statement and the approval of said board shall operate, within the meaning of the

preceding section, to subject such employer to the provisions of this act and all acts amendatory thereof for the term of one year *from the date of the filing of such statement.*"

Reading these three sections together it is obvious that it was the intention of the legislature (indeed section 6 so states in plain language), to place an employer under the operation of the act from the day of the filing of the statement as soon as the approval of the board was given to said application. Such approval, when given by the terms of the statute, operates retroactively and fixes the status of the employer as being under the act, "from the date of the filing of the statement." We, therefore, have the situation here in which the employer at the time of the accident was under the act and the employee (not having had an opportunity for election) was not under the act. This situation is exactly covered by section 3, which declares that the provision of section 1 shall not apply to such actions. In other words, the common-law defenses withdrawn by section 1 are open to the employer when he is under the act and the employee either voluntarily or involuntarily is not under the act.

The purpose of the legislature in making the approval of the board retroactive is plain. It was to prevent the penalizing of an employer by the denial to him of his common-law defenses after he had indicated his desire to come under the act, during the short period which must elapse between the filing of his election and its approval by the board.

The judgment must be reversed and a new trial ordered, at which time defendant may interpose the common-law defenses mentioned in section 1 of the act.

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

PORTH *v.* CADILLAC MOTOR CAR CO.

1. COMPROMISE AND SETTLEMENT—RELEASE—PERSONAL INJURIES—FRAUD—QUESTION FOR JURY.

In an action to recover for personal injuries in which the defense set up was a complete settlement and release, and the testimony was in conflict, it was a question for the jury as to the terms of the contract and whether the release was procured by fraud from plaintiff, he claiming that he thought it was a receipt for money paid under the contract, as he was assured by a representative of defendant and of the insurance company.

2. SAME—FRAUD—EVIDENCE—BURDEN OF PROOF.

One signing a release of damages for personal injuries is presumed to have executed it understandingly, and *prima facie* it must be taken as truly stating the agreement of the parties, and the burden of proof is upon him not only to show by a preponderance of evidence that it is not true, but that he was fraudulently deceived and misled by what was done and said into believing that he was signing a mere receipt for money paid under a contract different from that stated in it.

3. SAME—RELEASE—AVOIDANCE—TENDER.

If the contract under which the money was paid to plaintiff was limited to his loss of time, extra expenses and total incapacity for a year following the time it was entered into, with the matter of full compensation left open, owing to the uncertainty at that time of the permanency of the injuries and the extent of possible recovery, and plaintiff affirmed the contract, he was under no obligation to return the money paid in fraudulent settlement of it.[1]

4. MASTER AND SERVANT—SAFE PLACE TO WORK—PERSONAL INJURIES—EVIDENCE—MATERIALITY.

While the doctrine of safe place does not apply where a carpenter is employed by the owner in constructing a scaffold to do work on a cupola on a new building, the steel framework of which had been constructed by an independent contractor, and was injured as the result of the falling of the scaffold due to the absence of a bolt

[1]On return of tender of consideration for release of claim for personal injuries set aside on ground of fraud, see note in 35 L. R. A. (N. S.) 660.

in a steel beam on which the platform rested, yet the fact that he was directed to begin his work on top of a steel structure finished by an independent contractor is material as bearing upon his contributory negligence and the negligence of his employer.

5. SAME—NEGLIGENCE—PERSONAL INJURIES.

Where the owner of the building had knowledge or notice of the absence of the bolt in the beam in the steel framework of the building which caused the injury of the carpenter upon falling of the scaffold, and he neglected to take proper precautions for the protection of the carpenters, he was responsible for the resulting injuries.[1]

6. SAME—EVIDENCE—SUFFICIENCY.

Evidence *held*, sufficient to go to the jury on the question whether a foreman in charge of the carpenters had direct notice of the defect in the steel work so as to bind defendant.

7. TRIAL—INSTRUCTIONS—INTEREST, COMPUTATION OF.

In an action for personal injuries an instruction that if the jury should find for the plaintiff they should deduct the amount already received was confusing and prejudicial, where it would devolve upon the jury to figure interest on the amounts to be deducted and they were uninstructed upon that subject.

Error to Wayne; Cross, J., presiding. Submitted April 11, 1917. (Docket No. 135.) Decided December 27, 1917. Rehearing denied March 28, 1918.

Case by William Porth against the Cadillac Motor Car Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Keena, Lightner, Oxtoby & Hanley, for appellant.

Dohany & Dohany, for appellee.

STEERE, J. Plaintiff was injured on September 16, 1911, while working in defendant's employ as a carpenter on a building in process of construction, by the

[1] Authorities discussing the question of knowledge as an element of master's liability to an injured servant, see note in 41 L. R. A. 33.

fall of a scaffold which precipitated him to the ground some 40 feet below.

During the summer season of 1911 defendant was erecting a new factory building about 250 feet long at its Trombley avenue plant in the city of Detroit. Most of the construction work was done by independent contractors, but defendant also had in its own employ a force of carpenters to do certain of the wood work under the supervision of J. W. Butler, who took charge of the carpenter work for defendant as soon as the building was ready for that part of the construction. The Whitehead & Kales Company did the steel construction work under contract, which was early entered upon and had been completed when the accident happened. After its completion the Albrecht Company, which had the masonry contract, installed in the structure a freight hoist with which to carry on its work, and in so doing found it necessary to temporarily remove a small portion of the previously erected steel work, for which permission was obtained from the Whitehead & Kales Company. When through using the hoist at that place the Albrecht Company's employees removed it and replaced the steel work. It was subsequently discovered that at this point one of the bolts used to fasten a steel beam or channel iron where one end of it rested on a truss was left out or not properly replaced. This beam, or channel iron, was at the top of the steel construction on the trusses which supported the roof, in which the carpenters were constructing supports for a cupola. When the accident occurred a force of carpenters, including plaintiff, had just completed a platform or scaffold preparatory to working upon the cupola above it. This was made by placing planks upon the channel irons, or steel beams, including the one which had not been bolted at one end, which it is claimed allowed it to spring in the center with the weight put upon it so as

to withdraw the unbolted end from its bearing on the truss. After the platform, or so-called scaffold, was completed and the men were proceeding to use it in their work plaintiff was the first upon it, and when he reached its center it fell, taking him with it to the ground and seriously injuring him. He was at once removed to Harper hospital and there given proper care and medical attention.

Dr. Stockwell, who was called by defendant at the time of the accident, and attended plaintiff both at the hospital and afterwards at his home, testified that his injuries consisted of a laceration of the lower lip, a comminuted fracture of the middle left radius—one of the bones of the forearm—and fractures with considerable displacement of the *os calcis* bones in both ankles, which he diagnosed in his report as "probable results not good," meaning the injury would be permanent; that there was nothing in the report showing anything wrong with the collar bone, ribs, backbone, or the legs above the feet, and had there been it would have appeared in the chart as he went over the patient looking for all injuries. Dr. Povey, who was sent by plaintiff's attorney to examine him some three years later, testified to finding indications and the effects of those described by Dr. Stockwell and other fractures, including both collar bones, with the right elevated and the left depressed, and the breastbone depressed; that both ankle joints had been fractured and stiffened so that 75 per cent. of the foot motion was lost without hope of recovery; that the spine had been injured and his whole nervous condition upset, and as a result of scar tissue formed in the spinal cord and nerves his whole body was affected with a muscular tremor. While there is a marked variance in the testimony of the physicians as to the extent of plaintiff's injuries, it appears undisputed that they were serious, leaving him permanently crippled and totally incapacitated to

perform the work he was engaged in at the time of the accident.

After remaining in the hospital about eight weeks plaintiff was taken to his home, where Dr. Stockwell continued to attend him professionally until about the middle of the following January. An office employee of the Cadillac Motor Company named Stanley called upon him occasionally at the hospital to see, as he stated, how he was getting along and to take him his regular wages as instructed by his employer. This he continued to do after plaintiff was taken to his home until the latter part of January, when he broached the matter of a settlement with plaintiff and the subject was discussed several times along lines upon which they do not agree, but later Mr. Sawyer, an attorney for the casualty company which insured defendant against loss resulting from injuries to employees, was called in, and their negotiations culminated in some kind of a settlement, the nature of which is in dispute. Under it payment was made to plaintiff of $2,500, less the amount he had already received from defendant, and he signed the following document, for which a printed form was used:

"Release.

"Received of *Cadillac Motor Car Co.* this *27th day of January, 1912,* the sum of *twenty-five hundred* (*$2,500.00*) dollars, in full satisfaction and discharge of all claims which I now have or may hereafter have on account of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the *16th* day of *September, 1911,* while in the employment of the above. I am *satisfied with this settlement.*

"*William Porth.*

"Witnesses:

"*Mrs. Sophie Porth,*

"Address. *208 30th St.*

"*E. A. Stanley,*

"Address. *1343 Cass Ave.*"

(The italicized portions are in writing.)

At this time plaintiff was yet under total disability and in a helpless condition, attended and cared for by his wife and daughter. It is his contention that he was deceived into signing this instrument, supposing it was only a receipt for the money then paid him which, under the agreement they made, covered only damages, losses, and expenses for one year with the matter of final settlement left open. His version of the transaction, supported by the testimony of his wife, is that when first approached on the subject by Stanley he declined to make any offer, not knowing what his future condition would be, but upon being urged to do so he said he would take $10,000 to settle the whole matter if they would pay it then and there would be no further trouble, and never offered to take any less in full settlement; that as negotiations were pressed from time to time Sawyer finally told him, "The company will allow you $2,000 for the following year," which plaintiff protested was too little; that finally Sawyer and Stanley agreed to pay him and he agreed to accept at that time and for one year $2,500, deducting $287.50 which he had already received from defendant, they assuring him he would be well within a year, agreeing that the matter of a final settlement would be left open to be taken up at the expiration of that time when the result of his injuries could be better determined; that they came the following day and paid the amount agreed upon, presenting a paper for him to sign; that being unable to read he asked Sawyer to read it to him, but he said it was simply a receipt for the money which plaintiff believed and signed without hearing the paper read. His wife, who said she had been to school through the fourth grade and could read, testified that the agreement related only to the first year as she understood it; that Mr. Sawyer said the paper was a receipt and so believing she just glanced it over in part, and after her husband signed

it she, at Sawyer's request, signed as a witness and wrote in the words over her husband's name as Sawyer requested and dictated, "I am satisfied with this settlement;" that her husband never agreed to settle his whole claim for this sum but did at one time say he would be willing to take $2,000 if he could get well as they said he would.

Sawyer and Stanley testified that there were no assurances for the future, or misrepresentations, and the bargain was as the receipt indicates, which was read over to plaintiff before he signed it. Sawyer testified he himself read it to plaintiff, who was very nervous at the time and in bad condition with an injured arm, so "it is very probable that one of us assisted him in writing his name;" that after plaintiff had signed it his wife signed as a witness and then at his (Sawyer's) dictation wrote over her husband's signature his expression of satisfaction with the settlement. What was said, explained, understood, and agreed to on that occasion and prior thereto is in marked dispute.

In October or November of that year plaintiff's physical condition was such that his wife appealed to Stanley for help and he called Dr. Fay, a physician in defendant's employ, to see him. The doctor said an operation would relieve his ankles, but that he was then too weak for such operation and he would treat him at home for a time. Plaintiff testified that Dr. Fay thereafter attended him more or less for about nine months.

In January, 1913, just after the expiration of a year from the date of the receipt in controversy, plaintiff's wife appealed to Stanley for further assistance, and defendant began paying plaintiff, or his wife, $45 per month, which was continued until the following October, when further payment was refused by Mr. Eaton, manager of defendant's welfare department, who had

taken charge of the matter. He testified that the payments made and services rendered by him had nothing to do with any claim for damages, which plaintiff told him were settled, but were an ordinary activity of defendant's welfare department in aid of present or former employees, and after repeated warnings without results they were discontinued because of plaintiff spending the money given for the support of his family in saloons. Plaintiff denies so spending the money, and entirely different reasons are urged in his behalf for said payments.

Defendant's counsel requested the court for a directed verdict on various grounds, especially urging that no original liability on the part of defendant was shown, that if there had been there was a complete settlement and, in any event, plaintiff could not recover because he had not repaid or tendered back the money received and receipted for in full settlement of his claim.

The court submitted the questions of original liability and settlement to the jury as issues of fact, with instructions that in case they found for plaintiff in a greater sum than the amount he had already received, the latter, with interest at 5 per cent. per annum, should be deducted from the former. A general verdict was returned for plaintiff in the "sum of $5,000 over and above the amount of money heretofore received by the said plaintiff from said defendant," and judgment was entered thereon.

Defendant thereafter moved for a new trial contending amongst other reasons that, as shown by his affidavit, the testimony of a witness named Frank Dybalski touching notice given to defendant of the defect, alleged as the only foundation for plaintiff's claim of negligence, was wrongfully interpreted and contrary to the facts as he knew them. Dybalski was one of the carpenters working with plaintiff at the time of

the accident, and still in defendant's employ when this case was tried. He was called for cross-examination by plaintiff under the statute and examined through an interpreter, who was not objected to by defendant. The evident object in calling him was to show that he had notified Butler of the absence of a bolt in the end of the channel iron which fell, and defendant thus had notice of the defect which caused the accident. His testimony, as interpreted, is somewhat contradictory and confusing. The record indicates that counsel for both sides found trouble in getting consistent and responsive answers to their questions through the interpreter. He had answered that he informed Butler two or three days before the accident that the bolt was out; did not remember how many days, nor whether it was just a few minutes before it fell; did not know whether it was out two or three days; he wasn't up there to look; that his partner told him; that he did not know whether it was out two days or three days, etc.; until finally, near the close of his bewildering testimony as interpreted, counsel for defendant, who was examining him, said, "Tell in English what you said"; and he thereupon proceeded, somewhat disjunctively, to describe in English the situation shortly before the accident and said: "Then I told the foreman that place over there had no bolt in one end. He says, 'All right, never mind, they are going to be fixed.' That is what I know." His affidavit in support of the motion for a new trial was also taken through the interpreter and is, like his interpreted testimony, inconsistent in some respects. He however repeats that he saw the bolt was out and notified Butler of it.

Counsel for appellant state in their brief, as a major premise, that "Porth necessarily is seeking to avoid the contract of January 27, 1912;" assert that it was a contract of settlement in full, as evidenced by the pa-

per he signed, and contend that he can only repudiate the settlement and bring this action on the ground of mutual mistake or fraud, in which case return or tender of the amount paid is a prerequisite.

Plaintiff's repudiation is only directed to the paper he signed. Both parties say a contract was entered into shortly before this paper was signed, and that it was executed in full. Neither claims any fraud or mistake as to it. Their disagreement is as to its scope and terms. Plaintiff does not seek to repudiate the contract he claims was made, but contends it was limited to his loss of time, extra expenses, and total incapacity for a year following the time it was entered into, with the matter of full or further compensation left open, owing to the uncertainty at that time as to the permanency of his injuries and the extent to which he would recover; while defendant claims the contract was a full and complete settlement, just as the receipt signed by him shows. He only claims fraud as to the paper he signed—that advantage was taken of his ignorance, inability to read, and confidence in Stanley and Sawyer, at whose request he signed the paper then produced under the assurance that it was only a receipt for the money they had just paid him according to the terms of the oral agreement, as he asserts it was made. The testimony of the witnesses is clearly in marked conflict both as to this and the terms of the contract to which it related. In such case it is not for the court to pass upon the probability of his story or the credibility of the witnesses, for his testimony, taken as true and viewed in the aspect most favorable to his contention, raises issues of fact for a jury both as to whether he was fraudulently deceived into signing the paper in question and the terms of the contract then entered into. Of a release given under a somewhat analogous contention, it was said in *O'Neil* v. *Iron Co.*, 63 Mich. 690 (30 N. W. 688):

"It is not the intention, but the effect upon the plaintiff of what was said and done at the time the paper was signed, that is material here; for if the effect was to lead him to believe that he was signing a mere receipt, and call his attention away from the fact that he was signing so important a paper as an agreement for a release of defendant from liability, the result would be the same—he was deceived as to the true character of the paper he was signing. He testifies that he did not know that he was signing, and did not intend to sign, an agreement to release defendant from liability arising from its negligence."

Plaintiff admits that he signed this release in the presence of his wife and the other witnesses, and received the amount there stated in payment for damages resulting to him from his injuries. He is presumed to have signed it understandingly, and *prima facie* it must be taken as truly stating their agreement. The burden of proof is upon him not only to show by a preponderance of evidence that it is not true, but that he was fraudulently deceived and misled by what was done and said into believing that he was signing a mere receipt for the money paid under a contract different from that stated in it. If the contract was as he claims, and which he does not repudiate but affirms, we see no obligation resting upon him to return the money paid in settlement of it, as would be the case where a party seeking to repudiate a contract admittedly made claims he was fraudulently induced to so agree. Failing to prove by a preponderance of evidence that the contract was not as plaintiff's witnesses testify and the paper he signed shows, he of course could not recover.

Plaintiff's counsel urge that it was the duty of defendant at its peril to provide him with a reasonably safe place in which to work, and that its negligence is also shown by the fact that it had actual notice of the defect which made the place particularly dangerous,

but disregarded it. Defendant contends that as plaintiff was engaged in constructing a scaffold to facilitate his work on an unfinished building, when injured, he assumed the risk, and the doctrine of safe place does not apply under the ruling in *Hoar* v. *Merritt*, 62 Mich. 386 (29 N. W. 15); *Dewey* v. *Parke, Davis & Co.*, 76 Mich. 631 (43 N. W. 644), and other so-called scaffold cases in which it is held that the rule of safe place is not applicable.

It is to be noted that plaintiff and his fellow workmen had no part in constructing the steel frame of the building on which they were laying the plank for the floor, or so-called scaffold, from which to do the wood work above. The steel construction they were starting to use had been finished some time before by an independent contractor, as Butler testified. For the purpose of beginning the wood work in the roof defendant had accepted that steel work as done and ordered its carpenters upon it. While the rule of safe place as generally understood cannot be applied as the controlling principle in this case where plaintiff's employment was in the erection of a new building, or construction work which in its progress necessarily undergoes frequent changes and involves extra risks which he is presumed to assume, yet the fact that he was directed to begin his work upon the top of this steel structure after it had been finished by an independent contractor with whom he had nothing to do does have a bearing on the question of his contributory negligence and the duty of his employer when ordering him to begin work at such a place.

So far as the record discloses Butler was the only representative of defendant on the premises in authority. He was in charge of and superintending the work it was doing; notice could only be given to this corporation by notice to its authorized representative or agent in the line of that to which the notice related.

The testimony tends to show that his position was such that notice to him of this defect in the steel work was notice to defendant. There is evidence that he was notified of it and disregarded the notice. There is no evidence on which to base a claim of negligence because defendant engaged inexperienced or incompetent contractors, either for the steel construction or masonry. We need not discuss the question of duty to inspect before use of the work or material of a reputable, independent contractor of experience, for inspection is but a means towards an end, and plaintiff contends that defendant's authorized representative had direct notice. Upon that issue there was evidence to carry the case to the jury. If defendant in fact had knowledge or notice of the defect which caused the accident, and neglected to take proper precautions to protect its employees, it would be responsible to them for any resulting injuries. *Devlin* v. *Smith*, 89 N. Y. 470 (42 Am. Rep. 311); *Mansfield Coal & Coke Co.* v. *McEnery*, 91 Pa. 185 (36 Am. Rep. 662).

Upon that branch of the case defendant's counsel requested the court to charge the jury that:

"If competent men were employed to replace the angle iron that had been removed and afterwards fell, and the Cadillac Motor Car Company had no notice that this work had been improperly performed, your verdict should be no cause of action."

This the court refused and, after giving a general definition of negligence, charged the jury in part as follows:

"You are instructed that it is the duty of the employer to furnish its employees a reasonably safe place to work. A failure to do so would be negligence.

"If you find by a preponderance of the evidence that the cause of the scaffold falling was the failure to properly replace the channel irons, then you may find that the defendant was guilty of negligence."

This was, in effect, direction of a verdict in favor of plaintiff upon the question of negligence, as the cause of the accident was not controverted nor denied by defendant.

At conclusion of the court's charge counsel for plaintiff suggested to the court that if the jury "should find for the plaintiff that they assess plaintiff at whatever amount barring the amount he has already received from the defendant; I think that will be the proper verdict." To which the court replied, "Yes; it should be deducted from any amount." Plaintiff's counsel then said, "The clerk can do that." This is charged by defendant as prejudicial error. It was at least confusing. Apparently there was no question as to the amount which had been paid plaintiff. He testified that at the end of a year from the time he receipted for $2,500 defendant began to pay him $45 per month and continued the same for nine months, which it is urged was in recognition of the contract of partial settlement he claims was made and his right to further compensation. If his version of the agreement and significance of the subsequent payments made to him prevailed, those payments with interest at 5 per cent. per annum should be deducted in case the damages found by the jury exceeded the total amount previously paid him. Not only were the jury uninstructed upon that subject, but the payments were liquidated amounts apparently conceded, and involved no issue of fact for the jury. To leave this matter to the jury with general instructions involving figuring interest was confusing and prejudicial to a fair determination of the issues of fact proper for the jury to pass upon.

For the foregoing reasons the judgment is reversed and a new trial granted, with costs.

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

TATTAN *v.* BRYANT.

1. VENDOR AND PURCHASER — OPTIONS — LAND CONTRACTS — CONSTRUCTION OF CONTRACT.

   A memorandum of agreement relating to the sale of land which contains no obligation to purchase and makes reference to a "prior option," with the terms of which both parties are familiar, and provides that a deed will be given on compliance with the "terms of this option," and that on failure to make the stipulated payments the instrument will be canceled, constitutes a mere option and not an agreement for the sale and purchase of land, even though the parties are designated as seller and purchaser and other language more properly belonging in an agreement for sale and purchase is used, since the absence of an obligation to purchase is the distinctive characteristic of an option contract.

2. SPECIFIC PERFORMANCE—LAND CONTRACTS—EXTENSION OF TIME —CANCELLATION—NOTICE.

   Specific performance of a land contract, in which time of payment is made the essence of the contract, will not be granted in favor of the contract purchaser where, although the time of payment is extended a few days in order to allow the purchaser to have certain restrictions as to the use of the property removed, and, on the day to which time of payment was extended, she called at the vendor's office several times and was ready to make the payment due, she made no tender to, and left no notice with, those in charge of the office, and had not obtained the removal of the restrictions, and did not intend to, and shortly thereafter received notice of termination of the agreement from the vendor and took no steps in the matter until about five months later when she filed her bill, having in the meantime learned that a purchaser was about to relieve the property of its restrictions.

3. SAME—RIGHT OF ACTION—DISCRETION OF COURT.

   Specific performance of a land contract will not be granted as a matter of right, but in the discretion of the court.

4. SAME—EVIDENCE—SUFFICIENCY.

   Evidence *held*, insufficient to sustain the burden of proof

upon plaintiff, the purchaser, in an action for specific performance of an agreement for sale of land.

Appeal from Wayne; Perkins, J., presiding. Submitted April 16, 1917. (Docket No. 59.) Decided December 27, 1917.

Bill by Catherine Tattan against John A. Bryant for the specific performance of an alleged land contract. From a decree dismissing the bill, plaintiff appeals. Affirmed.

John C. Shields (*N. C. Bigelow* and *Arthur E. Fixel*, of counsel), for plaintiff.

Clark, Emmons, Bryant & Klein, for defendant.

STEERE, J. This litigation arises out of the following instrument in writing, which plaintiff contends is a land contract, and seeks to enforce specific performance of, while defendant insists it is but a forfeited option, and, even if construed as a contract, defaulted and not enforceable:

"Memorandum of agreement, made and entered into this 13th day of April, A. D. 1914, by and between John A. Bryant, of the city of Detroit, Wayne county, Michigan, hereinafter known as the seller, and Catherine Tattan, of the same place, hereinafter known as the purchaser: In consideration of the sum of one dollar this day paid to the seller by the purchaser herein named, said seller does hereby agree to sell to said purchaser the following described property, to wit: The Woodward avenue frontage, being the westerly one hundred feet (100) of lots B and two and the north one-half of the vacated portion of Pallister avenue of Chandler avenue subdivision of part lot five (5) of subdivision of quarter section 57, ten-thousand-acre tract, excepting and reserving an easement or right of way on a strip of land ten (10) feet in width from the easterly end of said property, as provided in a certain deed to John Kaiser, Sr.; also including ease-

ment and right of way over southerly ten (10) feet of land heretofore deeded to said Kaiser, Sr., on the following terms, to wit: For the sum of twenty-four thousand two hundred dollars ($24,200) payable five hundred dollars ($500) on the signing of this agreement and the balance of twenty-three thousand seven hundred dollars ($23,700) as follows: Twelve thousand two hundred dollars ($12,200) or more payable thirty days (30) from the date hereof and the balance of eleven thousand five hundred dollars ($11,500) as follows: Three thousand dollars ($3,000) one year from date; three thousand dollars ($3,000) two years from date and the balance of five thousand five hundred dollars ($5,500) three years from the date hereof, with the privilege of paying any and all sums at any time after this date, with interest at 6 per cent. per annum on any sums due and unpaid.

"It is understood and agreed between the parties that E. M. O'Roark, real estate agent, who held a prior option on this property, dated March 10th, 1914, which said option has expired, is to receive from the first payment of twelve thousand two hundred dollars ($12,200) the sum of seventeen hundred dollars ($1,700), which amount is to be in full of all claim on his part for commission or otherwise, against either of the parties hereto, or against said property; and said E. M. O'Roark has this day signed this agreement as evidence thereof. It is provided further that if said purchaser shall fail to pay the sum of twelve thousand two hundred dollars ($12,200) thirty days from the date hereof, as agreed, then said payment of five hundred dollars this day made shall be retained by the seller as liquidated damages and this agreement shall at once be canceled and the purchaser shall forfeit any interest she may have or may claim in said premises.

"It is understood and agreed that the purchaser has examined Burton abstract, that the title is satisfactory and that upon the completion of the terms of this option and payment of the purchase price for said property, she shall receive a deed warranting said title against the acts of the seller and a Burton abstract as now brought down and certified.

"In witness whereof, the parties have hereunto set

their hands and seals the day and year first above written.

"JOHN A. BRYANT.
"CATHERINE TATTAN.
"E. M. O'ROARK."

The only other writing of any significance connected with this instrument and what was done in relation to it is as follows:

"MAY 15, 1914.

"MRS. CATHERINE TATTAN,
"51 Massachusetts Street,
"Detroit.

"*Dear Madam:* I am writing to advise you that in view of the fact that you have defaulted in the terms of the agreement dated April 13, 1914, covering purchase by you of property owned by me at the corner of Woodward avenue and Chandler, I am exercising my rights under the terms of that agreement in declaring forfeited to me the $500 paid thereon on April 13, 1914, and I will now proceed to dispose of said property without being limited by the April 13th agreement.

"You came to this office on May 13th, on which date a payment of $12,200 was due, and stated that you were unable to make the payment and asked for a ten days' extension of time. This I was unable to give you and so stated to you. Inasmuch as you admit that you are unable to carry out the terms of the agreement, the deal is therefore declared off.

"Yours very truly,
"JOHN A. BRYANT."

The $500 payable "on the signing of this agreement" was then paid as provided. Plaintiff never paid or tendered the $12,200 made payable 30 days later. She called upon defendant at his office on May 13th and asked for an extension of time to make this payment, which she claims and he denies was orally granted, until the following Monday. Plaintiff testified that she was accompanied by her attorney, whom she took with her, thinking perhaps an extension of time would be granted, and if any writing was to be

done, etc., he would be there to look after her interests. With at first some misgivings as to the date, her attorney concluded that the interview with defendant in which he participated was on May 13th, and testified in part:

"As to the extension he absolutely refused to give it, but he said he would not do anything for a certain length of time. * * * I had an impression that the matter would stand as it was until over Monday."

Defendant fixes this interview on the following day (May 14th) and the second visit of plaintiff when she returned with her counsel to further press the matter, at which time, though answering to their persistent inquiries that he was not going to sell the property before Monday and they could see him any time they wished, he asserts that he positively refused to extend the stipulated time, which is supported by the testimony of his woman office assistant, and the interview finally ended by the attorney becoming irritated, and as he left intimating a purpose to "fix" defendant, which intimation was the occasion of sending the letter of May 15th to make clear in writing his position.

Defendant was a member of the contracting firm of Bryant, Detwiler & Co., and testified that his sole business was that of contracting, although he had invested money in real estate and owned the property in question for 4 or 5 years; it being his first purchase after his home. It was burdened with building restrictions which, under changed conditions and the invasion of business in that locality, tended to impair its market value. Plaintiff had been in the real estate business in Detroit for 15 years, handling many real estate transactions both as agent and for herself, and, as she testified, was familiar with the complications arising in that part of the city over such restrictions; knew the land which she had dealt for at the price of restricted property would be much more valuable with

the restrictions removed; expected to effect their removal within the 30 days before her second payment fell due, and intended to make her profit on the deal through being able to sell it as unrestricted property. One of the embarrassments she met in her campaign of removal was the reservation of a private easement or 10-foot right of way once deeded to John Kaiser, as appears in the description of the property. Of about 200 residents whose written consent was required to relieve the property from restrictions she had only secured some 12 or 14 signatures up to May 13, 1914, but claimed she had assurances that if the city would accept and adopt the 10-foot easement as a public alley she could obtain releases from the rest. She had accordingly been working with the city authorities to get the public alley through, and states she "was getting near to the council" when the date for the $12,200 payment arrived, and had an appointment with the legal representative of the city for the Monday following, which gave promise of favorable results. Her understanding that a purchase of the property by her was optional and her attitude in regard to the proposed public alley she hoped to secure are indicated in the following questions and answers on her cross-examination:

"*Q.* So you wanted further time to get a public alley there, is that right?

"*A.* No, it would be satisfactory to the city if they would accept a 10-foot alley.

"*Q.* Then, of course, you didn't want the property if they didn't?

"*The Court:* If they didn't what?

"*Q.* If the city would not accept a 10-foot alley, then what?

"*A.* Then I presume I was up against it to do anything with the property. * * *

"*Q.* Unless you could get the city to accept that 10 feet you would have to give up the property?

"*A.* Yes, that was as far as closing up with Mr. Bryant. I was to see Mr. L. that afternoon at 4 o'clock. I told him if the city would accept the 10 feet for a public alley, then I was going to go ahead with my deal with Mr. Bryant. * * *

"*Q.* Even if you could not get the alley accepted as a 10-foot alley, you were going to close?

"*A.* I was going to lose my $500."

Contending that the instrument in question is a present agreement between the parties for sale and purchase of land, and not a mere unilateral option contract giving a right to elect to purchase on or before some future date, counsel for plaintiff stress certain of its phraseology more properly belonging to, and commonly found in, an ordinary land contract, pointing out that the "memorandum of agreement" is signed by both parties, who are designated throughout as "seller" and "purchaser;" that, first naming a nominal consideration of $1, it specifically provides "said seller does hereby agree to sell to said purchaser the following described property, to wit," etc., for the stated price of $24,200, payable "five hundred dollars ($500) on the signing of this agreement and the balance as follows," etc., and that in case of default "said payment this day made shall be retained by the seller as liquidated damages." It is also urged that defendant so construed the document in his notice that she had "defaulted in the terms of the agreement covering purchase by you of property owned by me," and also admitted in his answer the allegation in plaintiff's bill that he offered to sell and convey to her the property in question, and she "agreed to purchase" the same.

On the other hand, we find no provision in the document by which she agrees to purchase; it makes reference to a "prior option," with the terms of which both parties were familiar, and it provides she shall receive a deed on compliance with the "terms of this option."

Having paid the $500 upon execution and delivery of the instrument, nothing further is imposed upon her by the instrument. She was free to perform and enforce it, or forfeit the payment and abandon it, whereupon, by its own limitations, it "shall at once be canceled." Absence of an obligation to purchase is the distinctive characteristic of an option contract. James on Option Contracts, § 105.

It is evident that the scrivener of this instrument, while naming it an option, clouded its clarity by adopting in part phraseology appropriate to an executory land contract, but in that aspect it is deficient for want of mutual executory obligations while it does contain the essentials of an unilateral option contract, giving the right to purchase within a limited time without imposing any obligation to purchase.

But even yielding to plaintiff's contention that under the conflicting wording of the agreement and defendant's concessions as to its import the question of specific performance of a land contract is before the court, we are in harmony with the trial court from that viewpoint. Plaintiff was familiar with and experienced in the difficulties attending attempts to enhance values of property in that locality by removing restrictions; she was interested in the "prior option" held by O'Roark, also a real estate agent, with whom she co-operated. During the life of that option she secured a customer who would buy the property on condition that they would remove the restrictions, which they attempted to do, but were unsuccessful, following which she secured this instrument, giving her 30 days longer in which to continue her efforts, paying $500 on it, which she states she was going to lose if she could not get the public alley accepted; for her anticipated profits on the deal were contingent on being able to sell it as unrestricted property. Her statements as to what she did or could do, and when, and

her ability to meet the payment on May 13th, or the following Monday if it was insisted upon, are in many respects confusing and self-contradictory. In apparent explanation of certain manifest inaccuracies, she said:

"The only thing I have to depend on is my memory, and I have so much business that that fails me once in a while. I don't keep any books or records."

Whatever else may be claimed for it, time limit was made of the essence of this contract in clear and unequivocal terms, and she well understood it. The most she claims is that the time was extended by parol, without consideration, from May 13th (Wednesday) until the following Monday. She testified that she called at defendant's office two or three times that day, and did not find him in; that she had part of the money necessary to pay the $12,200 with her, and had made arrangements to borrow the rest from a saloon keeper, and could have procured it by calling him up and notifying him everything was all right. She made no tender to, and left no notice with, those in charge of defendant's office, had not then secured removal of the restrictions on the property, and stated she did not subsequently make any further effort to do so. If not fully advised before, she shortly thereafter received notice in writing of defendant's position and took no steps in the matter until November 25, 1914, when she filed this bill, after, as testimony tends to show, she learned that a purchaser of the property was in a fair way to relieve it of the restrictions which impaired its value.

Accepting plaintiff's testimony as true, the special features and incidents of this case are not impelling to the enforcement of a discretionary remedy which she is not entitled to as a matter of right; but beyond this, upon the issues of fact which are essential to the application of this discretionary remedy, we cannot

disagree with the conclusion of the learned circuit judge that plaintiff has failed to sustain the burden of proof.

The decree is affirmed, with costs to the defendant.

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

PEOPLE *v.* PAGE.

1. CRIMINAL LAW—MURDER—INDICTMENT AND INFORMATION—SUFFICIENCY.

   An information for murder in the form of the statute, 3 Comp. Laws 1915, § 15739, is sufficient, although it does not state that the murder was committed while a robbery was being perpetrated or attempted.[1]

2. SAME—MURDER IN FIRST DEGREE—STATUTES.

   Under 3 Comp. Laws 1915, § 15192, the killing of a human being, which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, constitutes murder in the first degree.

3. TRIAL—ALIBI—INSTRUCTIONS—REQUESTS TO CHARGE.

   Any error on the part of the trial court in a murder case in failing to give an instruction on the right to find the defendant guilty of manslaughter is untenable, where the case is tried on the theory of the State of murder while attempting to rob, and the defense is an alibi, and no instruction that defendant might under the information be found guilty of manslaughter is requested.

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[1]On effect of statutory declaration that murder committed by certain means, or in the commission of felony, shall be murder in the first degree, upon right of jury to pass upon degree, see notes in 12 L. R. A. (N. S.) 935, L. R. A. 1916D, 610.

On reversal of conviction because of unfair or irrelevant arguments or statements of facts by prosecuting attorney, see note in 46 L. R. A. 641, specifically as to reference to previous conviction or other crimes, see page 663 of above note.

Generally on the question of homicide in the commission of felonies, see note in 63 L. R. A. 354.

4. SAME—ADMISSIONS—INSTRUCTIONS—PREJUDICIAL ERROR.
The admission, in a criminal prosecution for murder, of evidence of former crimes of accused will not be presumed to be prejudicial error where the court grants a motion to strike out such testimony and the jury at once is instructed to disregard it, and the instruction is also stated in the general charge.

5. SAME—CONDUCT OF COUNSEL—APPEAL AND ERROR.
An objection to the conduct of counsel for the State in attempting to introduce incompetent evidence in a criminal case must be specific in order to constitute a basis for the assignment of error.

6. SAME — INCOMPETENT TESTIMONY — INSTRUCTIONS — HARMLESS ERROR.
The attempt of the State, in a criminal prosecution for murder, to introduce incompetent testimony is harmless error where the court promptly rules that it would not be competent and the jury is cautioned to pay no attention to it.

Error to the superior court of Grand Rapids; Dunham, J. Submitted April 12, 1917. (Docket No. 157.) Decided December 27, 1917.

Lawrence Page was convicted of murder in the first degree, and sentenced to imprisonment for life in the branch of the State prison at Marquette. Affirmed.

Louis T. Herman, for appellant.

Cornelius Hoffius, Prosecuting Attorney, and *Fred P. Geib,* Assistant Prosecuting Attorney, for the people.

STEERE, J. Respondent, Lawrence Page, a young man 22 years of age, was convicted in the superior court of the city of Grand Rapids in Kent county of the murder of his stepgrandfather, Francis M. Sprague, who at the time of his death was living alone at 425 Rosell avenue in the westerly outskirts of said city.

Respondent was arraigned in the superior court on April 22, 1916, under an information containing three counts charging him in varying language with the murder of Sprague, on January 18, 1916. He stood mute to the information, and a plea of not guilty was entered by the court in his behalf. The case was brought to trial before a jury on June 6, 1916. The theory and claim of the prosecution was that respondent killed Sprague while robbing or attempting to rob him when they were alone together in the latter's home at or about 4 o'clock in the afternoon of January 18, 1916. Sprague's death was not discovered until shortly after noon on January 20, 1916, when his dead body was found in his home in a condition indicating conclusively that he had suffered death by violence a considerable time before the fact was known, and the *corpus delicti* is not questioned. The prosecution could produce no witnesses to the tragedy, and its evidence against respondent was circumstantial. The defense was an alibi. The trial lasted until June 16, 1916, when the case was submitted to the jury and a verdict rendered finding defendant guilty of murder in the first degree, for which he was subsequently sentenced to confinement in the branch State prison at Marquette for life.

Respondent's numerous assignments of error concentrate, in substance, to the four claims of prejudicial conduct and remarks of the prosecuting attorney during the introduction of testimony and in summing up the case, a fatal variance between the proof of the prosecution and its information, prejudicial admission by the court of incompetent testimony not cured by subsequently striking it out, and failure of the court to instruct the jury that respondent might be found guilty of a lesser crime than murder in the first degree.

Francis Sprague was 78 years of age at the time of his death. He was the husband of respondent's grandmother, with whom he had lived for several years in rooms on the second story of the house where he was living alone at the time he met his death; but under an agreement of separation between them, dated November 30, 1915, she had gone elsewhere to reside, leaving him in occupation of the rooms they formerly occupied together. The place belonged to her, and at the time in question her goods were stored in the lower part of the house, which was otherwise not in use and locked up; access to the rooms upstairs in which he lived being by an outside iron stairway at the rear of the building. Rosell avenue, which runs northerly and southerly in the westerly part of the city, is most directly reached from the central or business section by Bridge street, which runs east and west with a car line extending along it from Monroe avenue to the west, past Lincoln Park, to Valley avenue. Rosell is the next street west beyond Valley avenue, on higher ground and beyond the end of the car line. It is not a graded street and runs north from Bridge under the slope or near the rise of a height called Bridge Street Hill. Turning north upon it from Bridge street there are no buildings on the right or easterly side of Rosell avenue. On the left or westerly side, the first house is the home of an old couple named Weiner, beyond which, with a vacant lot or two between, is the house in which Sprague lived; just north and close adjacent to which is a house occupied by a family named De Graff, directly opposite whose kitchen door and within six or eight feet rests the foot of the outside stairs at the rear of the Sprague house. The hill rises sharply from the street to the west at the rear of the houses, which are on a so-called terrace considerably above the street level with a rise and walk leading to the rear between the two houses. Sprague was accustomed to

receive mail in the De Graff mail box, which was on their porch. The upstairs portion of the house which he occupied consisted of two rooms, a front room facing east on Rosell avenue and a back room facing west used for kitchen purposes, connected by a door and small covered landing with the head of the outside stairway. Respondent was familiar with the place and its environments, as well as Sprague's habits and characteristics, having both visited and lived there at different times. He testified on direct examination that before he went to Ionia prison he had lived up there with his grandmother and Sprague "six months in a stretch."

Shortly after 12 o'clock on January 20, 1916, one Edward F. Lillie, who had known Sprague for "35 or 40 years," went to his place of residence, passing to the rear between the Sprague and De Graff houses. It had been snowing, and he noticed there were no tracks. On going up the outside stairs he found a key in the lock of the outside door. He opened the door and saw deceased lying upon the floor apparently dead and in such condition that, without stopping to investigate, he hurried to a drug store at the corner of Valley and Bridge streets, where he telephoned the police department and for a coroner. A police officer named Slater was first on the scene, followed soon by the coroner and others. They found Sprague lying dead on the floor on his back in the rear room next to the entrance from the outside stairway, fully dressed as though he had just been or was going outside, having on his rubbers and a fur-lined overcoat. There was a partition on the south side of this room with a table against it not far from the outer door, upon which were dishes, articles of food, and a hammer with a drop of blood upon it. The body and room were cold. Some water in a pail near the outer door was frozen, and Sprague's body lay with the head to the southwest towards the

table in a frozen pool of blood, with the feet to the northeast within three or four feet of the entrance way between the two rooms across which a curtain hung on a rod. Against the wall close to this curtained doorway stood an iron bar about 20 inches long, two inches wide and an inch thick. On the right of the body close to this doorway was a pool of blood in which was frozen the handle of a potato masher. Near it was a pair of bow spectacles and his broken false teeth. The hands lay at his sides with the palms turned up. His tie was disarranged, collar broken in front, with blood on his shirt, collar, overcoat, and the back of his hands. The lapels of his coat were open with a bank book and other papers of no general value resting upon them, and a Grand Rapids Herald dated January 18th lay partially across the body. There was no money, watch, chain, stick pin, or other jewelry upon the body, except a plain band ring on his finger, and no weapon of any kind. A cap lay on the floor in the front room with blood stains and hair on the inside. A screwdriver lay on the floor between the body and outer door. Various serious cuts and bruises appeared upon the face and head. The autopsy disclosed a cut about an inch long under the left eye, another about two inches long on the forehead extending back with a clean cut wound to the skull, a jagged, crushing wound on the side of the head above the ear, and a fracture of the temporal bone where the lower jaw fits into it. The coroner testified that the organs were normal and death had resulted from this fracture of the skull producing concussion of the brain.

Officers of the police department immediately began an investigation, and detectives were detailed upon the case. The De Graffs and Weiners, who lived next adjacent on each side of the Sprague house, were interviewed at once. An officer went that afternoon

to look for respondent and an associate named Vincent Jagge. He visited their homes without finding them, but later, while waiting on the street, saw them come out of a pool room together and arrested them. They were taken to jail and put in separate cells. Each at first made total denial of any knowledge of or participation in the offense under investigation, but a couple of days later Jagge made a statement to the officers of his knowledge in relation to the matter, implicating respondent. As shown by the testimony of each of them, respondent and Jagge had been associates of like tastes and habits, pursuing their pleasures and vices in familiar companionship. Both were young men averse to steady employment, apparently preferring to live upon indulgent parents or relatives and obtain funds by borrowing, pawning their clothing, and other questionable expedients, rather than by working. Near three years prior to this time respondent had forged Sprague's name to a check, and Jagge had passed it. When arraigned for that offense, they pleaded guilty and were paroled by the court under suspended sentence. Respondent violated his parole and was sentenced to Ionia prison, where he served time until paroled from there in November, 1915, when he returned to his home in Grand Rapids and went to work in a factory where employment had been secured for him, but started again to frequent saloons, before he had seen Jagge or any of his old associates, as he testified, soon left his employment, and renewed his companionship with Jagge and other kindred spirits. He visited Sprague on several occasions and attempted to borrow money of him, states that he played checkers with him, was there in November to "get money for my tools," and secured $10. Jagge, who knew of respondent visiting Sprague to borrow money, testified that he reported lack of success on such occasions.

The last time Sprague was shown to have been seen alive by any one was on Tuesday, January 18, 1916, the date of the newspaper found with his body. He was shown to have gone downtown that afternoon and returned about 4 o'clock. Mrs. De Graff and Margaret Exo, who was living with her, saw him come up the steps to their porch that day and get his mail from the box about 4 o'clock p. m. He then had on an overcoat with a fur collar. August Weiner and wife, who lived on the south side of the Sprague residence and had known Sprague for several years, saw him, on the afternoon of the Tuesday before his body was found, as he passed their house going to and returning from the car line wearing a dark overcoat and cap. Weiner testified he was 72 years of age and did not work winters; that while sitting by his window on that afternoon he saw respondent, whom he had known well by sight since 1905, pass northerly from the street car line towards Sprague's place without any overcoat on and walking fast; that he was curious to observe where he went, and watched him turn into the passageway between the two houses leading to Sprague's stair; that witness remained by the window, and about half an hour later saw Sprague go by towards his home. Mrs. Weiner also testified to seeing respondent pass their house. In confirmation of the date, Weiner testified on cross-examination that he first told of this to the officer on the Thursday following, when they found the body and the ambulance was there. Minnie Bedford, proprietress of the Charlevoix Hotel on Monroe avenue, knew Sprague, who was often at her place and received mail there, recalled seeing him there the last time between 1 and 2 o'clock on the Tuesday previous to his body being found. Edward Mead, conductor of the car on which Sprague rode home that Tuesday, remembered the occasion and his speaking about a pair of glasses he thought he had lost and asked

Mead to look for, stating he had himself mislaid and found them. None of these witnesses or any others who testified had seen Sprague after that day until the body was found. Persons well acquainted with Sprague testified that he was in the habit of carrying considerable money on his person. As before stated, respondent knew Sprague well, and Jagge testified he told him of this habit.

It was shown that on Monday evening before the Tuesday in question respondent pawned his overcoat, which was of a dark gray color, to a Mr. Pawlowski for $2, although it was then cold winter weather. Pawlowski testified that he saw respondent the next afternoon (Tuesday) at about 5 o'clock in front of the Pantlind Hotel wearing a brown overcoat and spoke to him but received no response. Respondent redeemed his gray overcoat that day. He testified that he borrowed the money to do so from his mother, whom he met when he was on his way to see his grandmother, from whom he expected to get it. On Wednesday he went to Ionia, as he stated, to see the pardon board about getting permission to go to Detroit for work. He returned to Grand Rapids that night. Of respondent's visit to Sprague's house on that Tuesday Jagge testified, in part, that they met at the Columbia Hotel about 11 a. m., where they remained drinking and playing cards until about 2:30, when they left together; that although it was a cold day neither had an overcoat, Jagge having sold his some time before, while respondent had pawned his the previous evening; that neither had any money to speak of, and respondent said he was going to his grandfather's to get some, and Jagge asked him how he could get it, to which he replied, "Leave it to me, I will get it;" that they walked together west on Bridge street to the vicinity of Lincoln Park, and respondent asked Jagge if he would wait for him, to which Jagge said he

would go to his grandmother's on Garfield street, which was near by, and wait there; that he did so, and got something to eat, after which he went out to look for respondent and, not seeing him, returned to his grandmother's, where he read for a while and about 4 o'clock went out, saw respondent with a brown overcoat on extending below his knees and his hands in the pockets; that as they met respondent "acted kind of scared," and with an oath said, "Look there!" showing his left hand with some blood upon it, and, when asked what happened, said that Sprague came home and finding him there addressed him roughly, and in reply to his request to borrow money called him a vile name, looking around for something to strike him with, whereupon respondent "knocked him cold;" that after they went down the street a distance he produced a watch, with chain, and diamond, and said he also got a bunch of checks; that they went to Lincoln Park together, where respondent showed some blood on his knee and tried to wash the blood from his hands at the pump in the park, but it was frozen up; that he wanted Jagge to pawn the diamond he had, but the latter told him he was going home to steal something and left him; that he later met respondent down town wearing the same brown overcoat, and they were together for a time, then respondent went to a pawnshop while Jagge went to a theater and looked at pictures in the lobby, after which they met and respondent said he had tried to pawn the diamond but could not get enough money on it; that they met by chance the next day, and respondent said his "mother burned everything up, the suit and the overcoat and the underwear, and she had ditched the diamond, and he had found the diamond and taken out the real stone and put in a piece of glass and he had the real diamond with him that day, and he wanted me to find some one to pawn the diamond for him. He said he would give

them half the money if I could find somebody for him. I told him I didn't know of anybody."

Jagge's grandmother, Mrs. Garbrecht, testified that on the Tuesday in question he came to her home and remained about three-quarters of an hour and had something to eat; that he went out once during that time, and when he finally left she watched him from the window and saw him meet a boy whom she identified as respondent, who had on an overcoat, and she saw him pull his hand out of his pocket, showing it to Jagge, when they walked away together towards Bridge street. A young woman named Della Tischer, who worked in Peck's drug store and roomed at the Page home, testified that she usually got home before 7, and on the evening of January 18th she could not get into the house as usual; that she knocked, and finally respondent came to the door and asked, "Is that you, Della?" upon receiving an affirmative reply, he opened the door, and she noticed that he was excited; that in the sitting room one window was open as far as it would go, and there was a quick fire in the stove with an odor of burning cloth in the room.

Jagge's long and grilling cross-examination, as well as portions of his direct examination, showed him, as claimed by the defense, a witness of unsavory character, limited intelligence, and questionable veracity. His memory did not always serve him well as to what he had recently testified to. He was palpably of that type of witnesses the chief value of whose story lies in confirmatory facts and circumstances by credible witnesses to the discovery of which it has led. Though varying in minor details, his story and that of respondent touching their personal relations, conduct, and circumstances during the time under inquiry only differ materially as to respondent's whereabouts on the afternoon of January 18th and what was done or said by him in relation to his connection with or knowledge

of Sprague's death. He made total denial of seeing or being with Jagge that afternoon, and in support of his claimed alibi gave practically unsupported testimony as to his whereabouts between 2 o'clock and 5, although he stated a portion of the afternoon was spent at home fixing his mother's washing machine and changing the socket of the electric light in Miss Tischer's room from a snap to a pull switch. She denied that the light had been changed that day, and no member of his family testified to his being at home during that time. Many witnesses were called and testified to facts and circumstances tending to sustain or refute the theory of the defense, and, without further detail, it is sufficient to state that the record furnishes abundance of testimony which if found true fully supports the verdict rendered.

Defendant's complaint of prejudicial variance between the information and proofs, because none of the counts charged in direct words that the murder was committed while a robbery was being perpetrated or attempted, is not well founded. One of the counts was the statutory short form and the others of like import, but more elaborate phraseology. There was nothing in them to mislead. They simply failed to fully set out the manner in which the charged murder was claimed to have been committed and means used. It is not necessary in an information, or indictment, in this State

"to set forth the manner in which, or the means by which the death of the deceased was caused; but it shall be sufficient in any indictment (or information) for murder to charge that the defendant did wilfully, and, of his malice aforethought kill and murder the deceased." 3 Comp. Laws 1915, § 15739.

That was done in this case. Respondent's arrest on suspicion was followed by a complaint, warrant, and lengthy preliminary examination before the commit-

ting magistrate, or police court; while the testimony then taken is not in the printed record, it was returned to and before the trial court. In his opinion denying a motion for a new trial the presiding judge said:

"That examination must have informed the respondent of just what the claim of the people was. I have carefully read all the testimony taken in police court, and I cannot find that the evidence here differed from the testimony in police court."

The ruling is fully sustained by the statute as interpreted in *Sneed* v. *People*, 38 Mich. 248, and *People* v. *Bemis*, 51 Mich. 422 (16 N. W. 794).

It is urged as error that the court failed to instruct the jury that respondent might under the information against him be convicted of manslaughter. This is based on respondent's testimony that he was on friendly terms with Sprague, had borrowed money from him, might be found from the evidence to have gone there again for that purpose, and Jagge's testimony of what respondent told him occurred on that occasion. By statute (section 15192, 3 Comp. Laws 1915) the killing of a human being

"which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder in the first degree."

In Wharton on Homicide (3d Ed.), § 119, it is said:

"In such case the turpitude of the criminal act supplies the place of deliberate and premeditated malice and is its legal equivalent, and the purpose to kill is conclusively presumed from the intention which is of the essence of the criminal act intended, and such a murder is a murder in the first degree under such statutes, though it is casual and unintentional."

Upon the preliminary examination and trial, the theory and sole claim of the prosecution was that respondent killed Sprague while robbing or trying to

rob him. The only defense made or claimed was an alibi, and that Sprague was murdered by some one else later than the prosecution fixed the crime. In his opening statement to the jury counsel for respondent said, in part:

"We will show you that whoever committed that murder went into that home after 6:10, * * * and we will show you that the old man from where he was at 6 o'clock, could not have reached home before 6:30. * * * We will show you that Sprague was murdered by some one else."

Both parties tried the case upon these respective theories, and, when the prosecuting attorney in summing up to the jury made reference to some possible claim of self-defense, respondent's counsel objected and took an exception, saying:

"Because, as I understand this case, it is only a case of murder in the first degree or nothing, there is no manslaughter in this case, and cannot be under the law."

Counsel for the people said: "That is the claim; it is murder in the first degree or nothing." And upon that proposition the court instructed the jury in harmony with the claims both parties made.

The position then taken in the trial court by defendant is the opposite of that taken here. The trial court was not requested to charge the jury as is now claimed should have been done, nor was the question presented in respondent's motion for a new trial. Respondent's theory, and claim, then was and now is that the homicide was committed by another, that he was not present at all nor in any manner a party to it, and was wholly innocent. He was solicitous until after the verdict that the question of manslaughter should be excluded from the case, and to this he was entitled under the theory and attitude of both parties. The prosecution based its claim for conviction of mur-

der in the first degree on homicide while robbing or attempting to rob—that or nothing. The court fully and distinctly charged the jury that if robbery, or attempted robbery, by respondent was not shown beyond all reasonable doubt, he must be acquitted.

We find no occasion, under the circumstances shown here, to reverse this conviction for a claimed omission to charge the jury upon a point not then recognized by either side as tenable, not presented by any request, and not brought to the attention of the trial court by exception. *People* v. *Brott,* 163 Mich. 150 (128 N. W. 236).

The prosecutor was permitted upon re-direct examination of Jagge to show that respondent had told him of the commission of other offenses for which he had never been arrested. This followed a line of cross-examination as to the relations between respondent and Sprague and respondent and Jagge implying the improbability of respondent confiding to Jagge the facts of his culpability in this case as Jagge had related. It was offered by the prosecution to show intimacy and confidence between the parties to support probability of the witness' story. Though suggesting it was dangerous ground, the court at first admitted the answers for such proposed purpose, stating in that connection it would not be competent to show respondent did in fact commit the offenses mentioned; but after some discussion the court granted a motion of respondent's counsel "that all this testimony be stricken out," and told the jury: "Do not consider it in any way. * * * You will pay no attention to it." It is urged that the prosecuting attorney managed to get this prejudicial testimony before the jury under the specious argument repudiated in *People* v. *Schweitzer,* 23 Mich. 301, and striking it out could not cure the mischief thus done. This testimony was promptly stricken out and the jury instructed to dis-

regard it while the matter was fresh in their minds. That instruction was repeated and emphasized in the charge. It is urged by the prosecution that such evidence was competent for the purpose stated and should have been allowed to stand under the rule that offered testimony which is competent for one purpose and incompetent for another should be admitted, followed by instructions to the jury as to how and for what purpose only it may be considered. This seems questionable under some of our authorities, but the testimony was not permitted to stand, was not in the case, the jury was distinctly so instructed by the court and cautioned more than once to entirely disregard it. Under the facts and circumstances shown here, prejudicial error will not be presumed. In *People* v. *Droste*, 160 Mich. 66 (135 N. W. 87), it is said:

"It must be presumed that the jury considers only the testimony permitted by the court to stand."

The alleged prejudicial conduct on the part of the prosecuting attorney relates in the main to his attempts to introduce incompetent testimony and remarks in that connection. The evidence of the prosecution was necessarily indirect and circumstantial, built up largely from the fragmentary testimony of numerous witnesses to separate facts confirmatory of Jagge's testimony, furnishing links in the claimed chain of circumstantial proof. Respondent was represented by competent counsel, well qualified to protect his rights, and promptly urge objections to any questionable testimony offered by the prosecution which, as objections were made, naturally give rise to active discussion.

Serious objection is urged against the conduct of the prosecuting attorney in attempting to introduce a photograph of the deceased in evidence. It was claimed by the prosecution that Sprague was in the

habit of wearing a diamond stickpin in his tie, and when Jagge testified that respondent showed him a diamond, which he described as "a kind of clover-shaped," he was shown a photograph of Sprague and asked if "that diamond in the tie is the diamond you see." To which he replied that it was that shape and looked like it. The picture was then offered in evidence, and counsel for respondent said, "I object to the picture." The court held that the photograph was not competent, but suggested that, if there was any way of getting a picture of the diamond "by cutting that out," it might be introduced. A witness named Wood, who testified that Sprague lost his stickpin and later found it in his pocket, was shown the photograph, and, asked if "this is the stickpin you have reference to," said: "Very similar; the same one." The court said, in reply to a remark of the prosecutor as to its admissibility, that the picture of the stickpin would be proper, but not a picture of the deceased. Jagge had testified that respondent once told him of Sprague leaving his diamond lying around and that he would get his hands on it if he could. On cross-examination respondent testified he thought he had seen Sprague wear his pin and, being shown the picture of deceased, was asked if that was the pin he had seen him wear, to which he replied: "It looks like it, so far as I can see in the photograph; it must be his pin." No objection was made at this time or when Wood was shown the photograph. When objection was made, no reason was stated. The photograph of deceased was not admitted in evidence or exhibited to the jury. If the use made of the photograph was improper, which we question, the objection as made furnished no basis for an assignment of error.

That the prosecutor at times apparently manifested zeal without knowledge of applicable rules of evidence, and thereby put an extra burden on the trial court, is

indicated by some of the questions asked. The following transactions so indicating are urged as prejudicial and reversible error: Respondent had testified on his direct examination that he served time in Ionia for forgery and came out on November 18, 1915; on the afternoon of Wednesday, January 19, 1916, he went to Ionia to obtain permission to work in Detroit after getting a written permission from his "first friend." Interrogated upon cross-examination in relation to his connection with Jagge in that transaction, the following occurred:

"*Q.* Isn't it a fact that when you and Vincent Jagge were before Mr. Hyde, the probation officer, that you were told if you were out of town Vincent Jagge would be better off?

"*A.* I can't recall any such statement.

"*Mr. Herman:* Just a minute. I object to that as wholly irrelevant and immaterial.

"*Mr. Barnard:* It was in the presence of the accused.

"*The Court:* It may be stricken out, what somebody outside said about a man, it can't be used against him. It may be stricken out."

On rebuttal, Mr. Hyde was called by the prosecution, and the following occurred:

"*Q.* Whether or not you had occasion to have Lawrence Page and Vincent Jagge under your charge when they were under parole on the charge of forgery?

"*Mr. Herman:* There is no dispute about that.

"*The Court:* It is not competent anyway.

"*Mr. Barnard:* These are only preliminary questions.

"*The Court:* There might be some impeaching questions that are competent. You better ask him directly the impeaching questions.

"*Q.* The question I want to ask you is this: After Page was sent away to prison, didn't you have any further trouble with Jagge?

"*Mr. McKenna:* It doesn't rebut anything.

"*The Court:* It would not be competent.

"*Mr. Barnard:* For this purpose. I asked Mr. Page if it was a fact that he knew when he was sent to prison if Ed. Hyde did not state that Jagge was all right; he had no further trouble with him?

"*Mr. Herman:* Just a minute.

"*The Court:* It would not be competent. The jury will pay no attention to that statement."

That the proposed testimony was incompetent and the attempt to introduce it improper was promptly ruled and emphasized by the court, and the jury cautioned to pay no attention to it. Jagge was an early witness in the trial, which extended from the 6th to the 16th of June, inclusive. His close association with respondent was not questioned, and on cross-examination his record and shortcomings were caustically reviewed. Almost from the beginning his derelictions and respondent's were put in comparison under the indicated theory that any questionable conduct of the latter was attributable to his influence. This was dwelt upon by respondent's counsel in stating the defense to the jury, and it was said, amongst other things:

"We will show you that Lawrence did numerous things that way he ought not to have done. * * * We will show you that he did disabuse the old man's confidence; that he did forge his name."

Under this situation we cannot find that an unsuccessful effort of the prosecution to introduce incompetent testimony to meet defendant's theory which was promptly condemned by the court amounted to such prejudicial conduct affecting the merits of the controlling issue as to demand reversal.

In *People* v. *Swartz,* 118 Mich. 292 (76 N. W. 491), a murder case where prejudicial error was assigned on conduct of the prosecutor similar in many respects to that complained of here, it was said:

"The zeal of counsel in an important and closely

contested criminal case is apt to lead them to extreme expressions; but where the court directs and controls the trial, and promptly checks the attorney when he attempts to go further than his duty calls him, and properly instructs the jury to disregard the improper remarks, the verdict should not be set aside because, before this is done, an improper sentence has dropped from the lips of counsel."

Further discussion of alleged errors would serve no useful purpose. An examination of this record as a whole leads to the conclusion that the trial was impartially controlled and directed by the court, and respondent's rights were conservatively guarded by the monitions and adverse rulings on the occasions pointed out where it is claimed improper argument or questionable testimony were attempted by the prosecution. The court's instructions to the jury were full, explicit, and able, with especial emphasis and caution for respondent's protection on the presumption of innocence, burden of proof, to convince each juror beyond any reasonable doubt, the rules of circumstantial evidence with particular caution as to the great care to be exercised in drawing inferences from proven facts, which could only be considered at all after each was established to their satisfaction beyond all reasonable doubt; that all assertions or suggestions not sustained by proof should be disregarded; that any testimony or admissions of respondent's prior misconduct should only be considered as bearing upon his credibility, and not as evidence of his guilt under the charge against him, saying among other things the evidence alone could be considered by them, and:

"The evidence comes from the testimony of the witnesses that you have heard here upon the stand, and you consider only that which was admitted in evidence; anything that was excluded or stricken out after it was received you will not consider. * * *

"And again let me say to you, gentlemen of the jury,

that, if any statements have crept into this case from which you might infer that the respondent here has been guilty of any other offense or offenses than the one that I have mentioned of forgery you will not consider them as bearing upon the guilt of the respondent in this case. The respondent is here upon trial for the offense only that is charged in the information in this case, and he is not to be prejudiced in this case, or convicted in this case, by reason of the commission of any other offense. These charges, if any, or insinuations, if any, against the respondent concerning other matters, should be wholly disregarded by you. * * *"

We are impressed that respondent had at the hands of the court and jury a fair and impartial trial, disclosing no prejudicial error demanding reversal. After examination and consideration of the entire case as disclosed by this record, we are not of the opinion that it affirmatively appears the errors complained of have resulted in a miscarriage of justice.

The conviction is therefore affirmed.

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

In re BROWN'S ESTATE.

1. PERPETUITIES—CHARITABLE BEQUESTS—STATUTES—VALIDITY.
Act No. 122, Pub. Acts 1907, providing that charitable bequests otherwise valid shall not be invalid by reason of the "indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contra-

vening any statute or rule against perpetuities," is constitutional.[1]

2. WILLS—CHARITABLE BEQUESTS—FAILURE TO COMPLY WITH CONDITIONS—ALTERNATIVE LEGACIES.

The next of kin cannot claim title to bequeathed property, although a charitable corporation to which is bequeathed property in trust for charitable purposes is unable to take because the trust is invalid as to it, where there are valid alternative legacies to two cemetery boards, as the title to the property would pass at the testator's death, *eo instanti*, to such boards, and although the bequest to one of the boards is inoperative because of failure to comply with the conditions imposed by the will, the other board, in such event, being entitled to the latter's share under the terms of the will.

3. EXECUTORS AND ADMINISTRATORS—PROBATE COURTS—ESTATES OF DECEDENTS.

Proceedings in the probate court in the matter of estates of deceased persons are proceedings *in rem*, or proceedings to determine the status of the estate, and not proceedings *inter partes* between the various claimants.

4. WILLS—CHARITABLE BEQUESTS—ALTERNATIVE LEGACIES.

The fact that alternative legatees of a charitable trust do not appeal from a decision of the probate court directing the disposition of the residue of an estate is not important.

Error to Calhoun; North, J. Submitted April 3, 1917. (Docket No. 16.) Decided December 27, 1917.

Mary E. Winsor presented her final account as executrix of the last well of Charles Pratt Brown, deceased. On order of final distribution, Calista R. Eastman petitioned for distribution to her as sole heir at law. On the death of petitioner, Joseph J. Kennedy, administrator with the will annexed, was substituted in her stead. The will was sustained in the probate court and an order of final distribution entered, from which order petitioner appealed to the circuit

[1]For authorities passing on the question of right to enforce general bequest for charity or religion, generally, see comprehensive note in 14 L. R. A. (N. S.) 49, specifically as to effect of rules against perpetuities, see page 66 of said note. 37 L. R. A. (N. S.) 993.

court. Judgment affirming the order of the probate court. Petitioner brings error. Affirmed.

Chamberlain, Denby, Webster & Kennedy (*George B. Andrews*, of counsel), for appellant.

Charles L. Dibble, for appellee Ella E. M. Brown Charitable Circle, legatee.

Winsor & Miller, for appellee executrix.

James W. Mackey, City Attorney (*George H. Southworth*, of counsel), for appellee city of Marshall, alternative legatee.

STONE, J. Charles Pratt Brown died on the 24th day of July, 1910, being at the time of his decease an inhabitant of the city of Marshall, Mich. He left a last will and testament bearing date December 1, 1908, a copy of which appears in the record. This will was duly admitted to probate by the probate court for Calhoun county on August 23, 1910, and no appeal was taken from the order. Upon the admission of said will to probate, the execution thereof was committed, and the administration of the estate was granted to Mary E. Winsor, the executrix named in the will, who gave a proper bond, and letters testamentary were issued to her. As such executrix she filed, in due course, an inventory of said estate embracing personal property appraised at $32,844.73, and several parcels of real estate appraised at $4,861.90, one of which parcels of real estate was the home residence of the testator, located at the northwest corner of Prospect and High streets, Marshall. The will is a very lengthy document, consisting of a preamble, embodying explanatory or introductory matter, and the body of the instrument consists of 18 paragraphs or items. The 1st, 2d, 3d, 13th, 14th, 16th, 17th, and 18th paragraphs concern the interment of testator's body, the erection of a suitable monument on his burial

lot in Oakridge Cemetery, at Marshall, Mich., and the care and maintenance of said lot, the payment of just debts and expenses of funeral and last sickness, the care and maintenance of a cemetery lot at Richmond, Vt., where relatives of testator are buried, the filling of the vacancy to be caused by death, removal, resignation, or incapacity of the executrix or trustee, certain directions in favor of a sister of testator's deceased wife, and the naming of Mary E. Winsor as sole executrix and trustee of his will; and relative to those paragraphs there is no controversy involved in this appeal.

The 4th paragraph of said will is as follows:

"It is my will and I hereby give, devise and bequeath unto my executrix hereinafter named, but in trust only for the purpose or purposes hereinafter stated and set forth, seventy-five per cent. of all my property remaining after the payment of the bequests hereinbefore and hereafter set forth, the same to be held and invested by my executrix as trustee, for a period not longer than two years from the date of the probating of this, my last will and testament, and then, or before if possible, pay over to the trustees of a corporate society composed of citizens and residents, male or female or both, of the city of Marshall, Michigan, who have become legally incorporated under the laws of the State of Michigan, for charitable and benevolent purposes, and to be incorporated under the name of 'Ella E. M. Brown Charitable Circle,' with power to take, receive and be endowed, and safely keep and protect from loss, the bequests herein made, for the purpose of endowing in part an institution in the city of Marshall, to be operated forever by such charitable and benevolent organization or its successors, and to be called and named 'Brown Hospital,' and to be located, established and maintained by said organization or corporation from the income only of my bequests, with all the assistance that may be received or given by charitably inclined persons of the said city of Marshall and elsewhere, and that the building or buildings used and controlled by said corpora-

tion for the purposes of said hospital, shall be located on the site and premises of my present home residence at the northwest corner of Prospect and High streets in the city of Marshall, Calhoun county, Michigan, said bequests in this, my will, made for the purposes aforesaid within the time aforesaid. And should said association have become incorporated as aforesaid and with sufficient safeguards to safely keep and administer my bequests, using only the income thereof, for any purposes whatsoever, it shall before receiving any of the benefits of these, my bequests, or any other or further bequests, by its charter or by-laws, make adequate and sufficient provisions for the absolute safety of all moneys and property devised, bequeathed and committed to the custody of the officers and trustees of such corporation, to prevent loss, default or dishonesty of any of such officers and trustees to the injury of the institution or depletion of the bequests and gifts hereby made. And when all such bequests and enactments as are heretofore stated and set forth, have been complied with within the time aforesaid, then and not until then shall my said executrix as trustee, pay over said bequests to said corporation."

The 5th paragraph prescribes the qualifications of the officers and managers of the corporation contemplated by the 4th paragraph.

The 6th paragraph is as follows:

"It is my will and I hereby direct, that the object of these bequests shall be the support and maintenance of 'Brown Hospital,' for the use and benefit of such patients and afflicted and injured people, as may be cared for by said association and corporation, without regard to sex, color or condition, and that those able to pay for the benefits received, with care, nursing and medical attendance in said hospital, shall be charged such reasonable sums therefor as said officers, managers and trustees may by their laws from time to time determine and specify, and may admit into said hospital and care for those so admitted in like manner as they may deem proper and as their income and funds may permit, although such patients may be poor and unable to pay."

The 7th paragraph is as follows:

"It is my will and I hereby give, devise and bequeath unto my executrix hereinafter named, but in trust only for the purpose or purposes hereinafter stated and set forth, twenty-five per cent. of all my property, both real and personal, remaining after the bequests in the second and third paragraphs of this, my will, have been performed and paid, the same to be held and invested by my said executrix as trustee for a period not longer than two years from the probating of this, my last will and testament, and then or before if possible, pay over to the trustees of a corporate society composed of citizens and residents, male or female, or both, of the town of Richmond, State of Vermont, who shall have become legally incorporated under the laws of the State of Vermont, for charitable and benevolent purposes, and to be incorporated under the name of 'Laura Whitney Brown Charitable Circle,' with power to take, receive and be endowed and safely keep and protect from loss, the bequests herein made for the purpose of endowing in part, an institution in the town of Richmond, State of Vermont, to be operated forever by such charitable and benevolent organization or its successors, and to be known and called 'Brown Hospital,' and to be located, established and maintained by said organization or corporation from the income only of this, my bequest, with such assistance as may be received or given by charitably inclined persons of the State of Vermont and elsewhere, and that the building or buildings used and controlled by said corporation for the purpose of said hospital shall be located in the town of Richmond aforesaid. Said bequest in this, my will, made for the purpose aforesaid within the time aforesaid. And should said association have become incorporated as aforesaid and with sufficient safeguards to safely keep and administer my bequest under the laws of the State of Vermont, using only the income thereof for any purpose whatsoever, it shall before receiving any of the benefits of this, my bequest, or any other or further bequest, by its charter or by-laws make and provide adequate and sufficient provisions for the absolute safety of all moneys and property devised, bequeathed and committed to the custody of the officers and trustees

of such corporation, to prevent loss, default or dishonesty of any of such officers and trustees to the injury of the institution or depletion of the bequest and gift hereby made. And when all such bequests and enactments as are hereinbefore stated and set forth to be performed, have been completed within the time aforesaid, then and not until then shall my said executrix as trustee, pay over said bequest to said corporation."

The 8th paragraph prescribes the qualifications of the officers and managers of the corporation contemplated by paragraph 7.

The 9th paragraph defines the object of the bequest as set forth in paragraphs 7 and 8, and is substantially in the same language as paragraph 6, above quoted.

The 10th paragraph is as follows:

"It is my will and I hereby direct, that should such legal society and corporation in the city of Marshall, with all of the required conditions as set forth in the 4th, 5th and 6th paragraphs of this, my will, be not formed or in existence and ready to take and receive said property within the time limited, to wit, two years from the probating of this, my said will, then in that case I hereby devise and bequeath all of the seventy-five per cent. of my said property together with all interest, subject to the bequests hereinbefore and hereinafter made, and hereby direct my said executor or trustee to forthwith pay the same over to the corporation, should there be one formed and in existence as set forth in the 8th and 9th paragraphs of this, my will, if said corporation is legally prepared to receive and administer the funds as in said 8th and 9th paragraphs contained."

The 11th paragraph is as follows:

"It is my will and I hereby direct, that should such legal society and corporation in the town of Richmond and State of Vermont with all of the required conditions as set forth in the 8th and 9th paragraphs of this, my will, be not formed and in existence and ready to take and receive said property within the time limited therein, to wit, two years from the date of the probat-

ing of this, my will, then in that case I hereby devise and bequeath twenty-five per cent. of my said property, together with all interest thereon, subject to the bequests hereinbefore and hereinafter made, and hereby direct my executrix or trustee to forthwith pay the same over to the Ella E. M. Brown Charitable Circle of the city of Marshall, Michigan, provided said last-mentioned society has been incorporated and perfected as hereinbefore in my said will set forth."

The 12th paragraph is as follows:

"Should neither of said corporations or associations in Marshall, Michigan, or Richmond, Vermont, be incorporated under the laws of said States as hereinbefore set forth, and not be ready to receive, accept and take legally the moneys and property hereinbefore willed to them under the conditions in said will contained, in the time, to wit, two years from the probating of my said will, then in that case it is my will and I hereby direct that seventy-five per cent. of my property, less the bequests hereinbefore and hereinafter set forth, shall be paid over to the cemetery board of control of the city of Marshall, Michigan, they to receive and invest the same in permanent interest bearing securities and the income therefrom to be used by said cemetery board of control forever for beautifying and improving Oakridge cemetery in the city of Marshall. And that 25 per cent. of all of my property, save and except the amounts hereinbefore and hereinafter devised, shall be paid to a cemetery board which has been or will be formed to accept and receive the same, in the town of Richmond, State of Vermont, the same to be invested by said board in good interest bearing securities, and the income therefrom to be used by said board of control forever for the beautifying and improving of the cemetery in said town of Richmond where my father, Stephen Uriah Brown, and my mother, Laura Whitney Brown and their children are now buried."

The 15th paragraph is as follows:

"It is my will and I hereby direct, that should either of said societies or corporations formed and incorporated to receive the bequests hereinbefore set forth,

for any reason ever cease to occupy or use the hospitals or to occupy the same as an active association, then and in that case, it is my will and I hereby direct that said bequest to said hospital which ceases to operate as aforesaid, shall be void and the same shall revert to and become the property of the other hospital and corporation formed to receive the same as hereinbefore in this my will set forth, they to have and receive the same under the same conditions as hereinbefore devised and bequeathed to them. And should both of said societies or corporations formed and incorporated to receive the bequests herein set forth or for any reason both cease to occupy or use the hospitals or cease to occupy the same as active associations, then in that case it is my will and I hereby direct that the bequests hereinbefore made to said associations shall become void, and all of said property shall revert to and become the property of the said cemetery boards of control in Marshall, Michigan, and Richmond, Vermont, as in my said will set forth, in the same proportions as I have disposed of the same to said cemetery boards of control in this, my will, set forth."

The executrix proceeded in due course with the administration of decedent's estate, and on May 10, 1913, filed in the probate court her final account. It showed property on hand, real estate $3,820, and personal property $32,525.23. Some of the real estate had been sold.

After the filing of said account, and prior to the hearing thereon, Calista R. Eastman, the appellant herein, filed her petition in said probate court, alleging, among other things, that she was the aunt of said Charles Pratt Brown, deceased, and his next of kin, and as such aunt and next of kin was his sole heir at law and legal distributee; that effect could not be given or allowed to the devises, bequests, and directions in the will of said decedent contained, except those embodied in the 1st, 2d, and 3d paragraphs, and in such part of paragraph 18 as appointed Mary E. Winsor the executrix thereof, for the reason that said

devises, bequests, and directions constituted an attempted disposition by the decedent of his property and estate, invalid and void under the laws of the State of Michigan, and that accordingly she, as the next of kin and sole heir at law, was entitled to such residue as might be found remaining in the hands of said executrix upon the hearing of her said final account, and praying *inter alia*, that the devises, bequests, and directions aforesaid might be declared invalid and void, and that such residue might be assigned to her as next of kin and sole heir at law of said decedent.

Such proceedings were thereafter had and taken in said probate court in connection with said final account that on December 29, 1913, a decree or order of said court was made and entered allowing the said final account as stated, finding that there remained to be assigned to the person or persons, corporation or corporations, entitled thereto, a residue of personal estate of the value of $32,524.90 in said order and decree specified and itemized, and of real estate consisting of several pieces or parcels in said order or decree particularly described; directing also that two specific legacies of $300 each be paid to the cemetery boards at Richmond, Vt., and Marshall, Mich., for perpetual care and maintenance of certain cemetery lots; and ordering that the balance, personal and real, of said residue be assigned to the Ella E. M. Brown Charitable Circle, the corporation which, as determined by the findings of said order and decree, had been duly and seasonably formed by the citizens of the city of Marshall, and that any and all interest, income, rents, and profits arising from all of said estate, since the filing of the final account of said executrix up to the date when the said executrix transferred said estate to said corporation, the Ella E. M. Brown Charitable Circle, should be paid to said cor-

poration, less reasonable expenses, etc. Said Calista R. Eastman duly appealed from said order or decree to the circuit court.

The Ella E. M. Brown Charitable Circle was organized under Act No. 171 of the Public Acts of Michigan of 1903 (2 Comp. Laws 1915, § 9054 *et seq.*), which provides for the incorporation of associations not for pecuniary profit. The articles of association were dated and executed on July 25, 1912, and duly recorded during that month.

Such proceedings were had and taken in the circuit court upon such appeal that on or about October 2, 1915, judgment was entered therein by said court affirming in all things said order and decree of said probate court, and remanding the cause to that court for such further proceedings as should be fit and proper in the premises. At the final hearing of said appeal in the circuit court, appellant's counsel filed written request for findings of fact and law, and in compliance with such request the circuit judge, in rendering his decision, made and filed written findings of fact and law as follows:

"Findings of Fact.

"(1) I find as a matter of fact that Charles Pratt Brown died on, to wit, the 24th day of July, 1910, and at the time of his death he was an inhabitant of the city of Marshall, Calhoun county, Mich., and that he left as his last will and testament the instrument purporting to be such on file in the probate court in the proceedings from which this appeal has been taken.

"(2) I further find that the provision in said will by which a conditional gift was made to the citizens or residents of Richmond, Vt., has not become operative by reason of a failure to comply with the conditions precedent embodied in such bequest.

"(3) I also find that all of the conditions precedent to the vesting of the bequest provided in said last will and testament for the Ella E. M. Brown Charitable Circle have been complied with.

"Findings of Law.

"(1) I find as a matter of law that Act No. 122 of the Public Acts of 1907 is constitutional, and therefore valid and in full force and effect.

"(2) I also find as a matter of law that the instrument purporting to be the last will and testament of Charles Pratt Brown is such in fact and in law and is valid and binding in its provisions.

"(3) I further find as a matter of law that the provision in said last will and testament whereby the Ella E. M. Brown Charitable Circle is made the residuary legatee under said will is valid and effective, and that the title of the residue of said estate has vested in the said Ella E. M. Brown Charitable Circle.

"(4) It is also determined as a matter of law that the order made in the probate court in the estate of Charles Pratt Brown, deceased, from which this appeal was taken, was a valid order and that the same ought to be affirmed."

The learned circuit judge in his general finding also said:

"Exhaustive briefs have been filed by the respective counsel and duly considered. In addition to this, oral arguments have been heard, and the case was finally submitted after the decision of the Supreme Court in the case of *Loomis* v. *Mack*, 183 Mich. 674 (150 N. W. 370). After giving the matter a good deal of consideration, I am of the opinion that the bequests should be held to be valid. I am brought to this conclusion not only by the conviction that it is the duty of the court to follow the law as it was finally adjudicated in the case above cited, which amounted to a confirmation of the holding of the circuit court, but, even in the absence of this decision, I would be of the opinion above expressed. Certainly Act No. 122 of the Public Acts of 1907 was intended to cover a field of much-needed legislation, and it ought to be sustained, unless the constitutional objections urged against it are such as to foreclose such a holding. In addition to this, the last session of the legislature passed an act (Act No. 280, Pub. Acts 1915) which was intended to legalize gifts of this character, even assuming that it would be otherwise invalid; and while it may be a question

as to what, if any, effect this latter can have upon this litigation which was pending in court at the time the act became a law, still it plainly indicates the desire and intention of the legislature."

No exception to the findings, or appeal from the judgment of the court based thereon, has been had or taken by or on behalf of the city of Marshall, or by or on behalf of the cemetery board of control of said city. Said city and its board of cemetery trustees, by their attorney, appeared in the probate court as parties in interest under the will, but did not there contest the validity of any portion of said will, nor deny the authority or right of the Ella E. M. Brown Charitable Circle to receive the devises and bequests therein provided in its behalf; neither was any appeal taken by said city or its cemetery board from the order or decree of distribution entered by the probate court. The city, however, entered its appearance in the circuit court, and was permitted, over objection of appellant's counsel, to introduce in evidence certain sections of its charter and ordinances defining its powers in reference to cemeteries, and the receipt and administration of moneys for the care and maintenance thereof; also evidence of the ownership by the city of a cemetery known as Oakridge Cemetery, the management thereof under authority of the city charter by a cemetery board of control, and the ownership of a burial lot therein by the testator at the time of his death. The city did not, in the circuit court, deny the validity of any portion of the will, nor question the right of the Ella E. M. Brown Charitable Circle to take thereunder, but, as stated in open court by the city attorney, the purpose of its appearance, in both the probate and circuit courts, was merely to show that the city, "on behalf of the cemetery board of control," was qualified to take under the will, "if for any reason the court should hold that the Ella E. M.

Brown Charitable Circle is not a proper receiver under the will."

Appellant, in due course, proposed findings of fact and law as amendments of, and in lieu of, such original findings. The court denied appellant's application in so far as it asked that said proposed findings of fact and law be made in lieu of the court's said original findings, but found certain of said proposed findings of fact to be true and established in the case.

Appellant's proposed finding of fact No. 12 was denied. It was as follows:

"That the Ella E. M. Brown Charitable Circle, of Marshall, Mich., has not complied with the conditions precedent to the vesting in it of the bequest provided in said last will and testament of said deceased."

Said findings of law Nos. 4 and 6, as proposed by appellant and allowed by the court, are, respectively, as follows:

"(4) I do further determine as a matter of law that the citizens and residents of the town of Richmond, Vt., can take nothing under the provisions of the 7th, 8th, 9th, 10th, and 15th paragraphs of the will of Charles Pratt Brown."

"(6) I do further find as matter of law that the alternative bequest of the cemetery board, which has been or will be formed to accept and receive the same in the town of Richmond, Vt., is inoperative, and that the said cemetery board can take nothing under the provisions of the said will of Charles Pratt Brown."

Said finding of law No. 5, which was allowed by the court with modification, was, as proposed by appellant, as follows:

"I do further find as matter of law that the city of Marshall, Mich., can take nothing under the alternative bequests and devises embodied in the 12th and 15th paragraphs of the said will of Charles Pratt Brown."

This finding was modified as follows:

"And further I find as I am requested in the proposed finding of law number 5, but with this modification, that in the event of the failure of the Ella E. M. Brown Charitable Circle to take title to the bequest made thereto by the terms of the will of said Charles Pratt Brown, then I find as a matter of law that the city of Marshall would take title to said bequest."

Among the things found as established facts in the case by the court was the finding that Calista R. Eastman was the next of kin and sole heir at law of said deceased.

Exceptions to the findings of fact and law, as finally made by the court, were duly filed on behalf of appellant. The case is here upon writ of error, with assignments of error covering the questions presented.

After perfecting her appeal in this court, Calista R. Eastman died testate in Vermont, the State of her domicile, and her will, after due probate there, was admitted to probate as a foreign will, pursuant to the statute, in this State, and Joseph J. Kennedy was appointed administrator with the will annexed of said estate. He, having qualified, has been substituted as appellant here.

The contention of appellant is that all the trusts attempted to be created by this will are void, and that, the scheme of disposition of the residue of testator's estate through them being illegal, such residue must go to his next of kin as intestate estate. The grounds of the contention are:

(1) That, if otherwise valid, the trusts must fail because they all involve and are builded upon the suspension of the absolute power of alienation of real estate for a period of time and not measured by life.

(2) That, aside from the suspension of alienation, the trusts are invalid as being perpetuities for uncertain and indefinite objects and beneficiaries.

1. The suspension of the power of alienation. This branch of appellant's argument is based on the provisions of chapter 237, 3 Comp. Laws (3 Comp. Laws 1915, chap. 220), relating to estates in real property, and particularly sections 8796 and 8797 (3 Comp. Laws 1915, §§ 11532, 11533) thereof. Attention is called to the fact that the provisions of this chapter were originally enacted in the State of New York, and later adopted literally into the statutes of Michigan; that by a construction of the above-named sections placed upon them prior to their adoption in Michigan, and since uniformly adhered to, the courts of New York have held in many cases that the statute itself fixes an absolute and exclusive rule for limiting suspension of the power of alienation of real estate, and that the period of suspension permitted by section 8797 can in no case be measured by time alone, but must be based on the duration of life, or lives not exceeding two, in being, and that an attempted suspension for a period of time, however short, not in some form confined to the duration of a life or two lives, falls within the provisions of section 8796 declaring the future estate limited on such suspension to be "void in its creation"; that this is so because the statute fixes no time, but only the duration of lives in being, not exceeding two, as the permissible measuse of suspension; and that any period of time, however short, whether expressed in time units or determinable by any other measure of duration or contingency not circumscribed by a life or two lives in existence, exceed the duration of any two lives in being; and that the test to be applied to determine the validity of the suspension in a given case is not that it *must* exceed the duration of two lives in being under all circumstances, but whether by any possibility it *may* do so under any circumstances. Counsel cite *Coster* v. *Lorillard,* 14 Wend. (N. Y.) 265; *Hawley* v.

James, 16 Wend. (N. Y.) 61, and many other cases in support of this contention, and many Michigan cases, among which are *State* v. *Holmes*, 115 Mich. 456, 459 (73 N. W. 548); *FitzGerald* v. *City of Big Rapids*, 123 Mich. 281, 283 (82 N. W. 56); *Casgrain* v. *Hammond*, 134 Mich. 419, 429 (96 N. W. 510, 104 Am. St. Rep. 610).

2. It is urged by counsel for appellant that the trust for the establishment and maintenance of Brown Hospital, in the city of Marshall, is a perpetuity, and for use of indefinite and uncertain beneficiaries, and is void for these reasons under the law of Michigan as declared in the following cases: *Methodist Episcopal Church* v. *Clark*, 41 Mich. 730 (3 N. W. 207); *Hopkins* v. *Crossley*, 132 Mich. 612 (96 N. W. 499); *Stoepel* v. *Satterthwaite*, 162 Mich. 457 (127 N. W. 673); *Wheelock* v. *Tract Society*, 109 Mich. 141 (66 N. W. 955, 63 Am. St. Rep. 578); *Lounsbury* v. *Burial Ass'n*, 170 Mich. 645, 647 (129 N. W. 36, 137 N. W. 513).

It is urged that it follows that this trust must fail, for the reasons stated, unless the law, as declared in the above-cited cases, has been changed by Act No. 122 of the Public Acts of 1907, and that this, in turn, depends upon the validity of that act. Attention is called to the fact that the constitutionality of that statute was sustained by the equal division of this court. Counsel for the appellee Ella E. M. Brown Charitable Circle calls attention to the fact that section 8839 (3 Comp. Laws 1915, § 11575), contains a fifth clause, which does not appear in the New York statute, to wit:

"For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time prescribed in this title."

It is also pointed out that the New York statute

respecting restraints on alienations applies to personal property as well as real estate, while our statute applies only to real estate, and that consequently in this State, unlike New York, the rule against perpetuities as to personal property is that of the common law; citing *Penny* v. *Croul,* 76 Mich. 471 (43 N. W. 649, 5 L. R. A. 858); *Toms* v. *Williams,* 41 Mich. 552, 562 (2 N. W. 814); *Ledyard's Appeal,* 51 Mich. 623, 625 (17 N. W. 208).

It is the claim of counsel for said appellee that the bequest to it is valid, and that the appellant cannot complain of the judgment below for the following reasons: (1) Because this appellant has no standing in court, since he would not be entitled to the residue, even if the bequest to the Brown Charitable Circle were invalid; that if the judgment below was erroneous, neither Mr. Kennedy, as administrator, nor Mrs. Eastman, had she lived, would have had any right to complain of that fact, for the reason that Mrs. Eastman did not in any event become entitled to the residue of that estate; for in the event that the bequest to the Brown Charitable Circle failed, because it could not "take legally" the moneys and property, then the gift was vested at once in the alternative legatees, the cemetery boards; and that the fact that these alternative legatees did not appeal does not foreclose their rights. (2) Because, if there were any invalidity in either of the respects contended for by counsel for appellant, it is cured by Act No. 122 of the Public Acts of 1907, as supplemented by Act No. 280 of the Public Acts of 1915, and that both are constitutional, and that the latter act was operative when judgment below was entered. (3) That, even if these acts were unconstitutional, the gift contained in the will was not in violation of the rule against perpetuities, even as to the real estate, and that, in so far as the personal estate is

concerned, the will is valid, and that the two species of property are separable, and if for any reason this court should hold the gift of the real estate invalid it should sustain the gift as to the personalty.

2. Taking up the second point of appellee, it seems to us that, if Act No. 122 of the Public Acts of 1907 is to be held constitutional, it covers, controls, and disposes of both of appellant's main propositions. The first section of that act is as follows:

"No gift, grant, bequest or devise to religious, educational, charitable or benevolent uses which shall in other respects be valid under the laws of this State, shall be invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities. If in the instrument creating such a gift, grant, bequest or devise, there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes, shall vest in such trustee. If no trustee shall be named in said instrument, or if a vacancy occurs in the trusteeship, then the trust shall vest in the court of chancery for the proper county, and shall be executed by some trustee appointed for that purpose by or under the direction of the court; and said court may make such orders or decrees as may be necessary to vest the title to said lands or property in the trustee so appointed."

In January, 1915, this court, in *Loomis* v. *Mack*, 183 Mich. 674 (150 N. W. 370), by an equal division, held that act constitutional. Its title was attacked. By Act No. 280 (3 Comp. Laws 1915, § 11099 *et seq.*) the legislature of 1915 amended the title, and broadened somewhat the language of section 1. Section 3 provided that—

"all gifts, grants, devises or bequests made in pursuance to the provisions of act number one hundred twenty-two of the Public Acts of nineteen hundred

seven, and of the acts amendatory thereof, and all proceedings and acts performed in accordance therewith are hereby validated."

This is significant at least as showing the changed policy of the State upon the subject as expressed by the legislature. Act No. 122, Pub. Acts 1907, until repealed by the broader act of 1915, laid down a new policy, which has been followed for more than 10 years. It has been acted upon as a rule of property. In my opinion we should declare the original act constitutional and effective. I think that act controlling of the instant case, and that the judgment of the circuit court should be affirmed.

While not necessary to the disposal of the case, I am of the opinion that appellee's first position, that appellant has no standing in court because of the alternative legacies to the cemeteries, is well taken, and that the rule as stated in *Cruikshank* v. *Home for the Friendless,* 113 N. Y. 337 (21 N. E. 64, 4 L. R. A. 140), applies; and that, if the Ella E. M. Brown Charitable Circle could not have taken, as matter of law the property would have passed at the testator's death, *eo instante,* to the cemeteries named, notwithstanding the sixth conclusion of law as found, that the bequest to the cemetery board of Richmond, Vt., is inoperative. This is an appeal from a decision of the probate court directing the disposition of the residue of an estate. The nature of the proceeding does not materially differ from a chancery suit for the construction of a will.

We think it is settled in this State that proceedings in the probate court in the matter of estates of deceased persons are proceedings *in rem,* or proceedings to determine the status of the estate, and not proceedings *inter partes* between the various claimants. *Allison* v. *Smith,* 16 Mich. 405, 416; *Stevens* v. *Hope,* 52 Mich. 65 (17 N. W. 698).

And the fact that the alternative legatees did not appeal is not important. So, in any view of the case which we are able to take, the conclusion reached by the learned circuit judge was correct, and the judgment below is affirmed, with costs to the appellee.

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

LOVELAND *v.* BUMP.

1. APPEAL AND ERROR—REVIEW—PRESUMPTIONS.
   Where no bill of exceptions was settled, it will be presumed, upon appeal, that the testimony supported the findings of fact made by the trial judge.

2. PRINCIPAL AND AGENT—KNOWLEDGE OF AGENT.
   The knowledge of the agent is the knowledge of the principal.

3. SAME.
   The rule that knowledge of the agent is knowledge of the principal is applicable where a husband, as agent for his wife, makes a loan, and takes notes as collateral security therefor, the consideration for which is known and is illegal, for his principal, and latter subsequently claims to be a *bona fide* holder of such notes.

Error to Emmet; Shepherd, J. Submitted April 10, 1917. (Docket No. 115.) Decided December 27, 1917.

Assumpsit by Frances M. Loveland against Matie C. Bump and George W. McCabe, copartners as Bump & McCabe, on promissory notes. Judgment for defendants. Plaintiff brings error. Affirmed.

Mesick & Miller, for appellant.

Halstead & Halstead, for appellees.

FELLOWS, J. Theodore O. Loveland and J. L. Records are copartners located at Iowa City, Iowa, and do business under the name of Brenard Manufacturing Company. Plaintiff, Frances M. Loveland, is the wife of Theodore O. Defendants comprise the firm of Bump & McCabe, and are located at Petoskey, in this State, where they conduct a retail hardware store. September 16, 1914, defendants signed a contract or order of similar purport to the contracts found in the records of the cases of *Boston Piano & Music Co.* v. *Seckinger, ante,* 312 (164 N. W. 263), and *Harrison* v. *Grier, post,* 672 (165 N. W. 854), handed down herewith. With this contract were detachable notes, as in the *Grier Case.* September 18th, and before any goods or paraphernalia had been shipped, defendants countermanded the order by wire. Plaintiff claims to be a *bona fide* holder of the notes. The case was tried before the court without a jury. The trial court filed findings of facts and conclusions of law, holding the contract void, and the plaintiff not a good-faith holder of the notes. Plaintiff brings the case here.

An examination of the records in these three cases would lead to the conclusion that these gift enterprises involved in these cases have a common origin. All the companies are located at Iowa City, Iowa. There seem to be, to some extent, common ownership, and the schemes would appear to have been originated by one mind. They vary in minor details, but in their essential features they are the same. No bill of exceptions was settled, but the finding of facts of the circuit judge bring this case within the cases above cited. We must assume that the testimony supports the findings. It will not be necessary for us to further discuss the question fully considered in these

cases. What was there said must be considered controlling here.

Was the plaintiff a *bona fide* holder of these notes? The record discloses that it is her claim that these notes were part of the collateral security for a loan made by her to the Brenard Manufacturing Company, but it also shows, and her testimony establishes that her husband, who was the managing partner of the company, was her agent in making this loan and taking this collateral. She also says that the money loaned came from her husband, who, she presumes, earned it in the Brenard Manufacturing Company; that it had never been in her possession; that it was deposited in the bank by her husband, and drawn out by her husband as he saw fit, he having full authority to sign checks and loan the money. The rule is too well established to need citation of authority that knowledge of the agent is knowledge of the principal. Plaintiff's husband, her agent, was the active partner of the business, and knew the consideration for this note and the terms of this contract. Obviously plaintiff is not a *bona fide* holder.

The judgment is affirmed.

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

RANIAK *v.* POKORNEY.

1. EQUITY—PLEADING—MULTIFARIOUSNESS—FRAUD.

A bill is not multifarious and sets up a case of fraud where it is alleged that plaintiffs, owners of land, delivered an abstract to one of the defendants, an attorney, for examination; that he advised them that the title was defective and that they should file a bill to quiet title; that he filed suit against a person having no title and set out a former chancery proceeding by another person against the defendant in the suit to quiet title and set up that such defendant had ceased to have title because she made no tender; that, as a result of a conspiracy between the attorneys for both parties, a decree was rendered in favor of the defendant in the suit to quiet title; that plaintiffs' attorney satisfied the decree without authority and fixed title in defendant; that such attorney secured a deed to the premises in the name of his mother-in-law, another defendant, and acted as agent for her in the sale of lots to other defendants; that such attorney in furtherance of the conspiracy refused to allow an appeal from the decree and advised plaintiffs that they had an adequate remedy on their warranty deed; that in pursuance of such conspiracy a suit was brought against the grantor and discontinued after considerable expense to plainitffs, and prayed that title be declared to be in them; that the decree in the suit to quiet title and the subsequent deeds be set aside; that plaintiffs' former attorney be compelled to deliver an abstract of title, repay money paid for services, and that the attorneys for defendant in the suit to quiet title be required to pay the expenses of plaintiffs in the latter suit, in the proceedings against the grantor and in the instant suit, including an attorney's fees. OSTRANDER, J., dissenting.

2. SAME—PLEADING—BILL OF REVIEW.

A bill of complaint is not a bill for review where it does not assume the validity of the pleadings in the case sought to be reviewed.

3. SAME—FRAUD—SETTING ASIDE DECREE.

A court of equity may relieve against fraud, even to the

extent of setting aside its own decrees, when founded thereon.

4. SAME—PLEADING—INCONSISTENT CLAIMS.

The stating part of a bill of complaint determines its character, and it is immaterial that the prayer for relief is inconsistent.

Appeal from Wayne; Gilday, J., presiding. Submitted June 8, 1917. (Docket No. 27.) Decided December 27, 1917.

Bill by George Raniak and another against Edward Pokorney and others to quiet title to land, to set aside certain deeds as fraudulent and for an accounting. From a decree dismissing the bill, plaintiffs appeal. Reversed.

Charles C. Stewart, for plaintiffs.

Edward Pokorney and *Moloney & Mendelsohn,* for defendants.

Plaintiffs in their bill of complaint set out that they are the owners, in fee simple, of two lots in the city of Detroit valued at $2,500. The first 12 paragraphs of the bill contain a detailed history of the title to said lots upon which they rely. The bill then proceeds by proper averment to charge that plaintiffs, desiring to have their abstract of title examined, sought the professional services of defendant Edward Pokorney; that said Edward Pokorney falsely and fraudulently advised them that their title was defective; and that it was necessary that a bill to quiet the same should be filed. This he agreed to do for a compensation of $50. It is further averred that said Pokorney filed said bill against one Susanna Mynell, a person who neither then, nor at any time prior thereto, had had any title to the premises in question, and further that in said bill against Susanna Mynell, a

former chancery proceeding between Susanna Mynell and one William Fischer, Jr., was set out, and the decree rendered in said Mynell-Fischer case was pleaded and the assertion made therein that said Susanna Mynell had ceased to have any claim upon said lots because she had made no tender, "as provided in the decree." In said bill it is further averred that defendants John E. Moloney and Morrey N. Mendelsohn appeared as solicitors for the said Susanna Mynell, filing an answer to said bill of complaint, and that they, conspiring with said Pokorney, set up a false and fictitious claim on behalf of said Susanna Mynell to said lots, based upon the decree in the Mynell-Fischer case which at that time was some 15 years old.

The bill further charges that defendants Pokorney, Moloney, and Mendelsohn, further conspiring, proceeded to a trial of said cause, and through false and misleading statements made to the trial judge secured the entry of a decree by the terms of which the title to said lots was fixed in the defendant Susanna Mynell upon the payment by her of the sum of $48. It is further charged that though defendant Pokorney was acting as solicitor for plaintiffs herein, he himself paid into court said sum for and on behalf of defendant Susanna Mynell, thus satisfying the decree of the court and fixing the title to said lots in said defendant. The bill then charges that said Pokorney secured a deed from said Susanna Mynell to defendant Josephine Medlin, the mother-in-law of said Pokorney, and that said Pokorney has since acted in the sale of said lots, one to defendants Mloodyanowski, and the other to defendants Krukowski. It is further charged that defendant Pokorney in the furtherance of said conspiracy refused to allow an appeal from said decree, and advised plaintiffs that they had an adequate remedy at law against one James J. Atkin-

son from whom they had received a warranty deed of the premises, and that in furtherance of said fraudulent purpose he brought an action in their behalf against said Atkinson, which later was discontinued, plaintiffs having expended over $125 in the prosecution of same. Plaintiffs pray:

1. That the title to said lots be declared to be in them in fee simple.
2. That the decree of September 4, 1915, in the case of *Raniak* v. *Mynell,* be set aside as having been procured by fraud.
3. That the record of such prior decree be declared void.
4. That Susanna Mynell, being a party to the fraudulent proceedings, took nothing by the decree, and conveyed nothing to Josephine Medlin.
5 and 6. That the deeds from Josephine Medlin covering said lots conveyed nothing, and passed no title to the grantees named therein.
7. That the defendants be required to answer.
8. That the defendants be required to deliver to plaintiffs the abstract of title covering said lots.
9. That defendant Pokorney be required to repay to plaintiffs $130 fraudulently taken from them for services.
10. That said defendants Pokorney, Moloney, and Mendelsohn be decreed to pay the expenses of plaintiffs: (a) In the fraudulent proceedings brought by the said *Pokorney* v. *Mynell;* (b) in the proceedings against James J. Atkinson; (c) in this proceeding including an attorney fee for $350 for services of an attorney.

To this bill of complaint, defendant interposed a motion to dismiss in the nature of a demurrer as follows:

"1. The said amended bill of complaint is multifarious. (a) The amended bill of complaint, if filed as a bill of review, states two grounds for relief, namely, errors apparent upon the record, and fraud. (b) The amended bill of complaint, if filed as a bill of review, asks for inconsistent relief as against the several de-

fendants, viz., relief in the prayer as to the property described in the amended bill of complaint; personal damages as against the defendants Edward Pokorney, John E. Moloney, and Morrey N. Mendelsohn, for expenses of a suit already tried; and personal relief as against the defendants Edward Pokorney, John E. Moloney, and Morrey N. Mendelsohn, for expenses to be incurred in this suit, the prayers for relief being inconsistent.

"2. The amended bill of complaint, if filed as an original bill, in the nature of a bill of review, is multifarious for the following reasons: (a) The amended bill of complaint seeks to set aside two decrees of the circuit court for the county of Wayne in chancery, in two separate and distinct suits, upon two separate, distinct, and inconsistent grounds, namely, for fraud, and errors apparent upon the face of the records. (b) The relief prayed for in the said amended bill of complaint is multifarious for the same reasons as given above in paragraph 1 (b).

"3. The said amended bill of complaint should be dismissed for the reason that it cannot be sustained, either as a bill of review, because leave of the court was not obtained before filing the same, or as an original bill, in the nature of a bill of review, on the ground of laches.

"4. The said amended bill of complaint, as appears from the reading thereof, contains a large amount of scandalous, impertinent, and libelous statements which, from the reading thereof, are apparently not based upon actual knowledge, but are drawn entirely from imagination.

"5. The said amended bill of complaint is not drawn in accordance with the rules and practice of the court, but is drafted in such a manner that an intelligent answer thereto cannot be made, nor issue joined, as intended, by pleadings in chancery."

Upon argument of said motion the court below entered a decree dismissing plaintiffs' bill of complaint, without prejudice.

BROOKE, J. (*after stating the facts*). We are of opinion that the bill is not multifarious under the fol-

lowing decisions: *Torrent* v. *Hamilton,* 95 Mich. 159 (54 N. W. 634); *Richardson* v. *Richardson,* 100 Mich. 364 (59 N. W. 178); *Robinson* v. *Motor Car Co.,* 170 Mich. 163 (135 N. W. 897); *Bennett* v. *Clark,* 181 Mich. 690 (148 N. W. 372); *Antoszewski* v. *Plumbing Co.,* 185 Mich. 215 (151 N. W. 635). It sets out a case of flagrant fraud, and seeks relief from said fraud which has become crystallized in the decree of the court. It is not a bill of review, and cannot well be, since a bill of review would assume the validity of the pleadings in the case sought to be reviewed, which this bill distinctly denies.

There can be no doubt of the authority of a court of equity to relieve against fraud, even to the extent of setting aside its own decrees when founded thereon. 3 Cooley's note to Blackstone's Commentaries (2d Revised Ed.), p. 426; *Jennison* v. *Haire,* 29 Mich. 219; *Barr* v. *Motor Co.,* 172 Mich. 299 (137 N. W. 697); 2 Kent's Commentaries (13th Ed.), p. 483; *United States* v. *Throckmorton,* 98 U. S. 61; *Johnson* v. *Waters,* 111 U. S. 640 (4 Sup. Ct. 619). The fact that the prayer for relief may be inconsistent is not of consequence. The stating part of the bill itself is what determines its character. Whether plaintiffs are entitled to the whole or any part of the relief prayed for will be determined by the trial court upon a hearing.

The decree dismissing the bill is reversed, with costs, and defendants are allowed 15 days in which to answer.

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

OSTRANDER, J. In my opinion the bill is multifarious.

POWELL *v.* PENNOCK.

1. GIFTS—JOINT BANK ACCOUNTS—STATUTES—VALIDITY.
   Under Act No. 248, Pub. Acts 1909 (2 Comp. Laws 1915, § 8038 *et seq.*), a husband who changes his bank accounts, making the same payable to himself or wife, or either, and to the survivor, creates a title in his wife at his death, provided he is competent to act and is not subjected to undue influence.

2. SAME.
   Act No. 248, Pub. Acts 1909, relating to the creation of bank accounts in the names of the depositor and another jointly and the right of survivorship, is valid.

3. FRAUD—UNDUE INFLUENCE.
   Fraud and undue influence cannot be inferred from mere opportunity.

4. SAME—UNDUE INFLUENCE—EVIDENCE.
   Evidence *held*, insufficient to show undue influence and fraud on the part of a wife in inducing her husband to make bank deposits payable to either or to the survivor.

5. SAME—MENTAL COMPETENCY—EVIDENCE.
   Evidence *held*, sufficient to show mental competency of a husband who transferred large bank accounts to an account made payable to either him or his wife or to the survivor.

Appeal from Barry; Smith, J. Submitted June 13, 1917. (Docket No. 41.) Decided December 27, 1917.

Bill by Ella L. Powell and others against Clara Pennock for an accounting for claimed assets of the estate of Asa B. Pennock, deceased. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Alonzo D. Cadwallader, for plaintiffs.

Alfred J. Mills, for defendant.

STEERE, J. Plaintiffs appeal from a decree of the

circuit court of Barry county in chancery dismissing their bill of complaint against defendant, their stepmother, filed to compel her to account for claimed assets of the estate of their father, Asa B. Pennock, deceased, charged to have been fraudulently obtained, sequestered, and appropriated by her.

The case was before this court in a preliminary stage on appeal by plaintiffs from an order sustaining defendant's demurrer to the bill. It was then held that under the allegations in the bill the probate court did not have exclusive jurisdiction over the issue tendered and a suit in equity might be instituted by the heirs to recover from the widow of deceased, whose estate had been closed in the probate court, any property rightfully belonging to the estate which had been obtained by the wife through fraud and undue influence. 181 Mich. 588 (148 N. W. 430). The order of the trial court was therefore overruled and the case remanded with leave to answer. Pleadings were thereafter perfected and the case brought to hearing upon pleadings and proofs taken in open court, resulting in a decree rendered in favor of defendant.

An opinion was filed by the learned circuit judge who heard the case which, with the former opinion of this court, adequately presents for a fair understanding of this controversy the circumstances under which the litigation arose, the relations of the parties and the questions involved, as well as the findings of the court and conclusions of law thereon which plaintiffs review and gainsay as not warranted by the record, and erroneous. It is as follows:

"Bill filed for an accounting and to recover, from the defendant, certain moneys and United States bonds on the ground that they came into the hands and custody of said defendant wrongfully and fraudulently. The complainants in this case are the son and daughter of Asa B. Pennock, deceased. The defendant is the widow of the deceased. The marriage of Asa B.

Pennock occurred April 9, 1910. The death of Asa B. Pennock occurred July 23, 1911.

"Asa B. Pennock had but little education. He was a man of excellent habits and of good reputation among his neighbors and friends as to honesty and fair dealing. Whatever he had in material wealth at the time of his death, he had earned by hard labor, industrious habits, and honest methods assisted by his former wife, who was the mother of complainants. He had a rugged aggressive nature. He hated shams, dishonesty, and fraudulent methods, and had but little patience with the weakness and incompetency of his fellows. He was, however, generous with the unfortunate and sympathetic with their needs, if he believed they were doing the best they could. He had a positive nature and in some ways might be termed opinionated. He was in many ways 'a diamond in the rough.' He was disappointed, and possibly in a sense angered, at the conduct of his two children, the complainants in this case.

"The daughter first married with Mr. Cadwallader. He (deceased) bitterly opposed the same and his feeling was not greatly lessened against her after she obtained her divorce. His efforts to help her and her husband in getting along in the world were so fruitless that his disappointment increased his bitterness, which abated in some degree after her marriage with her present husband, Charles E. Powell. The son, Addison J., as a youth and during his manhood, was a source of constant anxiety and care on account of his intemperate habits. Asa B. Pennock had but little sympathy for the weakness that develops dissipation and the train of evils that follow. For ten years, from 1888 to 1898, he was the legal guardian of this son, on petition of his son's wife. While since the guardianship has been terminated the son's habits had been improved, yet he has not been and is not now a total abstainer in the use of intoxicating liquors.

"Notwithstanding the disappointment of this father, the record shows that he has given to this son and this daughter material help aggregating hundreds of dollars in direct giving and the payment of claims against them, and in many other ways swallowed his disappointment and given them help far beyond what

many fathers would have done. He has given to the two sons of Addison Pennock his large home farm of over 300 acres, situated in Barry township and near the village of Delton, and worth, as shown by the proofs, upward of $15,000. He has also not only given to the complainants in this case, but has paid them for any and all services they have rendered in the care of his first wife and of himself.

"The defendant in this case had, before her marriage with Asa B. Pennock, been twice widowed and had some property at the time of her marriage to him. She was a hard-working woman and had earned her living by practical nursing and care of the sick. She was a woman of good character and reputation, sympathetic in her nature and possessed of good common sense, and at the time of her marriage was about 50 years old. She had been employed by Asa Pennock to care for his sick wife at the home of Charles and Ella Powell and was caring for her at the time of her death. Soon after her death she was employed by said Asa Pennock to be his housekeeper and acted in that capacity for pay for about 16 months before she and Asa were married.

"A few days after the marriage, Asa Pennock and his wife came to Hastings and he took up certificates of deposit in the Hastings National Bank and opened in the savings department of said bank an account aggregating a little more than $10,500, and had the money placed in the savings department of that bank and a savings bank-book issued to himself and his wife, Clara Pennock, jointly, and arranged, in writing, that the money was payable to either upon a receipt signed by either, and the survivor to be entitled to the entire fund.

"On the 21st day of December, 1910, Asa Pennock and the defendant went to Kalamazoo and to the Kalamazoo National Bank and took up certificates of deposit aggregating $9,000, and had the money placed in the savings department of that bank and a savings-bank book issued to himself and Clara Pennock, his wife, jointly, and payable to either, or the survivor. On the same day, said Asa Pennock and the defendant went to the Kalamazoo City Savings Bank at Kalamazoo, Mich., and took up certificates of deposit aggrega-

ting $12,000, and had the money placed in the savings department of that bank, and a savings bank book issued to himself and Clara Pennock, his wife, jointly, payable to either, or the survivor. These various bank books, with the accumulated interest were afterwards, and after the death of Asa Pennock, surrendered to the banks, and new books issued or the money paid to Clara Pennock, the defendant in this case. She received from the same upwards of $32,000. As to the government bonds, the proof fails to show that any came to the hands of the defendant. It is to place these various amounts of money in the estate of Asa B. Pennock for distribution to the heirs, or to recover the share of complainants therein under the statute of distribution that this bill is filed.

"Before disposing of this case, it may be well to state that, under the law, courts have no right to enter decrees, or judgments, by which any person will be deprived of the right to dispose of his or her property as seems best and just to them. Every person has the right and should be permitted to dispose of property as he or she sees fit to do, subject to the rights of creditors and the claims of dependents and the rights of a widow, which are guaranteed by law. So far as the complainants in this case are concerned Asa B. Pennock was under no legal obligation to give them a dollar of his property. He had a right to do with it as he wished and if he was competent to do what he has done and did it of his own volition, it ought to stand, no matter what others may think he should have done for his children or grandchildren.

"It is my judgment that there are three questions to be considered in disposing of this case: (1) Did the act of changing his bank accounts, making the same payable to himself, or wife, or either, and to the survivor, create a title in the same in Clara Pennock at his death, under the law, provided he was competent and did the same freely and of his own volition? If it did not, that would end the case and the complainants would be entitled to the relief sought. If it did, then (2) Was Asa Pennock competent to do what he did do when it was done? and (3) Was it of his own free will that he did it, if he was competent, and Was his action procured by fraud or undue

influence on the part of the defendant, or some one in her behalf?

"I am of the opinion that the first question is answered by Act No. 248 of the Public Acts of 1909, and the case of *State Bank of Croswell* v. *Johnson*, reported in 151 Mich. at page 538 (115 N. W. 464), and that a title was created in the defendant in the savings bank account books and that she was entitled to the money they called for by right of survivorship, provided Asa Pennock was competent to act and was not unduly influenced to do what he did do.

"(2) Was Asa Pennock competent to dispose of his property under the law? I do not think it necessary to review the testimony taken at the hearing at length. From the proof taken, I have not the least doubt of his competency. I think, taking into consideration the character of the witnesses, their means of information, their interest or lack of interest in the result of the suit, that the proof of his competency largely preponderates in favor of a finding that he was competent and fully knew and understood what he was doing and the effect of it upon those who would share in his estate had he died without disposing of the property as he did.

"(3) Was any fraud practiced on him, or was he unduly influenced by the defendant, or any one in her behalf, to do what he did do? It is my judgment that there is not a scintilla of proof that this was done. The most that can be said is that she had the opportunity. There is not the least proof that she took advantage of it. The proof is undoubted that she married Asa Pennock in good faith promising to be his wife and minister to his needs and care for him as she should do as his wife, and that she did this without stint or limit and devoted herself constantly to his comfort, is not disputed by any one. She was true to him, and if her offices as a good, true wife in ministering to his care and comfort has brought her close to him, and of his own free will he has supplied her with a competence, it should not in my judgment be disturbed, and under the law cannot be."

That the trial judge correctly decided the question

of law proposed in his first interrogatory proposition, there can be no doubt. Not only are his conclusions in harmony with *State Bank of Croswell* v. *Johnson, supra,* but the constitutionality of Act No. 248, Pub. Acts 1909 (2 Comp. Laws 1915, § 8038 *et seq.*), questioned in the briefs of plaintiffs' counsel, is decided in *Re Rehfeld's Estate, ante,* 249 (164 N. W. 372), which is cited with approval in the recent case of *People's State Bank* v. *Miller's Estate, post,* 783 (165 N. W. 608).

Plaintiffs' claims of fraud, undue influence, and mental incompetency are primarily questions of fact with the burden of proof resting upon them. As presented by this record fraud and undue influence are contingent upon the issue of the deceased's mental competency. In the absence of the latter even the claimed inferential evidence of the former disappears. Opportunity alone affords no inference. The record is barren of any direct evidence of acts or words on defendant's part tending in themselves to show fraud or undue influence. The evidence is most conclusive and practically conceded that when in his right mind and full possession of his mental faculties deceased was of a positive, impelling nature, given to forming his own conclusions, acting upon his independent judgment and not to be influenced, unduly or otherwise, to adopt any course of action he had not independently decided upon. The gist of plaintiffs' claim is that deceased's natural powers had abated and his mentality failed to incompetency, taking advantage of which defendant unduly influenced him to dispose of a portion of his estate as he was not of his own free will inclined to do and on his own initiative would not have done, thereby defrauding them of their rights as his heirs.

The legal principles applicable to the issue of mental incompetency as here raised are well settled in this State and elsewhere. Amongst the many cases

cited the following are more or less in point upon various phases of the testimony: *Kempsey* v. *McGinniss,* 21 Mich. 123; *Fraser* v. *Jennison,* 42 Mich. 206 (3 N. W. 882); *Rice* v. *Rice,* 50 Mich. 448 (15 N. W. 545); *In re Shepard's Estate,* 161 Mich. 441 (126 N. W. 640); *Haines* v. *Hayden,* 95 Mich. 332 (54 N. W. 911, 35 Am. St. Rep. 566); *Hibbard* v. *Baker,* 141 Mich. 124 (104 N. W. 399); *Schneider* v. *Vosburgh,* 143 Mich. 476 (106 N. W. 1129); *In re Hoffmann's Estate,* 151 Mich. 595 (115 N. W. 690); *In re Ganun's Estate,* 174 Mich. 286 (140 N. W. 561); *Reagan* v. *Murray,* 176 Mich. 231 (142 N. W. 545); *In re Williams' Estate,* 185 Mich. 97 (151 N. W. 731); *In re McIntyre's Estate,* 193 Mich. 257 (159 N. W. 517); *Ginter* v. *Ginter,* 22 L. R. A. [N. S.] 1024, and cases cited (79 Kan. 721, 101 Pac. 634).

Any attempt to outline and review at length all testimony of many witnesses called by the respective parties and the elaborate arguments of counsel contained in the over 1,600 printed pages of record and briefs with which this case is enlarged would involve no unsettled legal questions, serve no useful purpose, and be of no interest to any one except the litigants and their counsel. Large portions of both record and briefs are devoted to biographies (auto and otherwise) of the parties to this litigation, their relatives, friends, and enemies, including some of their attorneys, often tainted in the extreme with aspersive matter which, whether true or false, is of scant relevancy and best ignored.

A search of this long record with the questions of deceased's mental competency and capacity to independently plan and act for a desired purpose uppermost sustains the thought that, sanely considered from his viewpoint, what he did is not shown to have been unwise or unnatural at his time of life as he was then situated. During his long life since early manhood

he had always lived in domestic relations and maintained a home of his own, most of the time in the country upon his farm. In 1911 he decided to establish a home for the declining years of himself and his then wife in the nearby village of Delton and to that end selected a place in the suburbs with ample grounds where he could, and did, continue to a degree the familiar environments and characteristics of a country home which a long life had made attractive to him, keeping a horse, cow, pig, poultry, etc. So far as shown, and aside from the conduct of his children in certain respects, his home life with his first wife had always been pleasant and congenial. It is undisputed that such home conditions were re-established after his second marriage and continued until he died. His children were as welcome there as before, were on friendly terms with defendant, conceded that she was kind and congenial, a good housekeeper, and took good care of their father and his home until he died.

Deceased's first wife, who was about three years older than he, became mentally unbalanced and practically helpless about two years before her death, and was thereafter a constant care. He tried to keep up his home and care for her there with hired help, employing several different women as housekeepers, but they were unsatisfactory or would not remain, and for a time his wife was cared for at the homes of their children, for which he paid, living himself at his own home. To relieve his daughter of the burden of caring for her mother he secured the services of defendant to care for his wife at the home of his daughter and son-in-law. She proved an efficient and satisfactory nurse and caretaker, remaining in that service and caring for his wife until her death. Of this his son-in-law, Charles Powell, says in part:

"I told him he had got a good woman taking care of him and to take his wife home, because my wife

wasn't capable of taking care of her; wasn't able to do it any longer, and I said, 'I wouldn't have my wife as your wife is for all the money you ever had.' 'Well,' he says, 'I couldn't keep a woman in my place five minutes if she was there.'"

Powell and his wife were then living on a farm of 110 acres which deceased had given them.

After the death of his first wife deceased preferred to, and did during most of the time, continue to live at his own home. His children had homes of their own and were interested in their own affairs. He tried unsuccessfully to get his granddaughter and her husband to live and keep house with him, and in 1908, when unwell, lived at his son's home for a time, paying for his board, but this proved unsatisfactory to him and he returned to his own place, living alone for a time, and eventually employed defendant as his housekeeper, subsequently marrying her as stated. He had stood by and helped his two children, who had been a disappointment and source of anxiety to him for many years, until they were well past middle life, settled in homes of their own on valuable farms which he had given them. He had previously given his daughter, after her first marriage against his wishes, a valuable farm adjoining the city of Hastings, which was squandered, and upon her second marriage, without his knowledge or consent, to her present husband who was then a farm hand, he ultimately gave them the farm they were living on when he died. He had first started his son in business in Hastings, where his dissipation was such that he proved a failure, and then established him on a farm, where he so conducted himself that his own wife petitioned the probate court for a guardianship to control him, which deceased assumed and exercised for 10 years, in the meantime paying off a mortgage on the son's farm, and before he remarried he deeded his former home farm of 360

acres to his son's children. During his long and active life he had been thrifty, efficient, and successful in his pursuits; primarily a thorough and capable farmer he was also a stock dealer and at times engaged as an auctioneer. He had made money and was well off. Without going into details the record gives support to the contention that he had given to plaintiffs and their children from his accumulations nearly twice in value that which he saved for himself in his old age. After what he had done for them, and his experiences with them, it was not unnatural nor passing strange that he decided to remarry and re-establish himself in his old home where he desired to be and, as he told friends he proposed to do, provide that the wife whom he selected and who made a pleasant home for him in his old age, as he said defendant did, would be "well taken care of" and "never regret it." He took counsel with others as to how to most conveniently provide this and be safe himself, after which he adopted the course stated. If he understandingly entertained such views and intent, it appears to be conceded he did not make an unwise selection, for the testimony is practically undisputed that defendant was a kind and congenial wife to him, took good care of his home and him, when he needed care. After their marriage he told his cousin Ebenezer Pennock, an old resident and leading citizen of the county, that "he was going to Hastings to fix matters so she would never have to work out." Of his mentality this witness said:

"I never saw Asa B. Pennock when I thought he was not competent to understand his business and transact it. He was always competent to transact his business and understood it and had a good mind and memory. The last time I see him he was just as capable to talk about stock or horses or anything else as he ever was, from anything I could see."

It is strenuously urged in the briefs of plaintiffs' counsel that this was purely a mercenary marriage

on defendant's part for which she planned and schemed to get the old man's money, while defendant's counsel deny this and argue more meritorious motives. While that issue is of scant materiality, it may be conceded and seems probable that neither party was actuated by any romantic or altruistic notions on the subject of matrimony, and both took a practical view of the temporal and material benefits anticipated from this alliance. Both had been married before and were of mature years. He was an old man and she, though much younger, was an elderly woman, past the childbearing age. What motives may have actuated them to enter into this marriage contract is immaterial, provided they mutually so desired, understood what they were doing, and were qualified to contract.

As to deceased's mental vigor and competency at the time under consideration there is of course conflicting testimony, but a study of this record leads strongly to the impression that his ability to do business, manage his affairs, and make contracts was never seriously questioned until after his death, and this litigation arose. He retained possession of, and actively managed the affairs of, the large farm he had deeded to his grandsons, came and went as he pleased, bought and sold, collected and paid, transacted business at the banks and elsewhere until near the time of his death. Old neighbors, bank officials, and experienced business men who have no apparent bias or interest in this litigation testify strongly in substantiation of his retained mentality. Whatever physical infirmities of age he may have been afflicted with, we cannot find it affirmatively shown by a preponderance of evidence that they noticeably impaired his mentality, incapacitated him from the exercise of his normal business judgment, or from rational conduct in the ordinary affairs of life.

We find no occasion upon this record to disturb the

conclusions arrived at by the learned circuit judge, who had the witnesses before him and heard their testimony.

The decree dismissing plaintiffs' bill is therefore affirmed, with costs to defendant.

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

POTTER *v.* DUNDEE HYDRAULIC POWER CO.

1. WATERS AND WATERCOURSES—DAMS—OVERFLOWING LANDS—PRESCRIPTION.

   On a bill by an upper riparian owner to enjoin a mill owner from maintaining a new dam at a level higher than the one replaced, *held*, that the ultimate test of defendant's prescriptive right was the extent to which the old dam raised and held the level of the water it impounded.

2. SAME—DAMS—EVIDENCE.

   Evidence *held*, to show that by the maintenance of a tighter and more perfect dam, even if no higher, defendant had increased its poundage capacity over the old dam to a certain extent and also to show that the height of the new dam at the spillway exceeded that of the old one.

3. DAMAGES—EXCESSIVE VERDICTS.

   A judgment for $840 damages for overflowing plaintiff's farm of 40 acres for 4 years, *held*, excessive to the extent of $200.

4. APPEAL AND ERROR—DAMAGES—MATTERS NOT DECIDED ON TRIAL.

   Where, in an action against a mill owner to recover damages for flooding plaintiff's farm land caused by the building of a new dam higher than the old one, the trial court

holds open the question of damages after March 1st of a particular year contingent on the dam being reduced by the middle of May, with the right to plaintiff to make a showing as to damages, and does not pass on them, the question of damages after March 1st will not be considered on appeal.[1]

Appeal from Monroe; Chester, J., presiding. Submitted June 19, 1917. (Docket No. 90.) Decided December 27, 1917.

Bill by Charles C. Potter and another against the Dundee Hydraulic Power Company to restrain the maintenance of a dam at an excessive height, and for damages caused by flooding. From a decree for plaintiffs, defendant appeals. Modified, and affirmed.

Willis Baldwin, for plaintiffs.

Thornton Dixon, for defendant.

STEERE, J. Plaintiffs, who are husband and wife, have owned and occupied for more than 20 years an 80-acre farm located upon the north side of the river Raisin about one-half mile up stream and westerly from defendant's dam across said river at the village of Dundee, Monroe county. Approximately one-half of this farm is upland and the remainder flats, or bottom land, along the north bank of the river which plaintiff claims was especially fertile and productive farming land, subject to overflow only in the time of spring freshets, and which he tilled successfully until defendant erected a new and higher dam of concrete in the summer of 1911, raising the level of its millpond and flooding his lowland. This bill was filed in February, 1912, to restrain defendant from maintaining this dam at a higher level than the one it replaced,

[1] On liability for damming back water of stream, generally, see note in 59 L. R. A. 817, specifically as to right to increase height of dam, see page 874 of above note.

and to perpetually enjoin defendant from flooding plaintiff's land to any greater extent than had been done by preceding dams erected upon the same site.

It was shown that as early as 1827 a tract of 120 acres of land upon which the dam in question is located was conveyed by the then owner to defendant's predecessors in title, requiring the grantees "to construct a good, substantial, and firm dam across the river Raisin at the best point on the said river on said premises, where they can get the neatest head and fall, and also to construct, excavate, and build a good and sufficient race," etc.

Tradition, supplemented by the testimony of living witnesses, shows that a dam of some kind and height has been maintained since that time at the point where the grantees then decided they could "get the neatest head and fall." No flowage privileges were ever acquired by defendant or its grantors from upstream owners, and beyond the limits of the land first acquired what rights defendant has are by prescription.

During the intervening years age, freshets, and ice floes from time to time made imperative frequent repairs and occasional reconstruction of the dam maintained at this site. According to the memory of the oldest inhabitant, running back some 70 years, the first dam was known as a brush dam, later repaired and reconstructed with logs and known as "a log dam," as early as 1846, which was washed out in whole or in part and rebuilt or repaired occasionally, but retaining that character and name until some time between 1897 and 1900, after being wrecked by a flood, it was restored or rebuilt by its then owner, Mr. Davis, in a more substantial manner, and thereafter known as a "timber" or "rafter dam." This work was done by or under the supervision of a witness named Edwards, who was running the mill, and in charge of the property for Davis. He testified that he was there in

Davis' employ 20 or 21 years, "had everything to do with it while there," and built the "new" or rafter dam about 2 years before he went to Detroit, where he had lived 14 or 15 years. He described the old dam as a "wooden crib dam, made of wood, logs, plank, and dirt." He testified that he measured and intended to build the new dam the same height as the one it replaced. It experienced similar vicissitudes as had its predecessors, requiring frequent repairs, or reconstruction, but was maintained and in use until defendant acquired the property, and the cement dam was constructed according to the plans and under supervision of an engineer who testified to surveys, measurements, photographs, etc., of the old and new dams tending to show that the height had not been increased, and the elevation at the spillway formerly enjoyed by Davis and his predecessors was not exceeded.

After this bill was filed the north end of the new cement dam, built during the summer, washed out, and in October, 1912, plaintiffs obtained a temporary injunction restraining construction of the portion carried away at the height proposed, but upon defendant filing a bond to meet any damages which plaintiffs might recover the dam was permitted to be restored to its former height.

The case was heard in the fall of 1914, and findings were made by the trial court in which the evidence is reviewed and the conclusion reached that the present dam is in fact and effect much higher than former dams, that plaintiffs had suffered damages therefrom amounting to $840 up to the time of the finding, which was adjudicated against defendant, and a mandatory injunction granted requiring the present dam to—

"be cut down 2 feet from the top of the wing, measuring from the top of the wing at the south end of the timber on the north stone wall, and that this dam

be so cut down from the north end to within 50 feet of the flume. This remaining 50 feet may be continued as it is. The headgates in the flume shall not be maintained at any greater height than that portion of the dam shall be after cutting it back 2 feet."

The principles of law applicable to this controversy are well settled and not in dispute. It is conceded by plaintiffs that defendant has a prescriptive right to maintain adjacent to their land as high a level of backwater as resulted from the old dam, or dams, and to overflow their flats to the same extent. If the new dam does no more, they cannot complain of the burden. It is conceded by defendant that it cannot place an additional servitude upon the upstream shore lands by raising the level of the backwater either through constructing a higher dam or an absolutely tight dam if the former one maintained during the period of limitation was so imperfect or leaky as to regularly allow water to go through it instead of over its crest, thus failing to fully impound the water and maintain a level of which it would be capable if more perfectly constructed and kept tight against leakage. The settled law in this case is abundantly discussed and defined in *White* v. *Forbes,* Walk. Ch. 112; *Turner* v. *Hart,* 71 Mich. 128 (38 N. W. 890, 15 Am. St. Rep. 243); *Miller* v. *Bank of Belleville,* 148 Mich. 339 (111 N. W. 1062); *Sheffield Car Co.* v. *Hydraulic Co.,* 171 Mich. 423 (137 N. W. 305, Am. & Eng. Ann. Cas. 1914B, 984); *Brockway* v. *Power & Light Co.,* 175 Mich. 339 (141 N. W. 693).

It is apparently undisputed that this dam, as were its predecessors, is about 400 feet long, extending nearly north and south across the Raisin river and its adjacent flats to the higher land, or "banks," on either side. The mill and flume are at its south end, on the south side of the river, connected with the pond by a raceway extending from the flume northwesterly

into the impounded water above the dam. The only suggestion of the power developed by any of the dams is found in the testimony of a witness named Pulver, who had lived his life of 67 years in the vicinity of the dam, and was called as a witness by defendant. He testified:

That more horse power was used in the "old times than now"; that "the paper mill used 60, the turning mill 15, and the sawmill 25, making about 100 horse power. The sawmill at times ran from 25 to 30 horse power. It did not have a good wheel. * * * There was power enough to run all these six months in the year, perhaps not so much sometimes; some years it was quite a bit less. * * * In dry weather all these mills could not run continuously."

While testifying to having "blown out a wheel pit under the mill for Davis," and a familiar knowledge of hydrodynamics at that point, by looking at it rather than from any computations, he stated that he never took any measurements, but "everybody knows that the old dam was 30 inches to 3 feet lower than the present dam," which he admitted was merely a guess. Other portions of his testimony as well as that of other witnesses are decidedly out of harmony with this guess, and again there is testimony in the record tending to confirm it; while the guesses, or estimates, of other witnesses place the present dam about the same height as the old.

Defendant claims a prescriptive right to maintain a normal head, or elevation, of about 7 feet 3 inches above the surface of the tail-water at the spillway, and that the present dam is built to that capacity following data and measurements indicating the height of the dam it replaced, while plaintiffs claim greatly increased upper water level resulting from both increased height of dam and better construction.

The height, appearance, and capacity of the brush or log dam are memories only, while numerous photo-

graphs, plans, sketches, etc., accompany the evidence relating to the present dam and the rafter dam immediately preceding it. The abundant testimony is extremely conflicting as to the height at which both the log and rafter dams held the water back, and it is far from harmonious as to the effect of the present dam. While the evidence is at variance as to the comparative heights and results of the log and rafter dams, the more definite and serious issue and burden of plaintiffs' complaint is directed to the claimed increased level of the impounded water and flooding of upstream bottom lands following the erection of the concrete dam. The rafter, or Davis, dam is conceded to have been built in 1897 or 1898. Davis testified that the old dam was dilapidated when he bought the property, that he repaired it so that he had "a nice head of water, about 7 feet 3 inches," although he did not think he ever measured it, and that he continued that amount of water as much as he could until he built the new, or rafter, dam, with which he also calculated to hold back about 7 feet 3 inches of water. He tells of a landowner with whom he had difficulty because he insisted the dam was a detriment to his property, and Davis told him "he had better go slow," but the next year he put in an improved wheel, and had more pressure than he needed, so he cut back the center of his dam 2½ feet on a slant, making a spillway which the testimony indicates and the trial court found lowered the perpendicular of the rafter dam about 10 inches. That year a stone wall about 30 feet in length was built at the north end, as a part of the dam, with a 6x6-inch timber upon the top of it. A year later a stone wall was built at the south end. These walls yet remained at the time of the trial, and were adopted by the court as fixed points with which comparisons could be made in analyzing the conflicting testimony. Witnesses of

defendant testified that the spillways in the concrete dam and in the rafter dam were about the same height, and the water was held at about the same level, while others called by plaintiff testified that it was both higher, some even nearly 3 feet, and proportionally retained the water at a much higher level, and for a longer time, owing to tighter construction. The evidence is convincing that the rafter dam was built somewhat piecemeal, higher in some places than in others and lower at the south end than the north. It may fairly be concluded that as constructed it held the impounded water at a higher level than its predecessor until cut down in the center as shown. Edwards, who constructed it for Davis, was called as a witness by defendant, and testified that he measured the water 20 or 25 feet north of the mill and kept the lowest point of the dam 7 feet 8 inches above bed rock; that, compared with the old dam, it was higher in some places and lower in others; that it would leak badly in the winter, and they would block it up until warm weather came and then fix it; that during the year he was there he knew of no complaints or objections to the height of the water; that he cut down a part of the center to protect the rest of it; that, except for the wings, which he thought would have to be cut off probably to satisfy the people, he was perfectly confident the present dam is no higher than the rafter dam. And, in extenuation of his appearing as a witness, he points out a material distinction in the capacity of the two dams the full significance of which he apparently did not appreciate himself, as follows:

"I feel as though it has put me in a bad place in bringing me down here, because those people are all old friends of mine and old acquaintances, and I believe they are honest in their opinion, but when they look at that dam as it was previous to the new dam there was 18 inches to 2 feet of water below the dam that made the dam look lower, and when they get a

tight dam it makes it look as though it was higher, but if they had spent as many months in there as I have they would know more about the difference."

To the same effect a witness named Rood, in defendant's employ, who had lived in Dundee all his life and had at one time repaired the rafter dam, which he described at length, stated that as near as he could figure it the dam was about 7 feet 8 inches from the bed rock, and the tail-water was about 2 feet deep.

Harry Gray, defendant's superintendent, testified that measurements of the water at the present dam were made daily and sent to the Detroit office, and from the reports he figured the average tail-water as 6 inches.

After listening to the volume of conflicting, and in many respects confusing, testimony which was taken in open court, the circuit judge made personal inspection of the dam in company with counsel for the respective sides, and went up the north bank of the river to the west side of plaintiff's land. At the dam various measurements were made in his presence which are recited in the record.

Adopting the rafter dam as maintained up to the construction of the present dam as the criterion of defendant's prescriptive right of flowage, the court found with ample and convincing testimony that the average previously maintained level of impounded water had been raised materially by the present dam to a height which flooded, soaked with seepage, and destroyed the drainage of plaintiff's lands at times and in a way and to an extent never experienced from the old dams, preventing their tillage and impairing their productivity.

It is stated in the court's findings that defendant claims the present dam is no higher at the spillway than the old dam, but "concedes that the wings on

each side of the spillway are higher, and should be cut down to the height of the spillway." While this concession does not otherwise appear in the record, the strenuous contention of defendant's counsel is that the evidence as a whole conclusively shows, with no contradictory testimony except random estimates and guess work, that the old dam was of the height of the present spillway, and to cut down 2 feet from the top of the wing as ordered would reduce the entire dam several inches (varying from 9 inches to 7⅝ inches) below the surface of the present spillway.

The ultimate test of defendant's prescriptive right is the extent to which the old dam raised and held the level of the water it impounded. The height of the dam, while indicative, is by no means conclusive. There is abundant testimony that the old timber dam was of doubtful construction, not tight, and frequently out of repair, having a tail-water of from 18 inches to 2 feet, as testified to by defendant's own witnesses. The new dam is shown to be of concrete construction, substantial and tight, with an average tail-water of 6 inches. If the height of the old dam was the same as the present one, its impounding capacity was clearly not the same. In that aspect of the case there is abundant testimony to justify the conclusion that by maintaining a tighter and more perfect dam, even though no higher, defendant has increased its poundage capacity over the old dam to the extent directed reduced. There is also abundance of testimony to warrant the trial court in the conclusion that the height of the present dam at the spillway exceeds that of the old one. It would serve no beneficial purpose to further review this in detail, but the testimony found in the ample record considered in its various aspects, and as a whole, satisfies us that the extent to which the trial court determined defendant has ex-

ceeded its prescriptive right of flowage should not be disturbed.

It is further contended that the damages awarded for flooding plaintiffs' lands up to March 1, 1916, the decree for which was filed March 25, 1916, is excessive, and that the testimony upon that subject furnishes no basis to warrant a computation of the amount found by the court due at that date.

The trial court gave judgment in favor of plaintiffs, with right of execution, against defendant in the sum of $840 as damages for excessive flooding of plaintiffs' land to March 1, 1916, and provided that:

"In case the same is not cut down by May 15th, the defendants herein shall have the right to make a further showing as to further damages sustained by them by reason of not cutting down the said dam so that their premises could be cropped during this present year."

It is not questioned that most of plaintiffs' flats had been cleared and cultivated from time to time for many years before the present dam was built. This land was river bottom annually flooded in the spring, subject to the hazard of inundation in time of freshets, fertile as a result, and is shown to have raised good crops when everything went well. Potter claims it has produced as high as 40 bushels of wheat to the acre, and one year, when it was rented, over 100 bushels of corn per acre. He gives no dates, nor what proportion of his flats yielded such crops, nor how often, and no definite data as to his annual income from this land during the many years he owned it. Of its use he stated:

"I pastured some of it, mowed some of it, wheated some of it, corned some of it, barleyed some of it, and some I turned the cattle on."

He testified:

That "40 or 50 acres" of his farm consists of "low flats"; that he has 45 acres of flats; that he did not mean to tell the court there were 45 acres he had not worked since the new dam was built (then two years before), but "during the past two years there are right around from 30 to 40 acres of my land that I haven't worked. I have mowed some of it. All my flats except five acres are in bad condition every day."

Of his damages he said:

"I couldn't judge as to the damage during the last two years because of the water and my not being able to crop the land; it is worth all you can get for it."

Further interrogated, he testified:

"Such land is worth for renting purposes from $5 to $7 per acre, just as you can strike a party and the bargain you can make."

Two other witnesses who own bottom land which they claim was also damaged by flooding give some data as to rental value of such land. S. B. Curtis, who owns bottom land across the river from Potter, stated that before the new dam was built they cropped the land as they wished for many years; that his was used chiefly for hay and pasture; that he had seen June freshets come, and had his land flooded just before hay harvest, and under modern methods of drainage those freshets come more often than formerly; that he thought the new dam made the water from a foot and a half to two feet higher than the old at the spillway, so that the bottom land is soaked with water when not flooded, and the pasture not so good as it would be with the water off; and that with the water off Potter's land could be rented at from $5 to $10 per acre. H. C. Reynolds, who had known Potter's flats for 60 years, testified, "As to the back end of it, they used to work it all." He had seen it in corn, wheat, and meadow, "not all, but portions, of

it," saying of its rental value, "I think they are renting land there from $4 to $6 per acre for a year, or for the season." He estimated the difference in height of water between the old and new dam as about three feet.

Aside from comparisons and assertions in general terms, we find no tangible data affording any basis for determining damages except the testimony of these three witnesses as to rental value. To take an average of their lowest estimates would not be out of harmony with the trial court's discount of their testimony touching the difference between the height of water as maintained by the new dam and the old, which we think the record fully warranted. While it is fairly shown that the productive value of plaintiffs' land was damaged by and during increased flooding after the new dam was completed and in operation, no claim is made of permanent injury if the former level is restored. Of the four years for which damages were claimed and awarded there was little, if any, backwater during the first, when the dam was under construction. Taking this into consideration, together with the fact that the productiveness of the land while impaired was not totally destroyed, and plaintiff yet had a beneficial use of it for pasture and hay during these years, we are constrained to conclude that the damages awarded should be limited to $640 on a basis of $4 per acre per year during the four years in question for 40 acres detrimentally affected, for which we think there is evidential support in the record.

The matter of damages subsequent to March 1, 1916, which we are asked to determine, was reserved and held open by the trial court contingent on the dam being reduced by the ides of the ensuing May, with the right given plaintiff to make showing as to further damages. That question has not been passed

upon by the lower court, and is not before us on this record.

Modified as to damages as above indicated the decree of the trial court is affirmed, with costs to plaintiffs.

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

NEAL *v.* NOVELTY LEATHER WORKS.

1. EVIDENCE—ADMISSIBILITY—TESTIMONY ON FORMER TRIAL.
   Evidence *held*, not to show that plaintiff's illness was so severe and of such permanent character that he could not testify so as to render admissible his evidence in another case as to the validity of the claimed contract involved in each case.

2. SAME—COMPETENCY—CORPORATIONS—OFFICERS—ADMISSIONS.
   Statements and admissions of the president and general manager, and the treasurer of a corporation, who constitute a majority of the directors and are both officially and actively engaged in the business, relative to the existence of a contract with plaintiff, are competent evidence, in a suit against the corporation by an agent for an accounting as to commissions on goods sold.

3. CORPORATIONS — OFFICERS — AUTHORITY TO MAKE AGENCY CONTRACT.
   Evidence *held*, to show that the president and general manager of defendant corporation had authority to make an agency contract.

Appeal from Wayne; Codd, J. Submitted June 22, 1917. (Docket No. 137.) Decided December 27, 1917.

Bill by William C. Neal against the Novelty Leather Works and another for an accounting. From a decree for plaintiff, defendants appeal. Affirmed.

Arthur E. Fixel, for plaintiff.

Thomas W. Payne, for defendants.

STEERE, J. The Novelty Leather Works is a Michigan corporation located in the city of Jackson, engaged in the manufacture and sale of leather goods and novelties of various kinds, including certain automobile appliances. During the time of the events involved in this litigation, it had four stockholders and three directors, of whom defendant Collins was president and general manager, and John Bennett treasurer.

Defendant Collins had secured a patent, or patent rights, for an invention called the "Collins Always Ready," or "Quick Action," curtain, designed to facilitate the manner of holding automobile curtains on the inside and convenience in using them, the rights and equitable ownership of which belonged to the Novelty Leather Works.

Plaintiff was a so-called "manufacturer's agent," engaged in the sale of automobile material and accessories with his office in the city of Detroit. In the summer of 1912, as defendants were about to put this device upon the market, plaintiff became interested and participated, in an agency capacity, in its promotion, on whose initiative and to what extent is a matter in dispute. Plaintiff claims that on Collins' solicitation he entered into an agreement with defendants in the fall of 1912 to act as their general agent in promoting and assisting in the sale of this device and licenses to use it, in consideration for which he was to receive 10 per cent. of defendants' receipts from the sales of the appliance and royalties from licenses to automobile

manufacturers for its use; that in fulfillment of the agreement on his part he did, as stated in his bill of complaint for an accounting—

"assist the said defendants in the sale of said device and licenses, and did provide stenographic service, service with correspondents, distribution of printed matter, and the use of his office for said defendant, the Novelty Leather Works, and that a large number of circular letters soliciting trade by mail were sent out by your orator, in performance of his part of said contract. That your orator likewise solicited business, personally calling on automobile manufacturers, and that, as a result of the efforts of your orator working in conjunction with said defendant, the Novelty Leather Works, a large amount of business was secured for the said automobile curtain device."

Defendants deny any contract of general agency; and, in explanation of plaintiff's admitted relations with them, claim that, when in Jackson showing defendants the merchandise he was handling, plaintiff was impressed with the merits of their curtain device and said he could place it with the General Motors Company, of which his brother was president; that on this proposal it was agreed that if he could accomplish it defendants would pay him 10 per cent. commission on the deal; that the only transaction then talked about was a license to the General Motors for use of the patent, of which Collins testified:

"He was to consummate the sale, go to the officials and complete the arrangement for the demonstration, and I was to put the—I was to demonstrate the curtain and make it and put it on, and he was to close the deal.

"*Q.* What were you to pay him for that?

"*A.* Ten per cent."

Collins also testified that up to this time they were furnishing the device on tops they were making without extra charge and had "no idea of the selling as a license proposition" until plaintiff brought it up, and

Collins then told him "if he could do that" they would pay him 10 per cent. for such sales as he actually consummated, "would furnish literature and give him an opportunity to make the sales." Asked of the termination of their relations in the latter part of 1913, "Why did you dismiss Mr. Neal or sever your connection with him?" Collins replied:

"There were two reasons, one was that, when the Cadillac Motor Car Company started to evade our patent by certain methods, I discovered the evasion when they had 1,500 cars out, and some time later Mr. Neal apparently was giving my affairs very little attention."

Plaintiff's claim and alleged grounds for equitable relief are, briefly stated: That he advertised the curtain by personal interviews and correspondence and assisted in the solicitation of patronage from many automobile companies doing business in Michigan and elsewhere, until, largely as the result of his activities while its general agent, defendants realized a profitable business in this patented device with numerous automobile manufacturers; when defendants refused to recognize his contract of employment as general agent or his services in that behalf, declined to pay the money due him under said contract, refused to furnish him any statement, and denied his right to information from or inspection of their books to ascertain upon what sales and royalties they owed him commissions, charging that they have been withheld from him and the desired information concealed for the purpose of defeating his claim and defrauding him out of his just compensation amounting to a sum largely in excess of $500, for which reasons he prays an accounting, an adjudication and adjustment of his rights, and a decree for such sum as may be found his due.

At the hearing oral and documentary evidence was introduced, including a large amount of correspond-

ence with different automobile concerns and between the parties to this suit, indicating, amongst other things, individual efforts on plaintiff's part as well as active co-operation between him and defendants to promote the business; Collins frequently writing him on the subject with instructions to follow up prospective customers, "get busy," "get circulars off at once," etc. After testimony had been introduced by both parties leading up to and upon the question of plaintiff's right to an accounting, the trial court held, "without any prejudgment of the case at the present time, that an accounting should be had of all the business that was done by the defendant company in these curtains up to October, 1913," and made an order of reference to a circuit court commissioner of Jackson county for that purpose. Upon return of the report and testimony taken by such commissioner, the court found that a contract existed between the parties as plaintiff claimed, that upon undisputed sales during the period in question plaintiff's commissions of 10 per cent. amounted to $223.80, and decreed judgment in his favor for that sum, with costs.

Defendants in appealing from this decree urge that the following four vital questions were erroneously disposed of by the trial court adverse to their rights:

"(1) Whether or not the plaintiff has failed to prove, by a preponderance of evidence, a contract of agency between plaintiff and defendants, or either of them?

"(2) That if any contract of agency did exist between plaintiff and defendants or either of them, was it a special agency, and not a general agency?

"(3) Did defendant Collins have authority to bind the Novelty Leather Works by a contract of agency?

"(4) After all improper, incompetent, irrelevant, and immaterial evidence is excluded, has the plaintiff proven his case by a preponderance of the evidence?"

Plaintiff was not called as a witness nor present at

the hearing, owing, as was claimed, to a serious illness and nervous disorders; his physician who testified to his condition and the history of his case at length saying, in part:

"As a matter of fact, I don't think he will ever be able to testify without serious injury to himself * * * I don't think he will (be able to testify again), because any little excitement upsets him; he is liable to a relapse and a loss of memory at any time, from every exertion."

Upon this showing plaintiff's counsel offered, and defendants' counsel objected to, plaintiff's testimony taken upon the trial of a case in justice's court, on December 16, 1913, between himself and the Novelty Leather Works, wherein he testified in detail as to the validity of the claimed contract involved here. The court intimated misgivings as to the admissibility of this testimony and received it tentatively, inviting authority from plaintiff's counsel, and saying, "I do not conceive how I could consider such testimony in my final determination in this case." In the final determination the court announced the opinion that this testimony was incompetent and that neither it nor certain other hearsay testimony which had been offered would be taken into consideration in deciding the case; but, eliminating all such testimony, the court was satisfied from the correspondence and other competent evidence that the contract claimed for plaintiff had been proven, and he was entitled to the decree rendered.

Authorities are cited and argument offered in the briefs of counsel upon each side as to the admissibility of Neal's former testimony; plaintiff's counsel contending that it is admissible but, if not, the decree is sustained by other competent evidence, while defendants' counsel urge that it was rightly rejected, and without it the decree is not sustained by competent proof. We do not think the testimony satisfactorily

showed plaintiff's illness was so severe and of such permanent character as to warrant the admission of his former testimony, and for that, if no other reason, it was properly excluded. *Siefert* v. *Siefert,* 123 Mich. 664 (82 N. W. 511).

As to Collins' authority to bind the Novelty Leather Works, we think it conclusively shown that, not only was his action in the particular under inquiry ratified by a majority of the directors of the corporation, but as its president and general manager such action was within the scope of his authority. *Ceeder* v. *Lumber Co.,* 86 Mich. 541 (49 N. W. 575, 24 Am. St. Rep. 134). He and Bennett, the treasurer, constituted a majority of the directors and both were actively connected with the affairs of the company in official capacities; their statements and admissions in that capacity and connection would be competent evidence.

In the course of the company's business, Bennett, one of its directors, wrote plaintiff on October 17, 1913, using a letter head of the Novelty Leather Works showing him to be its secretary and treasurer, in part as follows:

"We have your letter of the 16th, which is carefully noted. * * * My understanding of the matter is as follows: That the arrangement between you and Mr. Collins was that you were to assist him in presenting and demonstrating the curtain, and in securing its adoption by the various automobile manufacturers, and that for your services, and the use of your office and so forth, you were to receive ten per cent. of the net amount received for the licenses. * * * Otherwise I see no reason why it should not be continued, but in any case, I see no reason why we should pay you commission on royalties received and also payment for office rent, use of your car, etc."

William Paul, a former employee of defendants, testified that in a conversation with Collins in June, 1912, in regard to the curtain device,

"he (Collins) told me he had been out on the road and was not quite satisfied and was going to get Mr. Neal as general agent on a 10 per cent. basis he said."

Allen Neal, plaintiff's son, testified that after Collins and his father had severed relations he talked with the former about their matters, and in that conversation

"he told me that he used to go around with him a good deal, and I asked him what kind of an arrangement he had with father, and he told me father was to get 10 per cent. on all business; he was a general agent and he was to get 10 per cent. on the receipts."

We think the foregoing testimony as to statements and admissions of the president and general manager of the company were competent, that from such testimony in connection with the written evidence in the case the trial court was fully justified in the conclusions reached, which we discover no occasion to disturb.

The decree is affirmed, with costs to plaintiff.

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

STOTTS v. STOTTS.

1. HUSBAND AND WIFE—ASSIGNMENT OF CONTRACT—FRAUD—ANTENUPTIAL ASSIGNMENTS.

   A prospective husband does not commit a fraud upon his intended wife by the assignment, one day before his marriage, of his interest in a land contract to one of his daughters, so as to render the assignment void as to her, because depriving her of rights of homestead and dower,

especially where the assignment was intended to relieve the assignor of what had become, because of his financial condition, an onerous obligation.[1]

2. EVIDENCE—LEASES—CONSIDERATION—NOMINAL CONSIDERATION.
The real consideration of a lease, the consideration of which is stated as being one dollar, may be shown, if material.[2]

3. HOMESTEADS—CHARACTER—INTENT.
A homestead right is an artificial estate in land for the protection of the family in possession of it as a home, and its character as such depends upon both possession and the actual intention of the parties, and, while the owners may live elsewhere temporarily, and, intending to return, retain their homestead rights, it is largely a matter of continuing intent, and is a fact to be proved like any other fact.

4. SAME—ABANDONMENT—CONSENT OF WIFE—PRESUMPTIONS.
If a homesteader removes with his family the consent of his wife will be presumed.

5. SAME—ABANDONMENT—EVIDENCE.
Evidence *held*, to show an abandonment by a husband and wife of homestead rights in property occupied as a homestead.[3]

6. HUSBAND AND WIFE—HOMESTEADS—ASSIGNMENTS.
A wife is not deprived of her homestead rights by the assignment of a life lease in a homestead, in which she does not join.

7. SAME—HOMESTEADS—ESTOPPEL—LACHES.
A husband and wife are estopped by their conduct and by laches from asserting homestead rights in a life lease of land bought under contract, where they abandon the property for 12 years and only make claim to it when the contract has been paid up by one daughter to whom the father had assigned the contract and by another daughter and her husband, and the father had been more than compensated by what his older daughters did in raising and educating one of his children.

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[2]On parol evidence as to consideration of a deed, see notes in 20 L. R. A. 101; 25 L. R. A. (N. S.) 1194.

[1]On conveyance of property in contemplation of marriage, but before negotiations for marriage have begun, as a fraud on the subsequent husband or wife, see note in 9 L. R. A. (N. S.) 955.

[3]As to effect of abandonment of homestead by parent on rights of children, see note in 56 L. R. A. 80.

Appeal from Wayne; Van Zile, J. Submitted June 8, 1917. (Docket No. 26.) Decided December 27, 1917.

Bill by George E. Stotts and another against Elizabeth Stotts and another to quiet title to land and for an accounting. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

William C. Gottman and *Charles C. Stewart*, for plaintiffs.

Anderson, Wilcox & Lacy, for defendants.

STEERE, J. Defendants Elizabeth Stotts and Alberta Stotts Auringer are daughters of plaintiff George E. Stotts. He and plaintiff Sarah Stotts, his second wife and their stepmother, filed this bill to recover the title to and possession of a house and lot in the city of Detroit known as 1287 Wabash avenue, appraised by real estate men at approximately $2,300 or $2,400. In 1913 and 1914, it was valued for taxation at $1,220 as shown by the assessment records for those years. The legal description of the premises is:

"Lot No. six hundred and twenty-two (622) situated on the west side of Wabash avenue according to a plat of Godfroy farm p. c. 726 lying north of Grand River avenue, recorded in the office of the register of deeds in Wayne county," etc.

Stotts first bought the vacant lot in 1890 for $575 under a land contract from the then owner, A. L. Hall, a real estate dealer who was represented in the transaction by John Wynne acting as his agent. He then made a payment of $250, having recently sold a lot in Canada for about that amount. The following year he made arrangements through Wynne to borrow from Hall $1,060 for the purpose of building a house on the lot. A new land contract dated May 14, 1891, includ-

ing that amount, was then substituted for the former one, the total consideration being $1,385, payable at the rate of $20 per month with interest on deferred payments. Stotts thereafter occupied this property with his first wife and their family until she died, on January 17, 1901. When they moved upon the premises, in 1891, they had four children whose names and ages were as follows: Elizabeth, 12 years; Alberta, 10 years; Edward, 3 years; Vera, 1 year. In 1895 a niece of his wife named Jane Gault, one year younger than Vera, was added to the family. The largest wages Stotts is shown to have earned was $70 per month, and with family expenses, sickness, etc., he fell behind in his payments upon this land contract until there remained a balance yet unpaid of $953.20 when the whole amount had become due, in 1897. Between that time and April, 1903, when he married his second wife, the amount was reduced to $768.12, an average reduction of $2.25 per month. When Stotts' first wife became ill some time before her death, his eldest daughter, Elizabeth, who had been working out for a year or so and contributed to the family support, gave up her employment, remaining at home to care for her mother and the children and doing the household work. After her mother's death, she continued at home as housekeeper for her father and cared for the family.

Owing to Stotts' continued delinquency in payments on his contract, Mr. Wynne, representing the Hall estate, became so dissatisfied that in 1903 he threatened foreclosure unless larger payments would be made. Stotts was then contemplating marriage with his present wife, Sarah, and proposed to assign the defaulted land contract to his daughter Elizabeth. He testified that his reason was the older daughters made it unpleasant for him when he told them he was going to get married and they agreed if he would do this "everything would be lovely." He also denied that

Mr. Wynne had ever told him he was in default or pressed him for payment. Wynne testified that, after he had insisted on Stotts making larger payments and written him relative to the matter, Stotts came to his office with a proposal to assign the contract to his eldest daughter, Elizabeth, "because he thought it would be more desirable," and Wynne told him if that was done he would show more leniency, saying:

"I insisted upon some arrangement whereby he should make larger payments on the contract. It had got to a point where we had to do something. I was satisfied to have him assign it to his oldest daughter; she had been working, and the other daughter was going to help, and it struck me that the two young ladies that were paying for their home would use every effort."

An assignment of Stotts' contract to his daughter Elizabeth was thereupon drafted by Wynne and signed by the contracting parties, on April 21, 1903. Upon the same date, Elizabeth gave back to her father a life lease of the property. The expressed consideration in each of these instruments was one dollar.

Stotts' first wife, who died after a lengthy illness, had then been dead about two years, and Elizabeth had from the beginning of her mother's disability devoted herself to caring for the home and family. Owing to the extra expenses in connection with his first wife's sickness and death added to the burden of his family maintenance, Stotts had become financially embarrassed and badly in debt; but with the help of Elizabeth he kept the family together and the younger children in school. The second daughter, Alberta, was attending the public training school for teachers when her mother died and began teaching the following fall. She lived at home and helped as she could there, contributing from her earnings to the family maintenance. During the two years following the first Mrs.

Stotts' death, Stotts was manifestly interested in and doing what he could for his children, and with the help of the two older daughters the family remained united, living together in pleasant and harmonious relations.

Stotts worked for the Detroit Omnibus Company and became acquainted with his present wife, who was for a time a waitress at the lunch counter in the Union Depot. When he announced his purpose to marry her, she was working in a restaurant opposite the Michigan Central Depot. The two older daughters frankly admit that when they learned who it was he intended should take the place of their deceased mother they were opposed to the marriage and tried to dissuade him because they felt, from what they had learned of her, she was not the proper person to place over the younger children nor good enough to be their father's wife; that he was badly in debt, not in a financial condition to marry, and the proposed marriage could only result in disappointment and trouble; but when he persisted in the project they acquiesced, and after the parties were married, at Windsor, across the river, on April 22, 1903, they visited her in friendly recognition of the new relationship and urged her, as he desired, to come with their father to the family home to live with them. This the newly married couple soon did, and Stotts states the daughters were very nice to him and his wife for a few days, until a demand was made upon them to pay board, when trouble started. His daughters ascribe the trouble which developed to other causes, claiming that the stepmother was not pleased with the ready-made family of her husband, was unkind to the younger children, dissatisfied with the place and surroundings, unaccustomed to and disliked the burden of caring for a household, preferred the downtown district, where she said it was more lively, was

often away large portions of the day, neglected the home and failed to provide or prepare food for the children, was inclined to be severe with the younger members of the family and quarrelsome with the older ones, and by her complaints to and influence over their father disaffected him towards them. It is undisputed that uncongenial conditions soon developed in the family, and Stotts sided with his wife in the disagreements which arose. After remaining there about three months, Stotts and his wife left. He gives as reasons that his children made it uncomfortable, "quarreling night and day with me," and "we left and went downtown, and wanted to keep roomers and make what money we could."

The evidence indicates quite clearly that, in deference to his wife's desires, Stotts planned and prepared to release himself so far as possible from his former family relations and responsibilities, to permanently abandon his former home and its burdens, and go with her where she preferred to live. He had been carrying $3,000 life insurance for years, which, after his first wife's death, he had made payable to his older daughters; the policy being in Elizabeth's possession. He asked her for the policy and said he wanted to make his second wife his sole beneficiary. Elizabeth protested that the younger children should participate to some extent, to which he indicated assent, and she gave him the policy with an understanding that he would make his wife a beneficiary to the extent of $2,000 and Elizabeth $1,000, "to hold for the younger children." He testified that later he made it all payable to his wife. It was agreed the older girls would keep Vera and he would assign his life lease of the property where they lived to Elizabeth. He claimed to have lost the original, and Alberta went to the office of Judge Jeffries, who had prepared it, to obtain a duplicate claimed to have been left with him, but

which he was unable to find; he, however, gave her a blank form and dictated to her the written portion, which she then wrote in pencil. On her return home she wrote the words over in ink, when Stotts signed and dated it as of April 21, 1903; Elizabeth also signing it, and Alberta signing as a witness. In its essentials this copy corresponds with the original, which he claims to have found years later amongst some old papers in his trunk and produced at the hearing. He thereupon executed the following assignment indorsed upon the instrument:

"In consideration of $1.00 (one dollar) I hereby assign and transfer all my right unto and interest in within lease to Elizabeth Stotts.
"Dated July 21, 1903.

"G. E. STOTTS."

On July 23, 1903, Stotts and his wife left the place and established their home elsewhere, taking with them his boy Edward and the adopted girl Jane. They also took substantially all the furniture and household effects. Some unpleasantness developed over this; Elizabeth especially protesting against their taking the piano, which her father had given her, and insisting that if they did she should be paid for her services as housekeeper during the time she had remained at home since her mother's death working without wages. The matter was compromised by the piano being left in consideration of a receipt in full for her wages.

Although prior to his second marriage Stotts had manifested an affectionate interest in the welfare of his children and, as they testify, was kind to them, he thereafter underwent a radical change in that particular. Having relieved himself of and severed all relations with his daughters, within three months thereafter he turned Edward, his only child remaining with him, out of his house and sent him adrift. Edward returned to his sisters, who received and cared

for him as a member of their family, bought him clothing, paid for his nursing, surgical services, and hospital bills during a serious illness, and assisted him until old enough and well enough to support himself. Jane, the adopted girl, remained with Stotts and his wife until 18 years of age, when she left to work out and care for herself. At the time of hearing this case, she was a married woman, apparently pleasantly situated, with a home and family. She appeared as a witness for defendant. Amongst other things, she told of Edward being put out soon after they moved downtown, and said:

"Mrs. Stotts used to strike me once in a while. She had a rather quick disposition, and when she is angry she acts quite angry, and has a pretty good sized temper."

Mrs. Stotts' acrimonious testimony on cross-examination lends color to this view.

For twelve years after plaintiffs had left these premises under the circumstances related and relieved themselves of his children by his first wife, they never visited the family or place, manifested no interest in either, made no claims and recognized none either as to the place or family, and all advances made by the children to be on friendly terms with their father were rejected or ignored. When at different times notified of the serious illness of his two younger children, as the daughters testify, he did not visit them, manifested no interest, and refused to help the older girls in defraying Edward's expenses at the hospital, where he underwent a necessary surgical operation. Of this Stotts testified in one portion of his examination that the older girls had agreed to support those children, and he wanted them to keep their agreement; that after he left he had "no communication with them at all" and did not know of the serious illness of either of the children. He also admitted

that he himself put Edward out of his house and knew that "Elizabeth and Alberta helped him in the hospital and took care of him," stating that he was under no obligations to provide for his youngest child Vera, "because they agreed to support her if I would leave her with them." They did in fact support, clothe, care for, and send her to school for over seven years, until she graduated from the high school and had secured a position, after which she lived with her sisters and paid board until married. Telling of their early experiences after their father left them, she concluded her direct testimony by saying:

"Our struggle was very difficult, and we had a hard time to get along. I am now married, have a happy, pleasant home, and a little baby."

After Alberta had taught successfully for a time, helping Elizabeth in the support of Vera and payments on the place, she married, and for some years she and her husband lived with Elizabeth and Vera, under an arrangement by which they helped make repairs on the house and payments on the property; Elizabeth having some time before assigned to Alberta a half interest in the land contract. In 1908 they all moved from the place, and it was rented thereafter, bringing $18.50 per month rental most of the time. During over 12 years following plaintiffs' hegira under the circumstances shown, his daughters not only relieved Stotts of the care and support of the two younger children, but paid the taxes, insurance, and repairs on the property, and made payments to Mr. Wynne upon the contract as best they could, until it was finally fully paid and the deed ready to deliver to them, when plaintiffs began this suit and restrained delivery by temporary injunction. Wynne testified that he then had the deed made out, and was about to deliver it, when the injunction was served upon

him, and knowing the girls and the family for years, he went to see Stotts about it; but Stotts then asserted his signature to the assignment of the contract to Elizabeth was a forgery, which Wynne knew was false, as he had seen him sign it, and so he refused to talk further with him. This Stotts denied, and admitted executing the assignment of the land contract, but swore that his claimed signature to the indorsed assignment of the life lease to Elizabeth was a forgery. Not only was the testimony otherwise convincing to the genuineness of the indorsement, but when confronted with this signature in connection with several others which he had testified were his, all so arranged that he could not tell to what documents they belonged, he unequivocally identified this signature as genuine and pointed out one of the others as the forgery. His excuse for slumbering upon his claimed rights for over 12 years, and until the land contract had been paid in full, was that he only discovered his lost life lease amongst some old papers in his trunk shortly before he instituted proceedings.

The three propositions upon which he bases his right of recovery are stated in his counsel's brief as follows:

"*First.* The assignment by George E. Stotts to Elizabeth E. Stotts, one day before the marriage, was a legal fraud as to Sarah, thereby depriving her both of a homestead and of dower, and was void as to Sarah Stotts.

"*Second.* The life lease, being in writing, could not be contradicted by parol.

"*Third.* Such life lease, if valid, could not be assigned or surrendered while the premises were occupied as a homestead without the wife, Sarah Stotts, joining in the assignment or surrender."

We discover little force in the first proposition. At the time the contract was assigned to Elizabeth, defendants sustained no family or fiduciary relations

with Sarah. She was not Stotts' wife nor a member of his family. Whatever fraudulent representations he may have made to her as to this property, as an inducement to marry him, it is very evident defendants were not aiding or abetting him, nor in any sense a party to them. In fact, as matters then stood he was unloading upon his daughter a liability which was pressing him, rather than an asset, spurred to do so by Wynne's demand that something be done and a threat to foreclose, coupled with the inducement that leniency might be shown the older daughters, in whom he had more faith than in Stotts.

The proposition that the life lease in writing could not be contradicted by parol is directed to the admission of parol evidence as to the consideration for it. The expressed consideration in the assignment of the contract to Elizabeth, the life lease from her to Stotts, and his surrender of the life lease to her was but merely the nominal sum of one dollar. Defendants were permitted to show against objection that the mutual obligations and considerations for the assignment of the land contract and contemporaneous life lease were that, in anticipation of the family living together in the home, which he was otherwise about to lose, Elizabeth would accept and assume the burden of the contract with Wynne, paying $20 per month thereon and interest, while Stotts on his part would pay her $10 per month to be applied on the land contract, and make necessary repairs on the property. During the three months he remained there with his wife he paid but $10. The consideration for the surrender of his life lease was not only a release from the $10 per month he was to pay, the repairs upon the premises he was to make, and all other burdens in connection with the contract, but from the care, education, support, and maintenance of Vera, as Stotts himself testified. While denying the reassignment of

the life lease, he testifies that, at the time he and his wife moved away:

"The arrangement was, if I left Vera, that they would take care of her and support her and she would be no bother to me."

While the consideration expressed in a written instrument is *prima facie* to be taken as the actual consideration, the rule is well settled by abundant authority that parol evidence is admissible to show that the true consideration was greater than or different from that expressed. That there was a consideration in addition to the nominal one stated may always be shown when material. An examination of the following citations, and others to which they lead, will make clear the rule and reason for it: *Mowrey* v. *Vandling,* 9 Mich. 39; *Colman* v. *Post,* 10 Mich. 422 (82 Am. Dec. 49); *Kimball* v. *Myers,* 21 Mich. 276 (4 Am. Rep. 487); *Trevidick* v. *Mumford,* 31 Mich. 467; *Garton* v. *National Bank,* 34 Mich. 279; *Strohauer* v. *Voltz,* 42 Mich. 444 (4 N. W. 161); *Wood Mowing & Reaping Mach. Co.* v. *Gaertner,* 55 Mich. 453 (21 N. W. 885); *Flynn* v. *Flynn,* 68 Mich. 20 (35 N. W. 817); *Macomb* v. *Wilkinson,* 83 Mich. 486 (47 N. W. 336); *Cook* v. *Curtis,* 68 Mich. 611 (36 N. W. 692); *Cutler* v. *Steele,* 93 Mich. 204 (53 N. W. 521); *Church* v. *Case,* 110 Mich. 621 (68 N. W. 424); *Brown* v. *Smedley,* 136 Mich. 65 (98 N. W. 856); *Ruch* v. *Ruch,* 159 Mich. 231 (124 N. W. 52); *Scovel* v. *City of Detroit,* 159 Mich. 95 (123 N. W. 569); *Blanchard* v. *Ridgeway,* 179 Mich. 491 (146 N. W. 139); *Smith* v. *Maxey,* 186 Mich. 151 (152 N. W. 1011); Jones on Evidence (2d Ed.), § 469; *Velten* v. *Carmack* (20 L. R. A. 101), 23 Or. 282 (31 Pac. 658).

The trial court was not in error in permitting evidence of the true consideration for the instruments involved in this controversy and of the performance

or nonperformance of their obligations by the parties to them.

It is undoubtedly true, as contended by plaintiff, that by an assignment of his life lease in which his wife did not join Stotts could not deprive her of whatever homestead rights she held under it. At the time she married him, he, as the holder of the life lease, was but a tenant of Elizabeth, under an agreement to make repairs upon the property and pay $10 per month to help her make good his former delinquencies on the land contract and save the property. His wife's homestead rights rested on his tenure, and at the time they abandoned the property he had defaulted in his obligations to assist in paying up the contract. A "homestead right" is an artificial estate in land for the protection of the family in possession of it as a home. Its character as such depends upon both possession and actual intention of the parties. Though they may live elsewhere temporarily and, intending to return, retain their homestead rights, "it is largely a matter of continuing intent, and is a fact to be proved like any other fact." *Hoffman* v. *Buschman,* 95 Mich. 538 (55 N. W. 458).

"Where the owner leaves his homestead, it is incumbent upon him to prove an intention to return, since a removal is ordinarily *prima facie* evidence of an abandonment. If the homesteader removes with his family, the consent of his wife will be presumed." 21 Cyc., p. 621.

While living there, Sarah did not like the place, was dissatisfied with the location because too remote and quiet, said she would die if she had to live there, that it was too slow for her, and she wanted to move downtown. That her husband yielded to her importunities, made his plans accordingly, abandoned the place and project of helping pay for it, and they by mutual consent left together with no intention of ever

returning to it as their home, is fairly shown both by what transpired at the time of their departure and their conduct in the years which followed.

The surrender of the life lease to Elizabeth by Stotts' assignment indorsed upon the back without his wife's signature, even if irregular, informal, and without force against her homestead rights, was a part of the program of separation from his children, and all relations with them, and, in connection with other attending facts and circumstances, is at least evidence of an intention on his part to permanently abandon this property and with his wife make a home elsewhere. She was neither forced nor deceived into going, but, on the contrary, was anxious to go. We are well satisfied that the facts and circumstances show an abandonment of this property by them with such intent and purpose for the future that its character as a homestead ceased as to them. Thereafter they remained away and silent for more than 12 years, claiming nothing and doing nothing as to this property until his younger children were of age and out of the way, and the contract upon which he had defaulted fully paid up; then, under such changed conditions, they for the first time seek to assert the wife's homestead rights to the property on the ground that she did not join her husband in the surrender of his lease, which was of doubtful value, and, aside from other considerations, had been more than fully compensated by what his older daughters did in raising and educating his youngest child.

We agree with the trial court in the conclusion that, not only was the burden of Stotts placed upon his daughters by the contract, as its terms are admitted by him, unfair and unconscionable, but that by their subsequent conduct and laches plaintiffs are now estopped from asserting the rights they claim in a

court of equity. *Bovine* v. *Selden*, 155 Mich. 556 (119 N. W. 1090, 130 Am. St. Rep. 579).

The decree of the trial court is affirmed, with costs to defendants.

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

McDONALD *v.* YOUNG.

1. ACTIONS—WAIVER OF TORT—ASSUMPSIT.
   The possession of a second-hand automobile by an automobile dealer originates in contract and not in trespass where he obtains possession lawfully in the course of a contract for the sale of another car whereby credit is to be given for the second-hand car, which is canceled by mutual agreement, and the dealer wrongfully withholds the second-hand car, and the tort may be waived and assumpsit maintained to recover the agreed price of the second-hand car.

2. PRINCIPAL AND AGENT—KNOWLEDGE OF AGENT.
   The knowledge of agents within the scope of their agency is the knowledge of the principal.

3. APPEAL AND ERROR—ELECTION OF REMEDIES—WAIVER.
   Recovery can be had for a tort under the common counts in assumpsit, and if no objection is made to the form of action until after all the evidence is in it will not prevail.

4. ELECTION OF REMEDIES—ASSUMPSIT—TROVER.
   If no objection is made to the form of action in an action of assumpsit to recover a money judgment for the value of a second-hand automobile which defendant has wrongfully retained after cancellation of a contract for the exchange of a new car for the old car, both the question of title and right of possession may be tried as well as in an action

of trover on defendant's denial of ownership and possession.

5. SAME—TRIAL ON MERITS.

There is an election of remedies precluding the bringing of an action of tort based upon the inconsistent theory that defendant was not the owner, but was in tortious possession of a second-hand automobile which he had turned in as part payment in an exchange for a new car, where the contract was canceled by mutual agreement and a deposit returned, and plaintiff maintains an action of assumpsit for the value of the second-hand car upon the theory that defendant became the owner of the car and was liable for the purchase price, and the case is tried on the merits and the judgment in defendant's favor is not appealed from.

Error to Wayne; Murphy, J. Submitted June 27, 1917. (Docket No. 63.) Decided December 27, 1917.

Case in justice's court by John E. McDonald against Mathew A. Young for the conversion of an automobile. There was judgment for defendant, and plaintiff appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Reversed.

Barbour, Field & Martin (*Henry C. L. Forler*, of counsel), for appellant.

Charles L. Mann, for appellee.

STEERE, J. In the spring of 1916, plaintiff, a resident of the city of Detroit, negotiated with an agent of, and contracted to purchase from, defendant, who was in the business of handling Reo and Mitchell automobiles in that city, a new Reo—4 1916 car, the deal being evidenced in writing by the following order:

"Detroit, Mich., May 8, 1916.

"M. A. Young,
"Automobiles
"754-756 Woodward Avenue.

"You are hereby authorized to enter my order for one Reo—4 1916 automobile with regular equipment.

"1 Yale lock; 1 extra casing, tube and cover, for which I agree to pay the sum of eight hundred and seventy-five dollars. Terms: $25.00, and 1914 Reo touring allowed as $435.00 on the signing of this order.

"Balance of four hundred and fifteen dollars ($415.00) when car is ready for delivery.

"Date of delivery, on or about May 20, 1916.

"J. E. MCDONALD,
"Signature of Purchaser.
"1342 E. Lafayette,
"Residence.

"M. A. Young, By F. H. Mutschler."

Mutschler was one of defendant's salesmen, and his authority is admitted. Indorsed thereon appear the words: "Canceled. Deposit returned." At the time this contract was entered into, plaintiff paid defendant the $25. He claimed that about the same time he also delivered through his own authorized agent, or agents, to Mutschler, defendant's authorized agent, the 1914 touring car referred to, which defendant denied. Such claim and denial resulted in this litigation between the parties. Owing, as defendant claimed, to inability of the Reo company to fill its orders promptly, the new car was not delivered to the plaintiff on or about May 20, 1916, and shortly after that time plaintiff commenced to press defendant for delivery. As time went on, he became more insistent, making inquiry by telephone and calling at defendant's place of business, until on June 29, 1916, he visited defendant's place and insisted that something definite be done. Being unable to get any assurances as to when his new car could or would be delivered, he states that he demanded his money back and they came to a definite understanding, that the $25 was returned to him, and he gave back his contract. He then left without saying anything about the 1914 touring car; but in a letter of the same date written by an attorney named Hoffman, of whom he claimed to have bought

the car, a demand was made upon defendant in plaintiff's name for $375, stated as the value of the car which it was claimed had been bought by and delivered to defendant in part payment for the new car according to the written agreement of May 8th. Defendant denied having the car or that he ever owned it.

On July 14, 1916, plaintiff commenced an action in assumpsit, claiming damages of $500 or under, specifying in his bill of particulars that the action was brought to recover "purchase price of one Reo touring car, 1914 model, $435." Defendant pleaded the general issue, and a trial was had in which, it was shown, the testimony of plaintiff and his two principal witnesses, Hoffman and an attorney named Geiger, was in its main features as upon the trial of this case. Apparently that case was tried on its merits, but the ground on which it was then decided is not shown. The concluding entry in the justice's docket states: "I thereupon render judgment in favor of the defendant and against plaintiff of no cause of action." Plaintiff took no appeal from this judgment, but subsequently Hoffman, as plaintiff's attorney, made demand upon defendant for possession of the car, and this action in a plea of trespass on the case was begun in justice's court. A declaration was filed setting up the contract between the parties of May 8th, payment of the $25 and delivery of the 1914 car to defendant under it, his failure to deliver the new car, return of the $25, demand for return of the 1914 car, noncompliance with the demand, and that defendant wrongfully detained, converted, and disposed of it to his own use, to plaintiff's damage of $500, etc. Defendant pleaded the general issue with notice, as special defense, of the former action for nonperformance of "the very same identical promises and undertakings," trial whereof resulted in a judgment from which no appeal was taken, and which

remained in full force and effect. From a judgment in favor of defendant, the case was removed by appeal to the circuit court of Wayne county, where it was retried by jury, resulting in a verdict and judgment in plaintiff's favor for $379.68.

Upon the assignment of error presented here, defendant's main contentions are that the court erred in refusing his request for a directed verdict on the ground that in the former action plaintiff elected his remedy, tried the case on its merits, took no appeal from the adverse judgment then rendered, which stands as *res adjudicata,* precluding him from maintaining this action; and on the further ground that plaintiff is not shown to have owned the car and cannot maintain this action because his tentative purchase of the car from a former owner to turn in as part payment for the new car purchased from defendant was contingent upon the deal for it going through, which by agreement of the parties was canceled.

The first proposition turns upon whether in the former case plaintiff mistook or elected his remedy. That action was in assumpsit, and this is in tort. If he could and did waive the tort he now complains of and sued in assumpsit, he elected his remedy, and the former judgment standing against him precludes this action.

If, as plaintiff claims, defendant had possession of this car and wrongfully withheld it, he nevertheless obtained possession lawfully. The relation of the parties out of which the claimed tort grew had its inception in contract. Defendant's possession did not originate in trespass. In such case, tort may be waived and assumpsit maintained. *Tuttle* v. *Campbell,* 74 Mich. 652 (42 N. W. 384, 16 Am. St. Rep. 652); *St. John* v. *Antrim Iron Co.,* 122 Mich. 68 (80 N. W. 998).

It is urged further in plaintiff's behalf that there was no waiver in the former case, which was a

straight suit on an express contract to recover the agreed price of the old car claimed to have been sold and delivered to defendant according to the terms of a written agreement between the parties, as plainly shown by Hoffman's letter to defendant and the bill of particulars filed in the case; that no demand for the car was made until late in August, 1916, following the former judgment, and no tort was committed until there was a demand and refusal. Plaintiff apparently adopted this theory as to time of the tort subsequent to filing his declaration in this case, for it charges that the car was "wrongfully detained, converted and disposed of" by defendant on or about June 29, 1916, which is the date when the contract was rescinded by mutual agreement of the parties and payment for the car demanded in writing by Hoffman as plaintiff's attorney.

That it was then rescinded in its entirety there can be no question. Plaintiff was annoyed by delay in delivery of the new car, says that they had "sort of made a monkey" of him, and, instead of insisting on performance, he demanded his money back, came to an understanding about it, and when his demand was complied with he surrendered his contract to them. He then made no further claim and left, without mentioning the old car, which he testified on cross-examination he never had possession of, had not paid for, did not know where it was stored, and, when asked if he ever owned the car, said, "I suppose that would be a question." He stated that he agreed to buy the old car from Hoffman, and of the occasion said:

"I wanted to get a Reo car, and they (Hoffman and Geiger) asked me if I would buy this car—if I would I would trade it in, and in that way they would dispose of my car, if I got a new car."

Neither plaintiff nor Hoffman ever had actual possession of this car. It was stored in a garage on Peterboro street belonging to a Mrs. Holmes during the time of these proceedings. As late as August 15, 1916, she offered through her attorney to deliver it to "the proper party" upon payment of $25 storage charges; it having been there for over five months. Prior to May 8th, Geiger had come into possession of the car as part of the assets of a bankrupt concern of which he was trustee and had it stored in Mrs. Holmes' garage, being then responsible to her for the rent. No other party connected with the case as witness or otherwise is shown to have had any business relations with her. Hoffman had bid in the car, on Geiger's suggestion, at an auction sale of the assets of the bankrupt concern; Geiger testified that it was then out of repair, and he continued the rent of the garage intending to have it repaired and then turn possession over to Hoffman. Hoffman apparently had not paid for it, as he testified that on a certain occasion after May 8th he asked Geiger if plaintiff had given him a check for the car, and he said, "No," but he offered to give him a check and he did not take it. Geiger testified on cross-examination:

"I filed a præcipe in the case in justice court and started the suit, and when the case came up I was there as a witness."

Which suit he had reference to is not stated. Some time before May 8th Hoffman decided he did not want to keep the car, and asked Geiger if he knew of any one who might buy it. Geiger introduced him to plaintiff, and it was arranged that he would take the old car at $100 less than the price he was to turn it in for, on the new car. Hoffman and Geiger were present at plaintiff's place when the contract of May 8th was made. They agreed to show Mutschler the car and deliver it to him. Geiger testified that he met

Mutschler the next morning and took him to the door of the garage where this car was stored, unlocked the door, and pointed it out, another car being there also, and handed him the keys of the garage, requesting him to take it away that day, as rent was only paid up to that night, and he said he would do so at a certain time soon. Mutschler testified that he was shown the car and given the key of the garage by Geiger so he could get it, but he did not then go there to get it, and told Geiger he would do so soon; that the sales manager told him to wait until delivery of the new car; that he never took it away, or went back for it, or unlocked the door of the garage; and when the contract was canceled he returned the keys to Mrs. Holmes as directed by Geiger, who had told him he got them from her and to return them when he took the car out.

In any aspect of this case, plaintiff could not recover unless he was entitled to possession of the old car, and he was not entitled to possession of it unless he had legally purchased and owned it, which he with some reason "supposed" would be a question. It was personal property of over $50 in value, which he said he had never paid for or had possession of, did not know where it was, or whether it was ever moved from where it was stored. He had no memorandum in writing of its purchase from Hoffman, and neither of them, so far as shown, from Geiger, who was yet in possession of it when this oral and suggestively contingent bargain was made for plaintiff to buy the old car to trade in on a new one. Conceding that by authorized acts of agency on the part of Hoffman and Geiger a constructive delivery to defendant's agent by Geiger operated intermediately to vest title in plaintiff, their knowledge within the scope of their agency was his knowledge, and they knew what the facts were if he did not.

Demand of payment for the car was made of defendant and refused before either action was brought. There was no room for misunderstanding as to plaintiff's contract for a new car being canceled, or defendant's denial and defense thereafter as to the old car. The object of both suits was the same—to compel defendant to pay for the car. Under the circumstances of this case, the second demand was in fact and purpose a repetition of the first, though made in different form to lay the foundation for a second action, in tort, which might have been tried out under the pleadings in the first, so far as this record discloses. The case was apparently tried on its merits, and no objection to the form of action is shown to have been made. Recovery can be had for a tort under the common counts in assumpsit, and if no objection is made to the form of action until after all the evidence has been introduced it will not prevail. *Boston, etc., R. Co.* v. *Dana,* 1 Gray (Mass.), 83.

Both actions were between the same parties over the same subject-matter, and the object of each was to recover a money judgment for the same property. Both the questions of title and right to possession could have been tried in that action as well as in trover on defendant's denial of ownership and possession. In *Jennings* v. *Sheldon,* 44 Mich. 92 (6 N. W. 96), this court said of an action brought to recover the value of certain stone:

"It was clearly shown that the Dean suit was brought to recover for the value of the stone, and that Sheldon assumed the defense of it. It was immaterial that the suit was in assumpsit. It may be that the circumstances of the taking of the stone were such that assumpsit could not have been supported if objection had been made (*Watson* v. *Stever,* 25 Mich. 386); but the parties were not bound to take that objection, and the title could as well be tried in an action of assumpsit as in one of trespass or trover."

If, as plaintiff asserts, the former proceeding was prosecuted by him through a trial to judgment upon the sole issue and theory that defendant was owner of the car and holden for its purchase price, that claim is totally at variance with his present contention that defendant was not the owner, but in tortious possession. The two positions are inconsistent and contradictory. The assertion of one involves negation or repudiation of the other. Having, as appears by the record, advisedly elected to litigate his contention of ownership upon its merits to a final judgment in the former case, plaintiff is not now in a position to repudiate that contention and treat defendant as a wrongdoer because not the owner. *Nield* v. *Burton,* 49 Mich. 53 (12 N. W. 906); *Farwell* v. *Myers,* 59 Mich. 179 (26 N. W. 328).

The judgment is therefore reversed, with costs, and a new trial granted.

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

FLOKSTRA v. GRAND RAPIDS RAILWAY CO.

1. STREET RAILWAYS—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE.

The driver of a one horse loaded coal wagon which is struck by a street car is not chargeable with contributory negligence where it appears that he was walking on the side of the wagon opposite that from which a street car was approaching from the south on the further track on the street he was crossing, and just between the wagon box

and the horse where he could see, and he made a careful observation just before starting across the nearer track and noted a car coming from the south over a block distant, and, at the rate his horse was traveling, decided he could safely cross, and twice as far, before the car arrived, provided it was run at the lawful speed, and he exercised the judgment of an ordinarily cautious and prudent man under like circumstances.[1]

2. SAME—EXCESSIVE SPEED—QUESTION FOR JURY.
The question of speed of a street car is for the jury where the evidence as to the rate it is going when it strikes a wagon crossing the street is conflicting.

3. APPEAL AND ERROR—DIRECTED VERDICT—REVIEW.
Where an adverse directed verdict is contended for, the testimony introduced by plaintiff is to be taken as true and viewed in the light most favorable to his contention.

4. STREET RAILWAYS—EXCESSIVE SPEED—PRESUMPTIONS.
The driver of a wagon proceeding across a street has the right to assume that the speed of an approaching street car does not exceed that allowed by law.[2]

Error to the superior court of Grand Rapids; Dunham, J. Submitted June 25, 1917. (Docket No. 42.) Decided December 27, 1917.

Case by John Flokstra against the Grand Rapids Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Kleinhans, Knappen & Uhl, for appellant.

Hatch, McAllister & Raymond, for appellee.

STEERE, J. Plaintiff had verdict and judgment against defendant in the sum of $1,300 for damages sustained by him on the afternoon of February 19, 1916, in a collision between a coal wagon he was

[1]On duty to look and listen before crossing interurban electric railway on company's own right of way, see notes in 15 L. R. A. (N. S.) 254; 23 L. R. A. (N. S.) 1224.

[2]On right of driver of vehicle to assume that motorman will give him time to cross track, see note in 5 L. R. A. (N. S.) 1081.

driving across defendant's tracks and one of its northbound street cars. The accident occurred at the intersection of Pleasant street, along which he was driving east, and Lafayette avenue, along which defendant's double track extended north and south.

In asking reversal on a record containing numerous exceptions and various assignments of error defendant's counsel frankly and correctly center on the controlling issue, and say in their brief:

"The different assignments of error present but one legal proposition, which is that the plaintiff's own testimony shows that he was guilty of contributory negligence, and that the trial court should have directed a verdict for the defendant at the close of plaintiff's case and at the end of the trial."

Plaintiff was regularly employed with his single horse and coal wagon at cartage for the owner of a coal yard in Grand Rapids, and on the day in question had been sent to the city gas plant for a ton and a half of coke, which he had obtained, and was driving east along Pleasant street, walking on the north side of his loaded wagon, at the time of the accident. He could not see south over his load, but when just forward of it he had a clear view in that direction between the rear of his horse and the front of the wagon, and says, "I walked just between the horse and coal box, so I could see everything," although admitting that he was sometimes back of the front end of the wagon. He testified that as he came upon Lafayette avenue and approached the double car tracks he looked up and down that street from where he could see along it in both directions, saw no car was in view to the north, and, looking south, between his horse and wagon, observed there was a car coming from that direction over a block away and beyond Sycamore, the next street south of Pleasant, a distance estimated by him at between 500 and 600 feet; that his horse was

then close up to the west car track, and there was no danger in proceeding, for he had time to spare, twice enough time to cross, and "no danger at all when the cars come at a common rate," which he "figured on," and so he drove along, his horse going 2½ or 3 miles an hour, but the car came so that when he looked again it was within about 150 feet of him, and his horse's legs were then over the east track upon which the car ran; that the horse and front wheels passed safely over the east track, but before the wagon cleared it the car struck the back wheels and "knocked every spoke out of the hubs" and "smashed the wagon all to pieces." His further description of the accident relates to the time after he "came to" and was "picked up," in which he described the result of the collision to his person and property as he then and later saw and felt it, which need not be detailed, as no question is raised upon the measure of damages or amount of the verdict, if he was entitled to recover at all.

The negligence charged is excessive and reckless speed, failure to keep the car under proper control and "to operate the same at a careful and reasonable rate of speed," etc.

Defendant's chief contention is that plaintiff by his testimony is shown guilty of negligence in not looking again for the approaching car just before he entered on the east track; his previous observation having been before he drove upon the west track.

Across both tracks and the space between them was less than 15 feet. He had observed and noted the distance away of the approaching car when, as he states it, his walking horse was west of the west track "not more than 2 feet," "just west of the west track," "starting on the track then," and his judgment was that with the car more than a block away running at the common, lawful rate of not more than 15 miles an hour, as he assumed it would, he had abundant time

to cross that 15 feet, and was perfectly safe in proceeding. Even when he looked at the car the second time, within 150 feet of him, he yet thought he would get over safely, because he did not then know it was running very fast, saying, "That is the reason I thought there was no danger."

This is a case of plaintiff looking on reaching a crossing and seeing an approaching car over a block away exercising his judgment upon the safety of attempting to cross, not of failing to look.

The testimony of the motorman, called by defendant, tends in some particulars to justify plaintiff's conclusion that the car was an apparently safe distance away for him to cross had it been running at a lawful rate of speed and under proper control, as he had a right to assume it was. He testifies in part as follows:

"When I was just at the north crosswalk of Sycamore I saw Mr. Flokstra's horse and wagon. His horse's head was headed east down Pleasant street. The horse was not exactly in plain view, but I could see that he was striking straight east and continuing all the time from the first I saw him. He was about 10 feet from the west track when I first saw him. I should judge it was about a minute or a minute and a half from the time I first saw the horse until I hit him. I was then a third of the way from Sycamore street. I saw the horse when his head came across the west rail of the east track, and knew that he had to get across before I got to him or I would hit him. It was about ten seconds from the time when I first saw his head come over the west rail of the east track until I hit him. From the time I first saw the horse until I saw his head cross the west rail of the east track he had to travel about 18 feet."

The conductor of the car, who was in the back vestibule, testified that when he heard the gong and saw the passengers up in front stretching their necks he looked out on the right (or east) side of the car, and

at first did not see anything; "then I saw the head of the horse; then the body; then I saw the whole horse; then the front wheels; and then we hit. We were about a third of the block when I first looked." A witness of defendant who made measurements, testified that the distance from the north line of Sycamore street to the south line of Pleasant is 468 feet. From the west track on Lafayette avenue to the west curb of that street is 11 feet and 8 inches.

The speed of the car between the two streets was squarely an issue of fact for the jury. Fritz, the motorman, who was then running as an extra, testified that he saw plaintiff's coal wagon and horse going east toward the tracks over the west crosswalk on Pleasant street at its intersection with Lafayette avenue as he left Sycamore street; that he was then running about 14½ miles an hour, and cut off his current to coast, as it was down grade; that he was slowing down to stop for passengers waiting at Pleasant street, and when within about 200 feet of that street was going about 7 miles an hour, when he rang his gong and continued slowing down, but did not see or expect plaintiff was going to cross until he was within about 150 feet of him, when it was impossible to stop in time to avoid striking him, and the car struck the wagon "on the rear rim of the front wheel." A witness of defendant named Harris, who was a passenger and estimated the speed at "about 15 miles an hour," testified of the collision:

"The wagon didn't quite clear the track. Another instant and the wagon would have cleared it."

A witness named Van Mourik, a contractor called by plaintiff, who was a passenger on the car, describes the accident in part as follows:

"I went into the front vestibule to smoke just as we turned from Hall street into Lafayette street and continued riding in the vestibule up to the time of the

accident. When we passed Franklin street and turned into Lafayette, I was still in the vestibule. I saw Mr. Flokstra and his wagon as we came along there in the street car. At the time I saw him we were about 700 or 800 feet away from the accident, about two or three lots south of Sycamore street. When I looked down there and saw Mr. Flokstra I was standing pretty close to the entrance of the vestibule facing up to the front of the car. The first time I saw Mr. Flokstra the head of his horse was about in the middle of the street, and at that time the street car was 600 or 700 or 800 feet from the horse, south from it, about two or three lots south of Sycamore street. * * * After we passed Sycamore street the car was going at least 30 miles an hour. I continued to look at the horse and wagon, but I didn't pay much attention to it until we were pretty near up to it. When we got about 250 feet away I saw the horse and wagon were not going to clear the track. Up to that time the motorman had not slackened the speed of his car at all. When I saw the wagon was not going to clear the track, I hollered.

"*Q.* What did you say?

"*A.* 'Stop the car.' * * *

"*Q.* Up to that time had he done a single thing to slacken the speed of that car?

"*A.* No, sir; not that I know of.

"*Q.* At that time when you hollered to him to stop the car did you notice what he was doing, from what you could see?

"*A.* The only thing that I would know there was a fellow standing in the vestibule, and he was talking to him.

"*Q.* Was he able to get the car under control at any time before he hit the wagon?

"*A.* No, sir.

"*Q.* From what you could see?

"*A.* No, sir; no man could get that car under control more.

"*Q.* Why?

"*A.* It was going too fast and we were too close to it when he tried to stop it."

It has often been said, where an adverse directed verdict is contended for, the testimony introduced by plain-

tiff is to be taken as true and viewed in the light most favorable to his contention. The question for decision here is not whether plaintiff was or was not guilty of contributory negligence, but whether the evidence carried that question to the jury.

Plaintiff was driving a horse-drawn conveyance. Accepting his testimony as true, he took careful observation just before starting over defendant's closely adjacent tracks, and saw all there was to see which might threaten his safety. He noted a car coming from the south over a block distant, and at the rate his horse was traveling decided he would safely traverse the short space necessary to make the crossing, and twice as far, before the car would arrive, provided it was running at the customary and lawful speed, which he had a right to assume was the case. If he exercised the judgment of an ordinarily cautious and prudent man under like circumstances, he was not chargeable with contributory negligence.

We think this case falls within and is governed by the principles elaborated in the following decisions and authorities to which they make reference: *Putnam* v. *Railway*, 164 Mich. 342 (129 N. W. 860); *King* v. *Railway Co.*, 176 Mich. 645 (143 N. W. 36); *Prince* v. *Railway*, 192 Mich. 194 (158 N. W. 861); *Travelers' Indemnity Co.* v. *Railway*, 193 Mich. 375 (159 N. W. 528).

The judgment is therefore affirmed.

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

MILLS v. WATERS.

RAILROADS — CROSSING ACCIDENTS — AUTOMOBILES — NEGLIGENCE — QUESTION FOR JURY.

It was a question for the jury whether the driver of an automobile struck at a railroad crossing at night, was guilty of contributory negligence, where it appeared that the freight train which struck plaintiff's car was running backward without lights or signal at the end, that the headlight of the engine was not visible at the crossing, that there was a clear view except for the darkness for half a mile in each direction, and that plaintiff kept looking for trains and did not see any until he had crossed two tracks and was on the third and last one. STEERE, BROOKE, and FELLOWS, JJ., dissenting.[1]

Error to Gratiot; Searl, J. Submitted June 7, 1917. (Docket No. 5.) Decided December 27, 1917. Rehearing denied March 28, 1918.

Case by James Mills against Dudley E. Waters and Paul H. King, receivers of the Pere Marquette Railroad Company, for personal injuries and damages to his automobile. Judgment for defendants on a directed verdict. Plaintiff brings error. Reversed.

Charles H. Goggin, for appellant.

Parker, Shields & Brown (*John T. Mathews,* of counsel), for appellees.

STEERE, J. On November 5, 1915, plaintiff sustained injuries to his automobile and person in a crossing accident at Alma, in Gratiot county, at the intersection of Grover avenue and Superior street, caused by a backing train of freight cars upon defendants' track

[1] As to care required of driver of automobile at railroad crossings, see notes in 21 L. R. A. 794; 29 L. R. A. (N. S.) 924; 46 L. R. A. (N. S.) 702.

striking his automobile. Charging the accident to defendants' negligence, he subsequently brought this action to recover damages, and upon trial a verdict was directed by the court for defendants at the close of plaintiff's testimony, on the ground that he was guilty of contributory negligence in failing to stop, look, and listen before attempting to cross defendants' tracks.

It appears from plaintiff's own testimony that he did not stop his car before attempting to cross, which has been held to be contributory negligence as a general rule; but it is claimed in his behalf that the facts shown here present a recognized exception to that general rule, entitling him to take the verdict of a jury under various authorities cited, *Gorton* v. *Harmon*, 152 Mich. 473 (116 N. W. 443, 15 Am. & Eng. Ann. Cas. 461), and *Van Auken* v. *Railway Co.*, 96 Mich. 307 (55 N. W. 971, 22 L. R. A. 33), being emphasized as particularly in point.

Whether a plaintiff was guilty of contributory negligence is concededly a question for the jury if his testimony, viewed in its most favorable aspect, *prima facie* shows him free from negligence and raises an issue of fact upon that controlling question; and in considering the testimony where a verdict has been directed for defendant the appellate court will only seek to determine whether there is any testimony tending to sustain the burden imposed upon plaintiff to show that he exercised that degree of care and vigilance which a reasonably prudent and cautious man would and should do under like circumstances.

Plaintiff is a farmer, 42 years of age, residing about 3 miles north of Alma. On the day of the accident he had been attending the circuit court at Ithaca, the county seat, where he was serving as a regular juror for the term. While so serving he lived at home, driving to court daily in his automobile. His regular

route was through Alma along Grover avenue, which runs north and south, ending in Superior street just north of where it is crossed by three tracks of defendant. Superior street is the principal east and west business street of Alma, and a main thoroughfare for traffic into Alma from the east and Grover avenue, connecting with it from the south. At this crossing the three tracks of defendant running in a northeasterly and southwesterly direction cross both streets, Superior at an acute angle, and Grover nearly at right angles. The north track is the main line; the two tracks south of it being switch tracks leading to the Michigan Sugar Company's factory, located a short distance to the southwest of the crossing. The two side tracks connect with the main line a little over 280 feet east of the crossing and north of Superior street. From the south rail of the main line in the center of Grover avenue to the south rail of the nearest switch track is 21 feet 11 inches, and to the one farthest south 49 feet. Running from the center of the city easterly along the north side of the railroad to this crossing, Superior street jogs somewhat to the southeast just where the railroad tracks cross it, and then turns more easterly again, running from that point on the south side of the railroad, so that one traveling north on Grover avenue would in passing over the crossing necessarily veer to the west into Superior street when passing over the tracks. Going from the crossing towards his home, plaintiff would turn westerly on Superior street for a short distance, and then north again on a connecting north and south road.

Defendant's line is comparatively straight through this section, and the country sufficiently level that from any point on this crossing a train is visible in daylight for at least half a mile looking east and from a half to three-quarters of a mile looking west. Plaintiff was familiar with the crossing, having passed

over it many times, and had during several seasons crossed it in delivering beets from his farm to the sugar factory.

On the day in question court adjourned shortly after 5 o'clock, and plaintiff started home, accompanied by a neighbor, in his automobile, which was equipped with an electric self-starter, electric lights, service and emergency brakes, and other customary equipment for efficiency. He testified that it was getting dark when they left Ithaca, and he turned on his lights; that coming into Alma from the south on Grover avenue he was running at the rate of about 10 miles an hour, and as he approached the crossing it was so dark he could not see the forms of houses along either side of the street, but could see lights as he drove along, shining from residences and the sugar factory; being familiar with the crossing, he had it in mind, and as he approached it commenced to watch and listen for trains, slowing down his car, partially releasing the clutch with his right foot, and cutting down the feed of his gasoline, so that when he reached the south track he was going at about 4 miles per hour; that Grover avenue, approaching this crossing from the south, is slightly downgrade, so that he was practically coasting, with his car under safe control, and barely enough gasoline applied to avoid being stalled; that under these conditions the wheels and chassis made no noise at all, and the sound of the motor was so slight as not to interfere with his hearing; that he continued to look each way, listening as he looked, saw and heard nothing, crossed the first track yet watching, and, neither hearing nor seeing any sounds or signals or lights indicating an approaching train, continued on. As he came almost to the main track after crossing the two switch tracks, and just as he swung his auto more to the west where the traveled way turned onto Superior street, a man appeared to him

coming from the east on the north side of the main track, who "swung his lantern and hollered 'Stop!'" which was the first plaintiff knew a train was coming, but he was then so near the track he could not do anything. The end car of the train, which was backing slowly, struck his auto just at the rear of the front seat, capsizing and dragging it along for some distance, completely wrecking it, spraining and bruising plaintiff, who fell under it, so that he required the services of a physician and was laid up for some time.

On cross-examination plaintiff testified that the top of his automobile was up, and the wind shield entirely closed; that he had probably slowed down to 5 miles an hour, and, going at that rate of speed, he could stop his automobile with the service brake in 5 or 6 feet; there was a space of 21 feet between the north switch track and main line where he could have stopped in safety and listened without getting out. His engine was making some noise, but not to amount to anything, and his reason for not stopping before going upon the track was:

"I didn't think it was necessary, I guess, * * * because I did not see any train or anything."

He further testified:

"I don't remember that I saw anything after the man called me to stop. I did not see the train at the time it bumped into me, because I was not looking that way; at the time I was looking ahead to see where I was going. * * * As I approached that crossing my lights were shining ahead so that I could see plainly there were three railroad tracks at that crossing. I could not say positively whether I looked east before the front wheels struck the first south rail of the south track. I could not say how many seconds I looked east. I looked the same as a man would look. I could not see anything as I looked to the east there.

I looked back and forth both ways as I was going across there. I couldn't say where the car was when I looked east again after the first time. I will swear that I looked east again. I looked back and forth as I went across there, same as any man would crossing a railroad track where he knows that there is liable to be cars."

It is undisputed that plaintiff's automobile was struck by the rear car of a switch train consisting of a number of gondola cars and an engine which had gone from the sugar factory east on one of the switch tracks, over the crossing to switch onto the main track along which it was backing slowly westward, with no one stationed at the crossing and none of the train crew upon the end car in the direction the train was moving, nor light or signal at that end. It was moving quietly along at the rate of from 4 to 6 miles an hour, with a brakeman walking on the north side of the rear car carrying a railroad lantern, but concealed by the car from any one approaching from the south along Grover avenue. The engine was some distance away, headed eastward, and its headlight reflected in the opposite direction was not visible at the crossing.

Defendant introduced no testimony. Plaintiff called several who happened to be in that vicinity at the time of the accident. While their testimony is to the effect that it was a dark evening, that the train was moving slowly, not making much noise, and not plainly visible, it is not altogether in harmony with his claim that the train could not be seen and heard as it approached the crossing. One witness testified to hearing the engine whistle and others to hearing or dimly seeing the train before the accident. A boy named Ellison, who was selling papers some distance from the crossing, approximated by him at 15 rods, testified that he could just dimly see the train and heard it rumbling as it approached.

It is very evident that, had the brakeman, who was on the ground behind the rear car, been where he ought to have been, this accident could not have occurred, and it is equally evident that, had plaintiff stopped, looked, and listened just before reaching this well-known, to him, danger line of the main track, as has been many times held to be the duty of the driver of an automobile when his vision is obstructed, he would have escaped injury.

That defendant was guilty of negligence by reason of failing to properly guard the rear of its backing train at the crossing there can be no question; but can it be said from plaintiff's own testimony that there was no negligence on his part? The rule of comparative negligence does not obtain in this State. To recover it was incumbent upon him to affirmatively show he exercised due care and was free from any negligence which contributed to his injury.

Plaintiff was familiar with this crossing, and knew frequent switching was going on there at that season of the year during the sugar beet campaign, and that his route took a right angle turn to the west just at this crossing, to be made in part upon the railroad tracks. He states it was so dark as he approached the crossing that he could see nothing, except by artificial light. His own lamps were lit and shining brightly along the highway before him. He naturally knew that watching the lighted way as he drove both diverted his attention from and blurred his vision to objects not in the light. He sat on the left side, driving his auto with the top up and windshield closed. His companion, who was not called as a witness, sat on his right towards the approaching train. His engine was running, and made some noise, which he minimizes. So situated, he says he looked and listened, and could neither see nor hear anything. Others, his own witnesses, who were not so hampered, both heard and

dimly saw the train a sufficient distance away within which he could have stopped in safety had he seen and heard as they did. He testified that his sight and hearing were normal, he was not in a hurry, and could have stopped his car in 5 or 6 feet, but he guessed it was not necessary, preferred to take the chance rather than the bother of stopping to make it sure, and says, "I was depending for my safety on getting across, I guess."

It is urged for plaintiff that the two cases of *Van Auken* and *Gorton* against railroads, *supra*, are particularly in point as precedent, because the controlling elements constituting exceptions to the general rule were there, as here, that the only obstruction to the traveler's view was darkness of the night, the view being clear and unobstructed in the daytime, and, darkness not being a permanent obstruction, plaintiff could see and hear at all times the customary signals required to be given by trains at crossings, upon which he had the right to rely. In the *Van Auken Case*, containing four opinions, two of which are dissenting, Justice HOOKER in a concurring opinion particularly points out that:

"The inference should not be drawn that absence of light excuses negligence."

In the *Gorton Case* it was claimed that defendant ran its train through the country and across highways at 30 miles an hour without any headlight, which the court pronounced "a most unusual thing," saying:

"It is a matter of common knowledge that trains" so running "almost universally have headlights" throwing "a powerful light ahead," which "can be seen, where" no obstructions intervene, "for a great distance."

While certain things said in deciding those cases may tend in the abstract to support plaintiff's argu-

ment, we do not regard them as analogous to this case in their controlling features. They, with other cases of their class relating to accidents where horse-driven vehicles collided with trains, were before this court when the later cases of *Colborne* v. *Railway*, 177 Mich. 139 (143 N. W. 32), and *Sanford* v. *Railway Co.*, 190 Mich. 390 (157 N. W. 38), were decided, in which this court, with abundant precedent, recognized the increased importance under present conditions of the simple and common sense general rule requiring travelers on highways to stop, look, and listen at railroad crossings in its application to automobiles, because of their capacity for great speed, and resultant speed mania, while they can at the given time be controlled and stopped with ease and certainty.

"The proper application of this rule for one driving an automobile is simple, and in concrete cases far less difficult than for the driver of horses." *Chase* v. *Railroad Co.*, 208 Mass. 137 (94 N. E. 377); citing *Hubbard* v. *Railroad Co.*, 162 Mass. 132 (38 N. E. 366).

A wise, general rule as easily observed as this, particularly by automobiles, ought not to be undermined by exceptions in favor of automobile drivers.

The controlling principles involved here are fully discussed, with citation of authorities, and squarely decided, in the *Sanford Case*. Plaintiff's own evidence discloses that he failed to do the one sure thing to avoid accidents, and made chance the guaranty of his safety, neglecting the easily observed duty imposed upon him by law for both his own and others' safety.

The judgment should be affirmed.

BROOKE and FELLOWS, JJ., concurred with STEERE, J.

MOORE, J. I do not agree with the conclusion reached by Justice STEERE. I think the instant case is clearly distinguishable from the cases which he cites, of *Colborne* v. *Railway*, 177 Mich. 139 (143 N.

W. 32), and *Sanford* v. *Railway Co.*, 190 Mich. 390 (157 N. W. 38). In the first of these cases the car of the defendant company was lighted, and the lights could have been seen had the plaintiff looked. In the last of these cases the accident occurred in the daytime, and the obstructions were physical, through which the plaintiff could not see had he looked. In the instant case there was no obstruction to the line of vision. If defendant had done its duty by properly placing its lights, the plaintiff would have seen the approaching train.

In *Van Auken* v. *Railway Co.*, 96 Mich. 307 (55 N. W. 971, 22 L. R. A. 33), MONTGOMERY, J., speaking for the court, said in part:

"Our decisions have settled the law as follows:

"*First.* A railroad track is, in and of itself, a warning of danger, calling upon one about to cross to use his senses, and to look and listen for approaching trains. *Lake Shore, etc., R. Co.* v. *Miller*, 25 Mich. 274.

"*Second.* It is not incumbent in all cases for the driver to stop his team, if the track is clear, and he can safely rely on his sense of sight. *Guggenheim* v. *Railway Co.*, 66 Mich. 158 (33 N. W. 161); *Thomas* v. *Railway Co.*, 86 Mich. 504 (49 N. W. 547); *Richmond* v. *Railway Co.*, 87 Mich. 380 (49 N. W. 621).

"*Third.* As to whether, in a particular case, the driver is justified in relying upon his sense of sight alone, must, we take it, depend upon the circumstances of the case presented. * * *

"In the present case there was no obstruction other than the darkness, which, of course, would not have prevented the plaintiff and her companions from seeing a headlight. The sense of sight was therefore as safe a guide as in the daytime, unless it be held that travelers are guilty of contributory negligence as matter of law in not anticipating that trains will be run in the open country without headlights. We think the law ought not to be so. It is most unusual and extraordinary for this to occur. And we think it should be at least a question for the jury as to whether a traveler is in fault in failing to anticipate and guard against

such an unusual thing as the running of a train without a headlight."

In *Morgan* v. *Railroad Co.*, 162 Mich. 573 (127 N. W. 683), BIRD, C. J., said in part:

"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."

In the case before us the darkness was not an obstruction that would prevent seeing a light in the line of vision, and if the plaintiff took the precautions to which he testified, he would have seen the approaching train, if the trainmen had done their duty by placing proper lights, and no injury would have occurred.

The question of the contributory negligence of the plaintiff should have been submitted to the jury under proper instructions.

The judgment is reversed, and a new trial ordered, with costs to the plaintiff.

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

PELLSTON PLANING MILL & LUMBER CO. *v.* VAN WORMER.

1. EXECUTION—RIGHT TO REDEEM—STATUTES.
   The right to redeem from execution sales is a creature of statute.

2. SAME.
   The right to redeem from execution sale, in the absence of contract, continues during the period fixed by statute, and no longer.

3. SAME.
   The period within which the execution debtor may redeem is fixed at one year from the time of execution sale, by Act No. 314, Pub. Acts 1915, chap. 23, §§ 96, 97 (3 Comp. Laws 1915, §§ 12911, 12912), and is not extended by section 113, giving execution creditors 15 months to redeem.

4. SAME—RIGHT TO REDEEM—EXTENSION OF TIME—VERBAL AGREEMENTS.
   The right to redeem from an execution sale, being a right created by law, the time for its exercise may be prolonged by verbal agreement.

5. SAME—REDEMPTION—STATUTORY RIGHTS—WAIVER.
   The statutory period of redemption from execution sale of one year is waived by a senior execution creditor where, after the expiration of such period, and before any junior execution creditor has acquired any rights, he accepts payment of his judgment.

6. APPEAL AND ERROR—CHANCERY APPEALS—JUDICATURE ACT PRESERVING EVIDENCE EXCLUDED FOR REVIEW.
   The evidence in a chancery case will not be reviewed on appeal where it is not taken down nor returned pursuant to Act No. 314, Pub. Acts 1915, chap. 17, § 5 (3 Comp. Laws 1915, § 12493), relating to the exclusion of testimony by the trial court, and providing that the court may, in its discretion, if the excluded evidence is brief, permit the same to be taken down by the stenographer separate and apart from other testimony and to be returned to the appellate court under certificate of the trial court.

7. EXECUTION—RIGHTS OF JUNIOR EXECUTION CREDITOR—REDEMPTION.
   The levy of a junior execution creditor upon land sold to a

senior execution creditor is upon lands of the execution debtor and not upon the latter's right of redemption.

8. SAME—SUBROGATION—REDEMPTION.
All rights of subrogation to the rights of the senior execution creditor by a junior execution creditor are barred where the senior levy is discharged after the period of one year from the sale and within the 15-months' period by the acceptance of payment from the execution debtor. OSTRANDER and STONE, JJ., dissenting.

9. DAMAGES—SPECULATIVE DAMAGES—CONJECTURAL DAMAGES.
On a bill to set aside a sheriff's deed to an execution creditor, evidence of the loss of profits from the operation of a mill, *held*, too speculative and conjectural to be allowed.

Appeal from Emmet; Shepherd, J. Submitted June 20, 1917. (Docket No. 92.) Decided December 27, 1917.

Bill by the Pellston Planing Mill & Lumber Company against Austin H. Van Wormer to set aside a sheriff's deed, to restrain defendant from entering or remaining on the premises, and for general relief. From a decree dismissing the bill, plaintiff appeals. Reversed, and decree entered for plaintiff.

C. J. Pailthorp, for plaintiff.

Mesick & Miller, for defendant.

FELLOWS, J. December 10, 1914, the sheriff of Emmet county levied on premises of the present plaintiff, situated in that county, to satisfy an execution, theretofore issued out of the circuit court, upon a judgment rendered in justice's court and duly transcribed, in favor of the Rockwell Manufacturing Company. On March 30, 1915, said premises were sold at execution sale to Roy A. Darling, for the sum of $130.14, and a certificate of sale was issued to him; on January 11, 1916, he assigned such certificate to the First State Bank of Petoskey; on March 30, 1916, the bank as-

signed such certificate to Arthur B. Weyant. It is alleged in the bill that at this time $36.05 was paid to the bank by plaintiff; that Weyant furnished the balance of the money and took the assignment as plaintiff's representative, with an understanding that he should hold it for plaintiff's benefit. On June 12th, the amount due was paid to Weyant by plaintiff and he executed a receipt, which we think sufficiently describes the judgment, and which receipt was filed in the office of the register of deeds.

On September 7, 1915, the present defendant recovered a judgment against plaintiff, in the circuit court for the county of Emmet, for the sum of $1,000 and costs, which were taxed at $67.30. On September 16, 1915, execution on this judgment was levied upon the same premises of plaintiff, as was the Rockwell Manufacturing Company's execution, and, it is said, upon others. June 23, 1916, defendant paid to the register of deeds the amount of the Rockwell Manufacturing Company's execution sale, together with interest, and presented to and left with such register all the papers required by section 112, chap. 23, Act No. 314, Pub. Acts 1915 (judicature act, 3 Comp. Laws 1915, § 12927). On July 1st, the sheriff executed and delivered to defendant his deed of the premises, purporting so to do by virtue of the sale on the Rockwell Manufacturing Company execution and the proceedings taken by defendant, and thereupon defendant took peaceable possession of the premises, or at least a portion thereof, in the name of the whole.

This bill was filed to set aside the sheriff's deed, to restrain defendant from entering or remaining on the premises, and for general relief. The regularity of the proceedings, upon which both executions rest, is not assailed. The bill was dismissed and plaintiff appeals.

It is the claim of plaintiff that it had a right to re-

deem at any time within 15 months after sale; that, however, within the year after the sale it made arrangements with Mr. Weyant to advance some of the money needed to take up the Rockwell Manufacturing Company's claim and hold the certificate of sale as security; that it paid, and the holder of the certificate accepted, the full amount of the Rockwell Manufacturing Company's judgment within the 15 months, and before defendant took the steps it did to redeem as an execution creditor; that the sheriff's deed is void and should be set aside and defendant be required to respond in damages for the profits plaintiff might have made during the time defendant possessed the premises.

Defendant insists that the right of the plaintiff to redeem the premises from the execution sale ceased at the expiration of one year from the date of the sale; that thereafter the right to redeem existed exclusively in execution creditors having a levy, and that this right could not be taken away by any arrangement between the judgment debtor and senior execution creditors, or by payment and acceptance of the amount of the senior execution creditor's sale; that, by the proceedings taken by him, pursuant to the statute, he acquired the right as redemptioner to have the sheriff's deed issued to him; that it was in all regards valid and passed title to the premises; that plaintiff is not entitled to the premises, or to any damages for their being withheld.

The right to redeem from execution sales did not exist at common law but is a creature of the statute. An execution debtor has the right to redeem given him by the statute law of this State, and, so far as we have been able to find, by the statute law of all the States in the Union. As distinguished from his right to contract upon the subject of redemption, which we shall discuss later, and speaking only of his legal

right to redeem, such right depends upon legislative action, and is controlled by it. His right to redeem continues during the period fixed by the statute, and it continues no longer. *Youmans* v. *Loxley,* 56 Mich. 197 (22 N. W. 282); *Ross* v. *Mead,* 5 Gil. (Ill.) 171; *Campau* v. *Godfrey,* 18 Mich. 27 (100 Am. Dec. 133); *Cameron* v. *Adams,* 31 Mich. 426. By sections 96 and 97 of chapter 23, Act No. 314, Pub. Acts 1915 (3 Comp. Laws 1915, §§ 12911, 12912), which are the re-enactment of former legislation, this period within which the execution debtor may redeem is fixed at one year from the time when the execution sale was made. By section 113 of the same chapter (3 Comp. Laws 1915, § 12928) it is provided:

"The right and title of the person against whom the execution was issued, to any real estate which shall be sold thereby, shall not be divested by such sale, until the expiration of fifteen months from the time of such sale; but if such real estate shall not be redeemed as herein provided, and a deed shall be executed in pursuance of a sale, the grantee in such deed shall be deemed vested with the legal estate from the time of the sale on such execution, for the purpose of maintaining an action for any injury to such real estate."

By this section the right and title of the judgment debtor to the real estate is not divested until the full time within which both he and execution creditors may redeem, but the period within which his right to redeem exists is fixed by the sections above referred to, and that period is not extended by section 113. The fact that the statutory period within which execution creditors may redeem was fixed at 15 months does not, in any way, modify or change the statutory period fixed within which execution debtors may redeem, but furnishes a reason for the provisions of section 113. It was within the province of the legislature to fix one period for the execution creditor and another for the execution debtor. This it has done. We conclude that

one year, and one year only, is given the execution debtor within which he may enforce his right to redeem.

But it is urged that the execution debtor and the execution creditor may make such arrangements with reference to the redemption of the premises, and may enter into such contracts with reference thereto, as they may see fit, and the contracts are enforceable. If they may contract and bind themselves with reference to the extension of time to redeem beyond the year, may they not, in the absence of an express contract in advance, after the year has expired, discharge the lien, if done before any junior execution creditor has acquired rights in it by taking the steps pointed out in the statute? We think it is clear they may. If parties may validly contract for the doing of a particular thing, they may validly do that particular thing without contracting in advance. The authorities are numerous, and we think substantially uniform, that the execution creditor and the execution debtor may bind themselves by an agreement to extend the time for redemption, and that such agreement does not fail by reason of the statute of frauds. Mr. Freeman, in his work on Executions (3d Ed.), § 316, vol. 3, p. 1859), lays down the rule in the following language:

"So, if any agreement is entered into subsequently to the sale, though by parol, the substance of which is that the purchaser, or other holder of the certificate of sale, will treat it as a mere security, or will give a definite time in which to redeem, it will be enforced. The effect of such an agreement is to prevent any effort on the part of the debtor to redeem within the time designated by the statute; and not to enforce it in his favor, when it had been the means of lulling him into inaction, would be to pervert it into a cruel and fatal decoy. This the courts will not permit, nor will they heed the plea that the contract cannot be received in evidence because within the statute of frauds."

The rule finds support in numerous cases, among

them see the following: *Schroeder* v. *Young,* 161 U. S. 334, 344 (16 Sup. Ct. 512); *Turpie* v. *Lowe,* 158 Ind. 314 (62 N. E. 484, 92 Am. St. Rep. 310); *Vannoy* v. *Martin,* 41 N. C. 169 (51 Am. Dec. 418); *Burt* v. *Gamble,* 98 Mich. 402 (57 N. W. 261); *Smith* v. *Michigan State Bank,* 102 Mich. 5 (60 N. W. 438); *Combs* v. *Little,* 4 N. J. Eq. 310 (40 Am. Dec. 207); *Griffin* v. *Coffey,* 9 B. Mon. [Ky.] 452 (50 Am. Dec. 519). In the last-cited case it is said:

"The right to redeem being a right created by law, the time for its exercise may be prolonged by the verbal agreement of the parties."

If, then, the execution creditor may validly contract to waive the statutory period of redemption we think he may waive it, and does waive it when he accepts payment of his judgment.

There is an allegation in the bill to the effect that the redemption period was extended by an arrangement between plaintiff and Weyant, but the court excluded the evidence to this effect, and it was not taken down or returned pursuant to section 5, chap. 17, Act No. 314, Public Acts 1915 (3 Comp. Laws 1915, § 12493), and is therefore not before us. But, as we have indicated, the case must be controlled by the same theory, whether the redemption was pursuant to the terms of a pre-existing contract, or arrangements then made.

The levy of the defendant was upon the lands of the plaintiff. It was not a levy upon plaintiff's right to redeem, or his right to contract with reference to such redemption. While the second levy is frequently spoken of as a levy upon the equity of redemption, cases which have the question squarely involved hold that the levy is not a levy upon the right to redeem. *Merry* v. *Bostwick,* 13 Ill. 398 (54 Am. Dec. 434), *Hamilton* v. *Hamilton,* 51 Mont. 509 (154 Pac. 717); *Watson* v. *Reissig,* 24 Ill. 281 (76 Am. Dec. 746). Our

statutes on the subject set the matter at rest. It provides that the defendant in the execution may redeem; his devisees, executors, and administrators, his heirs, his grantees, or his vendees of the right may redeem. Section 97, chap. 23, Act No. 314, Pub. Acts 1915 (3 Comp. Laws 1915, § 12912). The right to redeem, therefore, passes by devise, descent, grant, or sale; and this, no matter how many executions have been levied. The parties given the right to redeem may redeem from any or all executions, and the second levy does not take away or create a lien upon such right. It therefore follows that when defendant made his junior levy it was upon the lands of the plaintiff, and not upon plaintiff's right to redeem from the first levy; that right was still free and unencumbered after the levy.

But it is urged that when defendant made his levy he acquired rights of his own; that he acquired the right by taking certain steps to redeem from the senior levy. True, he did acquire such rights, and so long as such senior levy was in existence the defendant, by taking the steps provided by the statute, might become subrogated to all the rights of the senior execution creditor. But he must do this when such rights were in force, before they were extinguished. This he did not do. After they were extinguished by payment, acceptance thereof, and discharged, no lien or rights longer existed and there were no rights to be subrogated to. Defendant had no interest, and could have or acquire no interest in the senior execution until, and unless, he took the steps for subrogation provided in the statute. In the instant case, when those steps were taken, the senior lien and the rights thereunder had been extinguished by payment, and by a payment which, we have shown, could lawfully be made and which operated as a discharge of the lien and the indebtedness secured thereby.

We are unable to find that the plaintiff is entitled to recover damages. The premises have not deteriorated. The claim for damages grows out of prospective profits. We are very doubtful upon this record, whether the mill is in physical condition to do a profitable business. We think that the prospective profits, under the testimony in this case, are too speculative and conjectural to be allowed, within the cases of *Allis* v. *McLean*, 48 Mich. 428 (12 N. W. 640), and *Truman* v. *Machine Co.*, 169 Mich. 153 (135 N. W. 89).

It follows that the decree of the court below must be reversed and one entered here setting aside the sheriff's deed to defendant and vacating the interest of defendant acquired thereby, but not affecting defendant's lien under the execution issued upon his judgment. The plaintiff will recover costs of both courts.

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

OSTRANDER, J. (*dissenting*). The statute provision (Act No. 314, Pub. Acts 1915, chap. 23, § 101, 3 Comp. Laws 1915, § 12916), is that:

"In case the persons entitled as hereinbefore provided, shall omit to redeem the premises so sold, or any part of them, within the year above prescribed, then the interest vested in the purchaser by such sale may be acquired within three months after the expiration of such year, by the persons, and on the terms hereinafter prescribed."

The thing which may be acquired is *the interest vested in the purchaser by such sale.* This interest, "the title of the original purchaser," may be in turn acquired from his vendee or grantee by purchase by any other creditor who might have acquired it originally. Section 106 (§ 12921).

In this case the year expired March 30, 1916. The certificate evidencing the title of the original purchaser at execution sale was then held by Arthur B. Weyant, assignee of the State Bank of Petoskey, which was assignee of the purchaser at the execution sale. Left in his hands, no creditor seeking the right which the statute gave him, the holder of the certificate would have been entitled to a deed from the sheriff, and any junior levy on the premises would have been extinguished. There was no redemption by the owner of the land within the year. In consequence, the interest vested in the purchaser at the sale might thereafter be acquired by the defendant here, and it was acquired. No right of the plaintiff was thereby invaded. Its right to redeem had expired. Undoubtedly, as between the purchaser at execution sale and his debtor, the owner of the land, an arrangement binding them only may be made, extending the time for payment of the debt. If the purchaser, during the year, agrees to accept his money after the year has expired, he ought to be bound. The reasons are stated by Mr. Freeman and set out by Mr. Justice FELLOWS in his opinion. But such an arrangement cannot affect the statute right of a creditor entitled, after the year, *to acquire the interest vested in the purchaser at such sale.* Otherwise, a right created by the statute is taken away by an arrangement between the execution purchaser and his debtor. The reasoning which will so defeat the right of junior creditors when payment of the debt is made after the year has expired will defeat it, if an arrangement to pay, not executed, is made by the execution purchaser and the debtor owner. The reasoning indulged by my Brother FELLOWS cannot be confined to a case in which payment is made after the year and before the junior creditor has exercised his right. The junior creditor's *right* does not depend upon its exercise on a particular day during the three

months' period. His *right* is a right to acquire the title of the original purchaser at any time within three months after the expiration of the year.

In my opinion, the decree below is right and should be affirmed.

STONE, J., concurred with OSTRANDER, J.

RAMSEY *v.* CHILD, HULSWIT & CO.

1. LIMITATION OF ACTIONS—FRAUDULENT CONCEALMENT OF RIGHTS—STATUTES—APPLICABILITY TO LAW AND EQUITY.

   Act No. 314, Pub. Acts 1915, chap. 9, § 20 (3 Comp. Laws 1915, § 12330), providing that when a cause of action is fraudulently concealed from the knowledge of the party entitled thereto, the action may be commenced at any time within two years after discovery of the fraud, applies both at law and in equity, even though the cause of action is based on original fraud.

2. SAME.

   Act No. 314, Pub. Acts 1915, chap. 9, § 20 (3 Comp. Laws 1915, § 12330), was intended not to curtail, but, when applicable, to enlarge, the six-year limit provided by section 13, and applies in an action at law only when it will in fact enlarge it, and hence an action at law is barred in six years from the commission of the act complained of, unless the fraudulent concealment section can be invoked to extend the time, and even then, unless brought within two years from date of discovery of the cause of action.

3. SAME.

   There was no fraudulent concealment of a cause of action of fraud in the sale of the bonds so as to make available the provisions of Act No. 314, Pub. Acts 1915, chap. 9, § 20 (3 Comp. Laws 1915, § 12330), where a purchaser of bonds from a bond house did not receive interest on her coupons at the time they were due and was afterwards informed

that the enterprises were in serious financial straits, and the organization of bondholders' protective associations was urged, and the associations were perfected and she otherwise received information which should have put her on inquiry, since the statute was not designed to help those who negligently refrain from prosecuting inquiries plainly suggested by the facts known.[1]

4. SAME—CONFIDENTIAL RELATIONS—FRAUD—NOTICE.
The fact that the relation of trust and confidence exists between a purchaser of bonds and a bondhouse officer cannot impair the legal effect of notice of fraud in the sale which should have put her on inquiry so as to render available the provisions of Act No. 314, Pub. Acts 1915, chap. 9, § 20 (3 Comp. Laws 1915, § 12330).

5. SAME—PUBLIC POLICY.
Statutes of limitations are based on public policy, are vital to the welfare of society and are favored in law.

6. SAME—DELAY—BAR TO ACTION.
Mere delay extending to the statutory limit is itself a conclusive bar to the prosecution of an action.

Error to superior court of Grand Rapids; Dunham, J. Submitted June 26, 1917. (Docket No. 75.) Decided December 27, 1917.

Assumpsit by Cyanea H. Ramsey against Child, Hulswit & Company for money obtained by fraud and deceit. Judgment for defendant. Plaintiff brings error. Affirmed.

Swarthout & Master, for appellant.

Butterfield & Keeney (*Charles B. Blair*, of counsel), for appellee.

KUHN, C. J. In this case an order was made sustaining a motion to dismiss plaintiff's declaration. The action is assumpsit to recover for alleged fraud and deceit in the sale of bonds, and the motion to dismiss

[1]On effect of running of statute of limitations of request not to sue or agreement not to plead the statute, see notes in 63 L. R. A. 193; 16 L. R. A. (N. S.) 645.

is based upon the ground that the action, as appears from the face of the declaration, is barred by the statute of limitations.

Of the eight specific grounds alleged in the motion to dismiss, the seventh (which relates merely to matters of form) has been withdrawn from the consideration of this court by stipulation of the parties, and the remainder may be classified under two general heads, viz.:

(1) Because it appears that plaintiff paid out her money for the bonds in question more than six years before the commencement of suit, and that therefore the action is barred by the statute of limitations. Act No. 314, Pub. Acts 1915, chap. 9, § 13 (3 Comp. Laws 1915, § 12323).

(2) That the action is barred by the "fraudulent concealment section" of said statute (3 Comp. Laws 1915, § 12330); the claim being that the declaration discloses that plaintiff had the means of discovering and did discover her right of action, or did not use due diligence to discover it, and that the declaration does not sustain the claim that the cause of action was only discovered within six months of the date suit was brought, or at any time within two years prior thereto, nor show when or how the discovery was made, or why it was not made sooner, or that plaintiff, with ordinary care, could not have seasonably detected it, or that the concealment of the cause of action was brought about by any act of defendant, or that it prevented inquiry, but, on the contrary, shows that the defendant informed the plaintiff of all the facts on which the cause of action is based, at least as early as the year 1911.

The substance of the principal allegations of the declaration is as follows: That in the years 1909 and 1910 the defendant corporation, which represented itself to be a bank or investment bank and bond house,

with a capital of a quarter of a million dollars, and maintaining large and expensive offices in Grand Rapids, placed on the market large issues of irrigation bonds of the Denver-Greeley Valley irrigation district and the North Denver irrigation district, in the State of Colorado, and the Big Lost River Irrigation Company, in Idaho. That defendant advertised these bonds extensively and in a manner calculated to deceive unsuspecting people, and particularly women, and urged investors to establish relations of confidence with a bond house of known high standing and consult it regarding investments, in order to secure the benefit of its experience and knowledge, through the mutual confidence thus established. That plaintiff, a maiden lady, upwards of 60 years old, had certain moneys on deposit in the City Trust & Savings Bank, of Grand Rapids, of which one Hugh Blair was cashier up to May 1, 1909, when he became a director and treasurer of the defendant corporation and its agent and manager in charge of the sale of stocks, bonds, etc. That said Hugh Blair was well known and highly regarded by plaintiff by reason both of his business and his family and social connections, and that she confided in and trusted him in business matters. That immediately after his connection with defendant, Mr. Blair began a course of persuasion to induce plaintiff to invest in the bonds of said irrigation districts. That agents and bond sellers of defendant were sent to her home in a distant part of Grand Rapids, and she also began to receive large quantities of circulars and advertisements relative to defendant's irrigation bonds. That representations were made to her verbally by Blair and other officers of defendant, as well as by its bond sellers and agents, and similar representations were made through the advertising matter sent her, concerning the character of the bonds and of the security and the lands upon which they were claimed to

be a lien. These representations all were of a glowing character, and it is the claim of plaintiff that she confided in and relied upon these representations and warranties, and was thereby induced to purchase, and did purchase the following bonds:

On May 20, 1909, bond No. 3376 of the Denver-Greeley Valley irrigation district, face value $500, interest at 6 per cent., semi-annually; amount paid therefor $505.

On November 5, 1909, bond No. 1486 of the Big Lost River Irrigation Company, face value $1,000, interest 6 per cent., semi-annually; amount paid therefor $1,010.

On January 19, 1910, bond No. 1728 of the Big Lost River Irrigation Company, face value $1,000, interest 6 per cent., semi-annually; amount paid therefor $1,010.

On January 10, 1910, bond No. 1522 of the North Denver irrigation district, face value $500, interest 6 per cent., semi-annually; amount paid therefor $505.

That at the time of the making of said representations and warranties, they were untrue, false, and fraudulent, and that plaintiff, confiding in said Blair and defendant and defendant's agents, was deceived and defrauded by them.

The declaration further sets forth: That the *defendant* paid one or two of the first group of coupons maturing on plaintiff's bonds, but that the interest coupons due December 1, 1910, on the bonds of the two Colorado companies and those due January 1, 1911, on the bonds of the Idaho company were not paid when due, and though plaintiff demanded payment of same, that defendant has neglected and refused, and plaintiff has been unable to secure payment. * * * That during the six months preceding the commencement of this action, plaintiff learned that none of the irrigation projects was ever completed, the lands were never settled, the irrigation works never constructed, no farmers were living on the lands to pay taxes and none could be collected, the projects were bankrupt and

out of business, and that the bonds and interest thereon were entirely worthless. Further, that the lands and works were not free from prior liens, but subject to prior mortgages amounting to upwards of $1,000,000, on which default had been made and foreclosure threatened, and that there were claims for construction liens, amounting to $1,000,000, on which foreclosure proceedings had been instituted.

After stating that, until the early part of 1911, plaintiff had no intimation that said bonds or the interest would not be promptly paid according to their terms, the declaration sets out a series of notifications by defendant and others to plaintiff, beginning in the early part of 1911, which admitted the serious difficulties in which the irrigation project then found itself by reason of financial and other troubles on the part of the great irrigation systems on which the districts covered by these bonds depended for water supply, and urged the organization of "bondholders' protective committees" in connection with both the Colorado and Idaho enterprises, and after such organization was effected, further communications from defendant and from the committees (of one of which Ralph S. Child, vice president and director of defendant, was a member) urged plaintiff to deposit her bonds with said committees, assuring plaintiff that work already done "removes all probability of complete failure of the project;" that plaintiff did deposit her Idaho bonds, the deposit being made with the defendant, and her receipt therefor being signed by Child, vice president; that the committees asked for funds to complete the project, held out the hope that the principal of the bonds and possibly some of the interest could be saved, and one communication from the Chicago Title & Trust Company assured plaintiff "that the only penalty to be suffered by those who are unable to protect their present investment by taking some of the new bonds is the

loss of interest on their present bonds until after January 1, 1914;" that plaintiff accepted as true the statements and advice of Blair to her during 1911, as she alleges, up to the time in said year when he left Grand Rapids to take up a permanent residence in California, to the effect that the companies would soon pay their interest, and that she relied on his statements and was thereby lulled to sleep and did not take other counsel or advice nor make investigation of the complicated matters and explanations contained in the communications received by her, and never understood the meaning of same nor the status of the irrigation matters until within the six months immediately preceding suit, when she learned that all of the projects had failed and her bonds were worthless. The theory of the declaration is stated to be that the formation of the bondholders' protective committees and the procedure taken was designed to prevent plaintiff from investigating the complicated situation, and further that the whole scheme was devised by defendant and Trowbridge & Niver Company and others "for the purpose of foisting these spurious issues of bonds on the unsuspecting public;" that the bondholders' protective agreements were a part and a continuance of the fraud, devised to keep the bondholders from bringing suits, and that this conduct has worked an estoppel against defendant, preventing it from pleading the statute of limitations, and has given to the original fraud and deceit a continuing character whereby defendant is deprived of the protection of the statute prior to the discovery of the fraud by plaintiff, which she claims occurred within the six months immediately preceding suit.

A second and third count are added to the declaration, the only variation in which that appears to call for special consideration as bearing on the questions involved in the motion to dismiss is that they allege in

the alternative that defendant *warranted* the bonds and their securities and the conditions surrounding the issuance. These are followed by the common counts, and a bill of particulars was filed showing the exact dates of the plaintiff's purchases of bonds and the dates and amounts of unpaid interest installments.

After a hearing of the motion to dismiss, the court below filed a finding that the motion must be granted and entered an order giving plaintiff leave to amend her declaration within 15 days, in default whereof the declaration to be dismissed. After the expiration of the 15 days, plaintiff having failed to amend her declaration, final judgment was entered dismissing the suit.

The question before us depends for its solution chiefly upon the construction to be placed upon the Michigan statute of limitations. The gravamen of plaintiff's action is that she was induced by the defendant to purchase the four bonds in question through certain alleged false and fraudulent representations. The first of said bonds was bought on May 20, 1909, and the last one January 19, 1910, and this suit was commenced October 7, 1916. Section 13 of chapter 9 of the judicature act (Act No. 314, Pub. Acts 1915, 3 Comp. Laws 1915, § 12323) is as follows:

"All actions in any of the courts of this State shall be commenced within six years next after the causes of action shall accrue, and not afterward, except as hereinafter specified."

Under the ordinary rule, plaintiff's cause of action accrued upon the purchase of the bonds, and if this section governs, clearly her action is barred.

The learned counsel for the appellant, however, have argued at some length, and cited many authorities claimed to sustain their position, that where fraud is charged as the foundation of a suit, the statute of limitations begins to run, not from the date of the commission of the fraud, but from the time the fraud is

discovered. The question when the statute begins to run in such cases is one as to which there has been much confusion and conflict of authority. The strict rule formerly obtaining in courts of law was that in all such cases the statute began to run from the time when the fraud was perpetrated. But it has long been the rule in equity that where relief is sought from a *fraud concealed from the complainant,* being himself free from neglect or fault in failing to discover the fraud, the statute begins to run from the time the fraud is discovered. In the absence of such concealment, however, equity usually followed the same rule as courts of law, and indeed some courts of equity applied the rule at law even to cases of concealed fraud, when the fraud was discovered a reasonable time before the expiration of the statutory period from the date of the fraudulent act. On the other hand, courts of law in a number of jurisdictions began to show a tendency to adopt the equitable rule, and early decisions may be found in both State and Federal courts to the effect that a replication of concealed fraud is a good answer to a plea of the statute of limitations. This doctrine, however, was by no means universal. As a result of the conflicting decisions, many of the States undertook to settle the question in their respective jurisdictions by statute, and the equitable rule above referred to has been embodied, in varying form and with greater or less scope of application, in the statutes of many of the States, most of which make the rule applicable at law as well as in equity. Michigan has long had such a provision, which, in its present form, appears as section 20 of chapter 9 of the judicature act (3 Comp. Laws 1915, § 12330) and is as follows:

"If any person who is liable to any of the actions mentioned in this chapter, shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at

any time within two years after the person who is entitled to bring the same shall discover that he had such cause of action, although such action would be otherwise barred by the provisions of this chapter."

This statute applies both at law and in equity. It will be observed that the legislature did not see fit to adopt the equitable rule to the full extent of allowing the six-year limitation period to be considered as beginning at the date of discovery of the cause of action, but chose rather to allow a period of two years from date of such discovery within which to bring suit, as a special right, when by the strict terms of the general rule the action would be barred before the expiration of such two-year period. Under the two sections above quoted, a plaintiff now has, in any case, the full period of six years from the date of the fraudulent act, or other act creating his cause of action, within which to institute suit, and moreover, where the defendant has fraudulently concealed from him his cause of action, he has, under any circumstances, not less than the full period of two years from date of discovery in which to bring his action.

The latter section of the statute was intended not to curtail, but, when applicable, to enlarge, the time for action limited by the former, and it applies only where it will in fact enlarge it. Without attempting to discuss what may still be the inherent power of a court of equity in Michigan *in exceptional cases* to go beyond the terms of the statute, even as modified, and on equitable grounds to grant additional relief, it is certain that in a suit at law the statutory provisions govern and an action such as the present is barred in six years from the commission of the act complained of, unless the fraudulent concealment section can be invoked to extend the time, and even then, unless brought within two years from date of discovery of the cause of action.

Counsel for appellant insist that section 20 does not

apply to cases where *fraud is the ground of action,* but only where some *other cause of action has been fraudulently concealed,* and that therefore in actions based on original fraud the equitable rule allowing six years from date of discovery of the fraud applies. It is a sufficient answer to this contention to say that this court has consistently applied the rule of section 20 to cases where fraud is the ground of action (see *Tompkins* v. *Hollister,* 60 Mich. 470 [27 N. W. 651]; *Stebbins* v. *Patterson,* 108 Mich. 537 [66 N. W. 484]; *Allen* v. *Conklin,* 112 Mich. 74 [70 N. W. 339]; also *Purdon* v. *Seligman,* 78 Mich. 132 [43 N. W. 1045]; *First Nat. Bank of Ovid* v. *Steel,* 146 Mich. 308 [109 N. W. 423], as have also the courts of other States in the application of similar statutes (see *Walker* v. *Soule,* 138 Mass. 570; *Brackett* v. *Perry,* 201 Mass. 502 [87 N. E. 903]; also *Wood* v. *Carpenter,* 101 U. S. 135 [Indiana statute]).

But appellant further claims that her declaration does in fact show a fraudulent concealment from her of her cause of action until within six months prior to the commencement of suit, and that if section 20 does apply, her action is saved thereby. In support of this claim counsel insist: *First,* that where fraud is the *gravamen* of the action, mere silence will toll the statute; and, *secondly,* that the alleged payment by defendant of the first group of coupons on the bonds, the subsequent correspondence leading to the formation of the bondholders' protective committees and the proceedings and communications of said committees, together with the advice and explanations of defendant through Mr. Hugh Blair and others, were acts amounting to a fraudulent concealment from plaintiff of her cause of action. Under our view of the law above announced, it is unnecessary to discuss the effect of the payment of the first interest coupons, because both the period of six years from the purchase of the bonds and the period of two years from the first default in

payment of interest had expired before this suit was begun, and plaintiff's action would be barred under the provisions of either section. An analysis of the notifications and proceedings relative to the bondholders' protective committees does not impress us that they were designed, or could have had the effect to *conceal* the cause of action, but rather to *reveal* it. The effort seems to have been to induce plaintiff, notwithstanding the ground for action revealed, to hold to her investment and take her chances in the ultimate outcome. This is by no means concealment. In view of the condition of affairs disclosed by the communications received by plaintiff beginning in the early part of 1911, even the statement in the letter of the Chicago Title & Trust Company of May 29, 1911, that "the only penalty to be suffered by those who are unable to protect their present investments by taking some of the new bonds is the loss of interest on their present bonds until after January 1, 1914," and the assurance claimed to have been given her by Hugh Blair in 1911 that "the companies would soon pay their interest" (upon which statements considerable stress has been laid), cannot reasonably be held to amount to a concealment of the fact that the original representations were untrue. To assure her that her loss would be small certainly does not tend to conceal the fact that the prior positive representations as to the absolute security of the bonds were false. We think the disclosures made to plaintiff in 1911, as set forth in the declaration, coupled with failure to receive the interest due on her bonds in December, 1910, and January, 1911, to say the least, should have put her upon diligent inquiry.

"The statute was not designed to help those who negligently refrain from prosecuting inquiries plainly suggested by facts known." *First Nat. Bank of Ovid* v. *Steel*, 146 Mich. 308 (109 N. W. 423); citing *Purdon* v. *Seligman*, 78 Mich. 132 (43 N. W. 1045).

Appellant's counsel raise the further point that the declaration shows a relation of trust and confidence between plaintiff and defendant; that there was accordingly a duty resting upon defendant to disclose the true state of facts to plaintiff; and that in such case mere silence, unaccompanied by any affirmative act of concealment, will prevent the running of the statute until discovery. It is true this court has taken a liberal view as to what constitutes a relation of trust and confidence in such cases. *Tompkins* v. *Hollister*, 60 Mich. 470 (27 N. W. 651); *Comfort* v. *Robinson*, 155 Mich. 143 (118 N. W. 943). There is also some authority for holding, under certain circumstances, that such a relation may exist with a corporation because of a special trust and confidence in an officer thereof. But under the circumstances of this case, we do not see how the establishment of such a relation can alter the result. It is not here a mere case of silence when there was a duty to disclose. We have already held that plaintiff had actual notice of the fraud, or at least such information as should have put her on active and earnest inquiry, and we do not think that the relation of confidence claimed in the declaration can be held to impair the legal effect of that notice. There were no such special circumstances as were present in the case of *Comfort* v. *Robinson, supra,* and the situation is not analogous.

We do not think there is merit in the contentions of the counsel for appellant as to the effect of the allegations of warranties made in the declaration. A careful consideration of this aspect of the pleading fails to disclose anything that can be fairly construed as a valid warranty *in futuro*, as to which a cause of action accrued within the limits of the statutory period. Nor has any explanation been advanced as to the case intended to be set forth in the common counts attached to plaintiff's declaration that seems to present any

meritorious reason why the order dismissing the declaration should not be sustained.

While regretting the situation in which appellant now finds herself, we cannot escape the conclusion that Miss Ramsey, if not with positive knowledge of the falsity of the representations which she claims induced her to make her unfortunate investment, at least with an abundance of information which should have led to a prompt investigation, slept on her rights and chose rather to await the results of the efforts of the committees to save for the bondholders at least a portion of the face of their bonds; and that having been disappointed in the outcome of the course she elected to pursue, she now brings a belated action and seeks to induce the court to relieve her from the situation in which she finds herself by her own negligence. We think the attitude of the courts on this subject is well expressed in the following language of Justice Swayne of the Supreme Court of the United States in the case of *Wood* v. *Carpenter,* 101 U. S. 135:

"Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay extending to the limit prescribed is itself a conclusive bar. The bane and antidote go together."

Under our view of the law as above stated, we are unable to find that plaintiff's declaration sets forth any cause of action that is not barred by the statute of limitations, and the judgment must therefore be affirmed, with costs to the appellee.

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

HARRISON *v.* GRIER.

1. BILLS AND NOTES—ACTION—DEFENSES—BONA FIDES.
Unless the subsequent purchaser of a note establishes that he is a *bona fide* holder thereof, the note is open to the defenses available as between the original parties.

2. SAME—EVIDENCE—QUESTION FOR JURY.
Evidence *held*, to present a jury question as to whether plaintiff was a *bona fide* holder of the note sued on.

3. EVIDENCE—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.
The credibility of testimony and the force to be given to it are questions for the jury.

4. TRIAL—INSTRUCTIONS.
In determining whether there is error in a court's charge, the charge must be considered as a whole.

5. APPEAL AND ERROR—QUESTIONS NOT RAISED ON TRIAL.
The question of what law governs the contract involved may not be raised for the first time on appeal.

Error to Wayne; Murphy, J. Submitted October 4, 1917. (Docket No. 9.) Decided December 27, 1917.

Assumpsit in justice's court by Charles W. Harrison against John A. Grier on a promissory note. There was judgment for plaintiff, and defendant appealed to the circuit court. Judgment for defendant. Plaintiff brings error. Affirmed.

James G. McHenry, for appellant.

Earl Lovejoy, for appellee.

FELLOWS, J. The Lyon-Taylor Company was a copartnership located at Iowa City, Iowa. Its traveling salesman called on defendant, a druggist, and a contract or order was signed, similar in its essentials to

the contract involved in the case of *Boston Piano & Music Co.* v. *Seckinger, ante,* 312 (164 N. W. 263). Attached to the contract so that it could be detached was a note for the purchase price.

Charles W. Harrison, the plaintiff, claims to be an accountant. He lives at Iowa City, Iowa. He claims to have loaned to the Lyon-Taylor Company $1,000 upon a note not produced in evidence, and to have taken defendant's note as a part of the collateral security for this loan. He claims to be a holder in due course.

Defendant makes the same defense to the contract as was considered in the *Seckinger Case,* and insists that plaintiff is not a *bona fide* holder of the note. The trial court held that the contract was void and unenforceable between the original parties, and submitted to the jury the question of whether plaintiff was a *bona fide* holder of the note. There was verdict and judgment for defendant, and plaintiff brings the case here.

The court was correct in holding that the contract was unenforceable between the original parties. The question is ruled by the *Seckinger Case.* We there held a similar contract was void; that, while not a lottery, strictly speaking, it had all the vices, all the appeals to cupidity, all the seductiveness of a lottery, was contrary to public policy, and unenforceable between the original parties. Unless plaintiff established that he was a *bona fide* holder of the note, it was open to the defenses between the original parties. *John Schweyer & Co.* v. *Mellon,* 196 Mich. 590 (162 N. W. 1006).

Plaintiff insists that he has so conclusively established his *bona fides* as that the court should have taken this question from the jury and directed a verdict in his favor. We cannot agree with this conten-

tion. A reading of the 28 pages of plaintiff's cross-examination clearly demonstrates that there was ample testimony falling from his own lips to justify the jury in finding not only that he took this note in bad faith, but that his taking of this and other notes from the Lyon-Taylor Company was a part of the scheme of that company, and a method adopted by the company to enforce collection of notes given on these unenforceable contracts.

We do not pass on the credibility of this testimony or what force should be given it. These were questions for the jury. Nor can we, without being unnecessarily prolix, undertake to detail it. Suffice to say that, among other things, he admitted, on cross-examination, that for several years before he took this note he did the auditing work of the Lyon-Taylor Company and its allied companies, that for several years he had been taking customers' paper of that company, and that he had lawsuits, not infrequent, growing out of such paper in which defenses were made. We think it was for the jury to determine whether he did not learn what the business of the company was when he audited it, or become conversant with its *modus operandi* from the several lawsuits he had growing out of its customers' paper. When somewhat hard pressed, he admitted that the money loaned the company was not his money, but belonged to other parties, but declined to state who they were, and refused to produce the note given at the time of the claimed loan, claiming that it was privileged. It is not pointed out wherein the transaction partook of that sanctity which surrounds the confessional, or communications between physician and patient, or attorney and client, so as to be shielded by the cloak of privilege which encompasses them. Without going further into detail, let it be said that the court did not err in submitting this

question to the jury upon all the facts found in this record.

Error is assigned upon excerpts from the charge. Excerpts from a charge must be considered in connection with what precedes and what follows them. The charge must be taken as a whole. When so taken and so considered, we think the rights of the plaintiff were fully protected in the instant case. The jury was told that suspicion that something may be wrong was not sufficient to defeat recovery; that facts upon which knowledge or notice were claimed must be brought home to plaintiff; that defendant was entitled to a verdict if plaintiff was a holder in bad faith, and plaintiff was entitled to recover if a holder in good faith. These thoughts were elaborated upon in a charge which could not have left the jury in doubt as to the legal rights of the parties. Such requests as plaintiff was entitled to have given were either given as requested or covered by the general charge.

Plaintiff further claims that the contract is an Iowa contract, and must be governed by the laws of that State. We are unable to find that this question was raised in the court below, and therefore find it unnecessary to discuss it.

No error to the prejudice of the plaintiff appearing in this record, the judgment is affirmed.

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

FLAX *v.* MUTUAL BUILDING & LOAN ASSOCIATION OF BAY COUNTY.

1. MORTGAGES — FORECLOSURE BY ADVERTISEMENT — CONFLICTING EQUITIES—EQUITY.

   A statutory foreclosure is not adapted to cases where there are conflicting equities; such equities can be properly considered and protected only in a court of equity.

2. SAME.

   Whether there are conflicting equities in the matter of the foreclosure of a building and loan association mortgage by advertisement involves the entire question.

3. BUILDING AND LOAN ASSOCIATIONS—MORTGAGES—FORECLOSURE—STATUTES.

   Section 10007, 2 Comp. Laws 1915, does not forbid the foreclosure of a building and loan association mortgage by advertisement, and such right of foreclosure is expressly granted by the general statute, 3 Comp. Laws 1915, § 14949, relating to foreclosures by advertisement, where there is a power of sale.

4. SAME—MORTGAGES—FORECLOSURE—ACCOUNTING.

   On the foreclosure of a building and loan association mortgage there is no more necessity for an accounting than in any other case where money is borrowed and partial payments made from time to time.

5. SAME.

   It is a question of fact whether, on foreclosure of a building and loan association mortgage by advertisement, contiguous pieces of land should have been sold as one parcel.

6. SAME.

   Under the evidence and the statutes, *held*, that the separate sale of contiguous pieces of land, under foreclosure of a building and loan association mortgage by advertisement, was proper.

7. SAME.

   The notice of foreclosure sale by advertisement under a building and loan association mortgage and the sheriff's deed covered both the land and its appurtenances and were sufficient to include an easement appurtenant to the land without a specific sale and description thereof.

8. MORTGAGES.
The fairness and good faith of a foreclosure sale under one mortgagor by advertisement is not impeached because no information was given of prior mortgages at the sale, where the mortgages were all of record.

9. SAME—FORECLOSURE BY ADVERTISEMENT—NOTICE.
A notice of foreclosure sale by advertisement need not allege the existence of prior mortgages.

10. SAME.
Where a bill attacking a foreclosure sale by advertisement under a building and loan association mortgage does not ground the claim, that the amount stated in the notice of sale was excessive, on improper methods of computation, the trial judge may, within his discretion, permit submission of sworn computations by counsel on argument.

11. SAME—FORECLOSURE—MAXIMS—APPLICABILITY.
The maxim *"de minimis non curat lex," held,* applicable to a claim that the amount stated in the notice of foreclosure sale under a building and loan association mortgage was excessive.

12. SAME—FORECLOSURE—EXCESSIVE CLAIMS—BONA FIDES.
Excessiveness in the amount claimed in the notice of foreclosure sale by advertisement will not necessarily invalidate the sale, provided the claim is made in good faith.

13. SAME—FORECLOSURE—REDEMPTION—EXTENSION OF TIME.
Where the period of redemption has not expired at the time of the filing of a bill to set aside a mortgage foreclosure sale by advertisement, and it is extended by stipulation until 30 days after the decree in the trial court, the right to redeem will expire at the end of the 30-day period if the mortgage sale is not set aside as void.

14. USURY—INTENT.
To constitute the charge of usury, there must be an intent to do something which is in violation of the statute.

15. SAME—BUILDING AND LOAN ASSOCIATIONS—MORTGAGES—TAXATION—EXEMPTION.
A building and loan association mortgage which bears interest at the highest permissible rate is not usurious because of a provision that the borrower shall pay any

tax assessed upon it, such provision being mere surplusage, in view of 2 Comp. Laws 1915, § 10011, exempting such mortgage from taxation.

16. SAME.

Mortgages held by building and loan associations are exempt from taxation under 2 Comp. Laws 1915, § 10011.

Appeal from Bay; Coumans, J. Submitted June 11, 1917. (Docket No. 34.) Decided December 27, 1917.

Bill by Charlotte Flax against the Mutual Building & Loan Association of Bay County to set aside the foreclosure of a mortgage, and for an accounting. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Frank S. Pratt (*Cooley, Hewitt & Wixson*, of counsel), for plaintiff.

T. E. Webster (*F. W. DeFoe*, of counsel), for defendant.

STONE, J. This case is in this court upon the appeal of the plaintiff from a decree dismissing her bill of complaint. By her bill filed September 9, 1914, she avers:

That on April 30, 1900, she was the owner of several parcels of land in Bay City, described as follows: Parcel No. 1, lot No. 1, of block 4, Jennison's Second addition; parcel No. 2, lot No. 3, of block No. 165, late Portsmouth; parcel No. 3, being a part of lots 3 and 4, block 50, plat of Lower Saginaw, as represented upon the accompanying plan attached to plaintiff's brief, which, while not in evidence, fairly shows the parcels composing what is called the laundry property; together with the perpetual use and right of way, in common with the other occupants of said lots 3 and 4, in and to the private way extending along the west

end of said land and on the southerly 12 feet of lot 4; parcel No. 5, lot No. 9, of block No. 14, Fraser's First addition; parcel No. 6, lots 6 and 7, of block 47, Daglish division of Portsmouth.

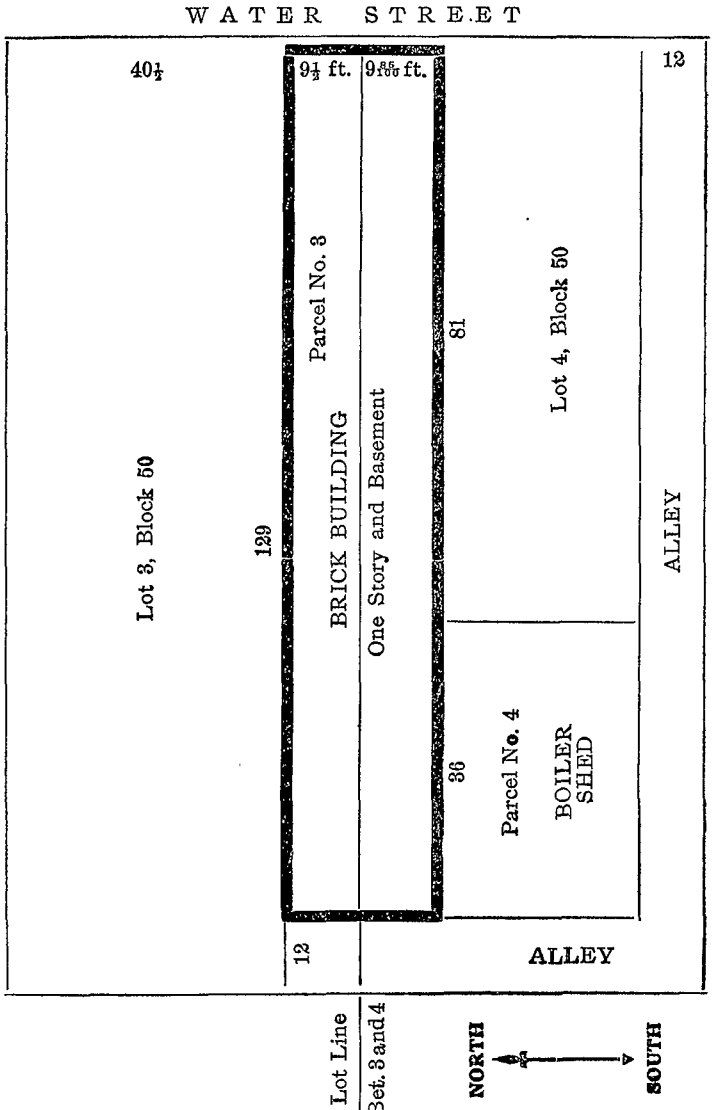
That in April, 1909, plaintiff purchased parcel No. 4 as represented on said plan, together with the perpetual use and right of way as above stated. The several descriptions of land will hereafter be referred to by the parcel numbers, as above stated.

That said parcel No. 3 had upon it a one-story and basement brick building erected by plaintiff, and which for a long time previous to plaintiff's purchase of parcel No. 4 had been used and occupied by her as a laundry, and it became expedient to acquire said parcel No. 4 for use in said business, in connection with parcel No. 3, and that after said purchase, the two parcels were occupied and used as one parcel by plaintiff in said business.

That commencing in April, 1900, plaintiff from time to time negotiated certain loans from defendant, and secured the same by mortgage on said land as follows:

No. 1, mortgage, dated April 30, 1900, on parcels Nos. 5, 1, 2, and 6 for	$2,000
No. 2, mortgage dated June 15, 1900, on parcel 3	2,500
No. 3, mortgage dated March 11, 1903, on parcels 2, 3, 5, and 6 for	200
No. 4, mortgage dated March 4, 1904, on parcels 1, 3, 5, and 6 for	300
No. 5, mortgage dated September 28, 1904, on parcels 1, 3, 5, and 6 for	300
No. 6, mortgage dated March 9, 1905, on parcels 1, 3, 5, and 6 for	200
No. 7, mortgage dated October 7, 1905, on parcels 1, 3, 5, and 6	200
No. 8, mortgage dated February 14, 1906, on parcels 1, 3, 5, and 6 for	300
No. 9, mortgage dated June 29, 1907, on parcels 1, 3, and 5 for	1,500
No. 10, mortgage dated April 22, 1909, on parcels 1, 2, 3, and 4 for	825

The following is a rough plan showing the lay of the two parcels comprising the laundry property. It is not drawn to scale, but is relatively in proportion.



All of said mortgages except No. 1, in addition to the land, covered by apt description all of the fixtures and fixed and movable machinery, tools, and appliances in the building on parcel No. 3 used in plaintiff's laundry business.

That with each of said several mortgages plaintiff subscribed for a certain number of shares of capital stock of said defendant, executed to said defendant the usual obligation or bond, and she received from it a passbook in the usual form for the entry of payments on each of the several stock subscriptions and mortgages.

The bill avers that about January 1, 1908, upon inquiry, she was informed by defendant that the balances then owing upon all of said loans theretofore made amounted to $4,085.38, and that about April 17, 1911, she was furnished by defendant with a statement that the total amounts then owing by her upon the four mortgages then remaining unpaid amounted to $2,905.37 on January 1, 1911. The plaintiff states that she made the usual weekly payments in the way provided for the repayment of loans by defendant, until the latter part of 1913, at which time she stopped making payments, because she became convinced that many payments which she had made had not been properly credited to her, and because she was informed at that time by defendant that her total indebtedness upon said mortgages was about $3,000, that in the meantime she was informed by the defendant that the said mortgages Nos. 3, 4, 5, 6, 7, and 8 had been paid in full, and that she surrendered to defendant the passbooks issued to her upon said loans, and that the same were then in defendant's possession.

Plaintiff further stated that since the making of mortgage No. 1 she had sold all of the real estate owned by her and above described, excepting parcels Nos. 1, 3, and 4, and that all of the proceeds of such

sales, with the exception of some small amounts, were paid over to defendant to apply on her said mortgage indebtedness, and that particularly, about April 1, 1907, she sold her laundry business, including machinery, for $4,000 to John A. Bedworth and Robert McQuater, and received a cash payment of $2,000, all of which was paid by said purchasers to the defendant to apply upon her indebtedness to it, and that afterwards, and on or about June 1, 1908, having previously repurchased the said laundry business, together with the tools and machinery, from said Bedworth and McQuater, she again sold the same to George C. Horrell and Jabez R. Pittsley for $3,000, the entire proceeds of which sale were paid to said defendant, at different stated times, to apply on her said indebtedness.

It is averred that during all of the time of plaintiff's said dealings with defendant, Thomas E. Webster had been the attorney and secretary thereof, and that in all of plaintiff's transactions with defendant, and in the sale of her several parcels of real estate, and in the sales of her laundry business said Webster had also acted as her attorney, and that most of her papers and vouchers bearing upon said several transactions were left by her with said Webster, and were then in his possession and control, and that she was unable to procure the same after repeated applications, and that on or about February 1, 1914, she again applied to said defendant through said secretary for information as to the state of her accounts with it, and was informed by said Webster that her total indebtedness to defendant aggregated about $3,000, and when she asked for a statement showing the amounts paid by her on said several loans, she was informed by said Webster that it would require too much time and work on the part of defendant to furnish her with such statement, and none had ever been furnished.

Plaintiff charged in her bill that many large payments had been made upon her said indebtedness to defendant, which had not been credited to her, and that, instead of owing $3,000, she did not owe to exceed the sum of $500, or thereabouts, that in February, 1914, the defendant claimed that of the above-described mortgages Nos. 1, 2, 9, and 10 were still in force, and that the other six had been paid, and that on February 11, 1914, defendant commenced a foreclosure of said mortgage No. 10, by advertisement, that the first publication was February 12, 1914, in the Bay City Democrat (a copy of which notice was attached to the bill), and that it was claimed in said notice that there was then due and owing upon said mortgage $1,588.65 principal, premium, and interest, and insurance and taxes paid by defendant; and it is averred that plaintiff was not indebted upon said mortgage to exceed $500, and that, pursuant to said notice the defendant, on May 9, 1914, through the sheriff of said county, sold the said parcels Nos. 1, 3, and 4, the same being bid in by defendant as follows: Parcel 4 for $300, parcel 3 for $700, parcel 1 for $700.84—a total of $1,700.84, which was the amount claimed to be due and owing upon said mortgage; including all expenses chargeable against said premises. A deed was made by the deputy sheriff who conducted the sale, which deed was deposited with the register of deeds on May 14, 1914 (a copy of which was attached to the bill). In such deed no mention was made of said right of way, nor was the same mentioned at the sale. It was averred that, although it was claimed by defendant that said mortgages Nos. 1, 2, and 9 were still in force, and in part at least unpaid, and the said parcels of land so sold were, in fact, sold subject to any sums that might be owing and unpaid upon said prior mortgages, no statement or announcement was made at the time of such sale by defendant of the

amounts claimed to be owing upon said prior mortgages. It was further averred that said lands so sold were worth much more than the sums at which the same were bid off at such sale, and that said parcel No. 1 was worth at least $2,500, and Nos. 3 and 4, together with the rights of way belonging thereto, were worth at least $3,000, that said defendant then claimed that said foreclosure proceedings were regular and legal, and that upon the expiration of the time allowed for redemption, under the statute, all of plaintiff's right, title, and interest therein would be absolutely foreclosed and cut off.

The bill further charges that said foreclosure proceedings were irregular, illegal, and void, for the following reasons:

(*a*) That said parcels 3 and 4, being contiguous, and occupied and used as one parcel, should have been sold as one parcel.

(*b*) That the rights of way described in said mortgage and notice of sale should have been offered for sale, and sold as a part of such single parcel composed of the two parcels Nos. 3 and 4.

(*c*) That the purchase of said mortgaged property by the mortgagee was not fair and in good faith, but was unfair and unjust.

(*d*) That the amount claimed to be due in said foreclosure notice was grossly in excess of the true amount of the indebtedness, even if there was anything then owing on said mortgage.

(*e*) That the prices at which the several parcels were sold to defendant were entirely inadequate, much less than the real value thereof, and were oppressive and unfair.

(*f*) That the said foreclosure notice did not disclose the fact of the prior incumbrances; nor did it state that the sale would be made subject thereto.

(*g*) That no statement or announcement was made at such sale disclosing the fact of the prior incumbrances, nor of the amount of same.

Plaintiff in her bill alleged that she was ready and

willing and offered therein to pay defendant any and all sums which the court might determine to be equitably and justly owing by her to defendant, and that she had not made any tender for the reason that she had found it impossible to determine in what amount, if any, she was indebted. And she charged that she had paid all of said mortgage, and had overpaid. She prayed that specific answer be made as to certain items; that the defendant come to a true and just account touching the amounts owing to it upon the four mortgages Nos. 1, 2, 9, and 10; that all of the foreclosure proceedings be set aside and held for naught, including the sheriff's deed; that she be granted a reasonable time in which to pay the amount, if any, which the court might find she was indebted to the defendant upon said mortgages; and that defendant be decreed to pay her any sum which might be found due plaintiff. And there was the prayer for general relief.

The defendant answered very fully and specifically, but claimed no affirmative relief; and upon the issue thus formed the case went to a hearing before Judge Collins on February 25, 1915. The hearing, however, was not closed, and in December, 1915, application was made to amend the bill of complaint. This was opposed, but on December 30, 1915, Judge Collins entered an order allowing the proposed amendments, being paragraphs 24*a*, 24*b*, and 24*c*, and the prayer in paragraph III*a*. These amendments introduced into the case new questions.

By paragraph 24*a* plaintiff claimed that all of said mortgages contracted for the payment of interest at a rate in excess of the rate limited by law and that in consequence thereof, all of said contracts were usurious, and defendant was not entitled to recover any interest thereon, and plaintiff was entitled to have all payments made by her apply on the principal of said indebtedness.

By paragraph 24*b* it was averred that said mortgages and loans numbered 1 and 2, which were made on the 30th day of April and the 15th day of June, 1900, respectively, provided for the payment of a premium at the rate of 5 cents per week upon each share of stock and each $100 of the loan, that said premium so contracted for was not determined or arrived at by competitive bidding amongst the persons applying for or desiring loans at such times, as required by law, and that said premiums on said loans of 5 cents per week per share were bid by the secretary of defendant, and were uniformly required of all parties who procured loans at such times, and that plaintiff was told and informed by defendant that in order to procure said loans she would have to pay said premium of 5 cents per week per share, which was done, and that by reason thereof the contracts for the repayment of the first and second loans were both usurious, and that in consequence thereof defendant was not entitled to recover any interest on said loans, and plaintiff was entitled to have all payments made by her applied to the payment of the principal, and was entitled to recover from defendant all payments in excess of the principal sum of said loans upon an accounting.

By paragraph 24*c* it was stated that all of said loans were secured by mortgages upon the same properties or some of them, so far as the same were owned by plaintiff, at the time of the respective loans, excepting the last, the loan of $825 on April 22, 1909, which was also secured by parcel No. 4, which was bought from the proceeds of said loan at or about the time the loan was negotiated, and that after the first of said loans each successive loan was really an increase of, and an addition to, the original loan of April 30, 1900; the mortgages and obligations made at the time of the procuring of the successive loans being

made in order to stipulate and agree upon the increased amount.

Paragraph III*a* of the amended prayer was to the effect that in stating said account defendant be required to apply all payments upon said mortgages which were made and had theretofore been applied in payment of interest thereon to and upon the principal of said mortgages.

The defendant fully answered said amendments, denying the several averments. Further testimony was taken, and the case treated as submitted, except that briefs were to be filed. In the meantime Judge Collins died. On October 24, 1916, the case came on to be argued before Judge Coumans upon the testimony which had been taken before Judge Collins. Plaintiff's counsel, at that time, against the objection of defendant's counsel, was permitted to testify relative to certain computations claimed to have been made from the books and schedules produced by defendant.

1. It is the claim of the plaintiff that the mortgage was not properly forecloseable by advertisement. There is no doubt of the correctness of the claim that a statutory foreclosure is not adapted to cases where there are conflicting equities, and that these can be properly considered and protected only in a court of equity. But it does not follow that a building and loan association mortgage cannot be properly foreclosed by advertisement. Whether there are conflicting equities in a given case involves the entire question. We think there was nothing to distinguish this particular mortgage from any other given to such association. There is nothing in the statute which forbids such foreclosure. Section 10007, 2 Comp. Laws 1915.

Such right is expressly granted by the general statute relating to foreclosures by advertisement, where there is a power of sale. Section 14949, 3 Comp. Laws 1915; *Gage* v. *Sanborn*, 106 Mich. 269 (64 N.

W. 32); *Northern Michigan Building & Loan Ass'n* v. *Fors,* 190 Mich. 69 (155 N. W. 736).

There is no more necessity for an accounting in case of such a loan than in any other case where money is borrowed and partial payments made from time to time. Many such sales have been made in the State, and many titles depend upon the validity of such foreclosures. There is no merit in the claim.

Should parcels 3 and 4 have been sold as one parcel? This involves a question of fact. It is undisputed that this property was not occupied and used as one parcel at the time of the sale, and had not been for a number of years. The property had not been used as a laundry for a number of years prior to the foreclosure, and the boiler and all laundry machinery had been removed, and the temporary building taken down. During most of this intervening time parcel 4 was rented to the Jennison Hardware Company and used by it for storage, in connection with its business. The laundry building proper was rented to another tenant, and used as a secondhand store. It also appears that parcel 4 was not covered by any of the other three mortgages, while all of the other property was. In view of these facts, and under the statute and authorities cited by plaintiff, the sale was properly made in parcels.

Was the sale void because the right of way in the alley was not specifically sold and described in the sheriff's deed? We do not understand how plaintiff has any cause for complaint in this regard. If the easement was of value, and was not sold, it still belongs to her, free from the mortgage, which was satisfied by the sale. But it seems clear that this easement was appurtenant to the dominant estate, and a description of it was unnecessary, and that it was effectually conveyed as appertaining to the lands described.

"Where an easement is annexed or appurtenant to land, it passes as an appurtenance, with a conveyance or devise of the dominant estate, and need not be specifically mentioned in the deed or will." 14 Cyc. p. 1184.

See, also, *Walz* v. *Walz,* 101 Mich. 167, 170 (59 N. W. 431); *Lathrop* v. *Elsner,* 93 Mich. 599 (53 N. W. 791); *Smith* v. *Dresselhouse,* 152 Mich. 451 (116 N. W. 387); *Bean* v. *Bean,* 163 Mich. 379, 397 (128 N. W. 413).

As the notice and the deed covered both the land and its appurtenances, both were sufficient to include the easement.

Was defendant's purchase fair and in good faith? The mortgages were all of record in the office of the register of deeds. If no information was given of prior mortgages, the plaintiff was not injured thereby. The giving of such information would, of necessity, tend to lower the price, and not raise it. The fact is that only Mr. Webster, the secretary of defendant, and the deputy sheriff were present at the sale.

Should the notice of foreclosure have alleged the existence of the prior mortgages? We know of no such requirement or practice. It is urged that the notice should have advertised the sale of an equity of redemption. But plaintiff did not have a mere equity of redemption in this land, because the prior mortgages had not been foreclosed. She was still the owner of the legal title. Counsel for plaintiff quotes from 27 Cyc. pp. 1468, 1469, but fails to quote the preceding sentence:

"If the notice attempts to describe the state of the title, it must be done with exactness."

Was there an excessive amount claimed in foreclosure notice? There is considerable controversy between counsel as to what is properly before the court

upon this subject. It is apparent from the original bill that plaintiff claimed the amount demanded was excessive and asked for an accounting because certain large payments specified in the bill were not credited to plaintiff and entered upon the passbook, as it was claimed they should have been. Plaintiff now urges under this subdivision that the amount stated in the notice was excessive because of errors in the passbook entries, due to improper methods of computation. It is said by defendant that the bill gives no intimation of such a claim, and that it was not made an issue on the taking of proofs. It does appear that upon the final appearance of the parties before Judge Coumans counsel for plaintiff asked leave to submit, as a part of his argument, certain computations that he had prepared covering each loan. He was sworn as to their correctness, and the computations were submitted. We think that this was within the discretion of the circuit judge. These computations deal with small fractions. We have examined the statements and computations with care, and are of the opinion that they have to do with fractions of a cent, and that it was practically impossible to figure out the weekly rates so that the total of a period of years will exactly equal 7 per cent. It will sometimes be a trifle more, and sometimes a trifle less. In any event it was a small sum arising from the use of a common method of computation, and should be disregarded. It seems to us that, if the maxim, "*de minimis non curat lex*," should ever be applied, it should be applied here. As illustrating the character of the claims, it is urged that the notice of sale was published 13 times, and it is said 12 times were sufficient and a corresponding reduction should be made in the advertising charge. The authorities cited in plaintiff's brief do not support the statement that an excessive claim in the amount due in the notice voids the foreclosure.

"A mortgage sale is not necessarily invalid because more is claimed than is in fact due (*Klock* v. *Cronkhite*, 1 Hill [N. Y.], 109), provided the claim is in good faith (*Jencks* v. *Alexander*, 11 Paige [N. Y.], 619). The excessive claim would be a circumstance only of more or less importance according to its magnitude, or apparent want of good faith, if attempt was made to redeem afterwards." *Millard* v. *Truax*, 50 Mich. 343 (15 N. W. 501).

See, also, *Damon* v. *Deeves*, 62 Mich. 465 (29 N. W. 42); *Emmons* v. *Van Zee*, 78 Mich. 171, 175 (43 N. W. 1100); *First State Bank* v. *Day*, 188 Mich. 228, 236 (154 N. W. 101); 27 Cyc. p. 1469.

The period of redemption had not expired when the bill was filed, and when the period was about to expire defendant entered into a stipulation extending the period of redemption until 30 days after the decree below. Unless the sale is to be set aside as void, the plaintiff's right to redeem must be held to have expired.

Was plaintiff entitled to an additional credit of $1,000 from the proceeds of the sale of the laundry to Bedworth and McQuater? This presents purely a question of fact, upon conflicting testimony. We shall not repeat the testimony here, but content ourselves with saying that a careful examination of the evidence leads us to the conclusion that the plaintiff has not sustained the burden of proof resting upon her, and we agree with the conclusion of the court below.

It is claimed that the mortgage was usurious, and that therefore plaintiff is entitled to have all interest payments applied on the principal of the several loans.

We are satisfied from the evidence that there was no intention to collect a higher rate of interest than the law allowed—no device or scheme on the part of defendant to collect usury. To constitute the charge of usury, there must be an intent to do something which is in violation of the statute. *Green* v. *Grant*,

134 Mich. 462, 467 (96 N. W. 583); *Becker* v. *Headsten*, 137 Mich. 478 (100 N. W. 752); *Archibald* v. *Thomas*, 3 Cow. (N. Y.) 284; 39 Cyc. pp. 919, 933, 969, 970.

"Where the amount of interest erroneously allowed is insignificant, it has been held, under the doctrine of *de minimis*, not to require correction." 22 Cyc. p. 1570.

Plaintiff claims that mortgages 1 and 2 are usurious on the ground that the defendant, instead of allowing competitive bidding for the funds of the association, established a fixed premium, which all applicants were required to pay. This claim could not affect the validity of this foreclosure, unless mortgages 1 and 2 have been overpaid, and such overpayment can rightfully be applied on this mortgage; the provision relative to competitive bidding having been repealed before this mortgage was executed.

There is no controversy as to the rule established by the cases cited by plaintiff. In our opinion, the plaintiff has wholly failed to prove that the defendant's funds were not offered to the highest bidder. In fact, there is, in our opinion, a clear preponderance of the evidence upon this subject in favor of the defendant's claim. We shall not further discuss the question.

Finally, it is claimed that all of these mortgages were usurious because each contained a clause that the borrower should pay any tax assessed upon the mortgage, while the loan itself bore interest at the highest legal rate. This clause, we think, was mere surplusage, because the mortgages held by these associations are, and always have been, exempt from taxation. Section 10011, 2 Comp. Laws 1915; *National Loan & Investment Co.* v. *City of Detroit*, 136 Mich. 451 (99 N. W. 380).

The question here presented is controlled by *Union*

Trust Co. v. *Radford,* 176 Mich. 50 (141 N. W. 1091). That case presented the question whether the mortgages of the trust company were exempt from taxation. It may be said that was the only question on both the original and the rehearing. Here that question is settled by the statute and the case cited.

After a careful examination of this somewhat intricate record, we are of the opinion that the learned chancellor reached the correct conclusion, and the decree of the court below is affirmed, with costs to the appellee.

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

TOWNSHIP SCHOOL DISTRICT OF WAKEFIELD *v.* MACRAE.

1. EVIDENCE—ADMISSIBILITY—CONTRACTS—ALTERATIONS.
   In an action by a school district on a sewer tunnel contractor's bond to recover damages for failure to complete the tunnel through a hill, evidence of one who, with the engineer of plaintiff, examined the ground where the proposed tunnel was to be constructed before the contract was signed and was shown where the end was to be, and that, as constructed, it came out at a point some distance further away so as to make the tunnel longer, was inadmissible to show that the course of the tunnel was altered after the execution of the contract, where it appeared that such circumstance did not occur in the presence of the contractor, and he knew nothing of it when he signed the contract, and the engineer might have been mistaken or some other event might have transpired.

2. TRIAL—INSTRUCTIONS—STRIKING OUT TESTIMONY.
   It is error to give an instruction, the only basis for which is stricken testimony.

3. CONTRACTS—MISTAKE OF ENGINEER—BREACH OF CONTRACT.
The act of an engineer in starting a tunnel contractor's foreman at what he erroneously believes is the correct point, necessitating the construction of a longer tunnel than that covered by the contract, does not constitute a breach of the contract.

4. SAME—BREACH—FAILURE TO PERFORM—RESCISSION.
The mere fact that there is a controversy between a tunnel contractor and a school board and its engineer as to whether certain work should be done is no excuse for the failure of the contractor to go ahead and complete the work under the terms of the contract at a certain rate per foot as claimed by him where such work would merely mean an extension of the tunnel.

5. SAME—CONSTRUCTION—DUTY OF COURT.
It is the duty of the trial court to construe a written contract.

6. SAME—"MORE OR LESS"—QUESTION OF LAW.
The term "more or less" as used in a tunnel construction contract in referring to the number of feet the tunnel is to be driven, is an expression which shows that the parties are to run the risk of gain or loss, as there might happen to be an excess or deficiency in the estimated quantity.

7. SAME—CONSTRUCTION—BREACH—RESCISSION.
Where the facts are not in dispute it is for the court to determine what is a substantial compliance with a construction contract.

Error to Gogebic; Collingwood, J., presiding. Submitted June 26, 1917. (Docket No. 65.) Decided December 27, 1917.

Assumpsit by the township school district of the township of Wakefield against Albert D. MacRae and another for the noncompletion of a sewer contract. Judgment for defendant MacRae. Plaintiff brings error. Reversed.

William S. Baird and *Herbert M. Norris*, for appellant.

James A. O'Neill, for appellees.

STONE, J. The plaintiff is a township school district embracing the township of Wakefield, in Gogebic county. It is the claim of plaintiff that it is now governed by Act No. 117 of the Public Acts of 1909 (2 Comp. Laws 1915, § 5909 *et seq.*). The said township, and therefore the plaintiff school district, embraces a large territory consisting of several geographic townships, and includes the village of Wakefield, which is located upon the south and east sides of Sunday Lake.

In August, 1914, there were in this school district ten schoolhouses, four of which were located within the village of Wakefield and three of these being then in actual use for school purposes. The said village had no sewer system, and the sewage from these last-named schoolhouses was being emptied through pipes into Sunday Lake. This was finally forbidden by the authorities of the village; whereupon the board of education of plaintiff took up the subject of the construction of a sewer system to take care of the sewage from its schoolhouses, and particularly those then emptying their sewage into said lake. At a meeting of said board held on July 28, 1914, it voted to construct a sewer. J. M. Goldsworthy was engaged as engineer for the sewer work at a commission of 2 per cent. of net cost. He laid out the sewer through the village of Wakefield, around the east end of Sunday Lake to the north side thereof, where it was to empty into a tunnel to be driven through the hill on the north side of the lake, where said tunnel would open into a deep ravine, and a proper fall could be obtained. This tunnel was also to extend back from a point where the sewer emptied into it, to Sunday Lake, so as to afford an opportunity for lowering the lake in case of high water. A shaft was to be sunk at the place where this sewer would discharge into the tunnel. The board of education determined to let the

contract for driving the tunnel separate from the other sewer work, and accordingly, on August 21, 1914, advertised for bids for constructing this tunnel, bids to be received for both an 8x8 tunnel and an 8x10 tunnel. The notice, among other things, stated that:

"For further information inquire of E. R. Hillis, Secy., or Ed. Niehold, Pres."

These bids were received on August 29, 1914, at which time the board of education met and considered the bids received. At this meeting it was determined to construct the tunnel 8x10 feet in size, and, the bid of defendant MacRae being the lowest, he was awarded the contract at the price of $9.95 per linear foot. Prior to the advertising for bids the engineer had prepared and filed with the secretary of the board of education plans and profiles for the construction of this tunnel. A written contract was forwarded to said defendant to be signed. Inclosed with this contract was a copy of the profile of the proposed tunnel that was on file with the secretary at the time the bids were called for, which showed the tunnel that was to be constructed to be approximately 1,200 feet in length.

Under date of September 8, 1914, a written contract was entered into between the board of education of the plaintiff and defendant MacRae for the construction of this tunnel, it being described in the said contract as follows:

"To excavate, dig, and construct a tunnel approximately twelve hundred (1,200) feet in length, more or less, through the hill north of Sunday Lake, in the township of Wakefield, in Gogebic county, Michigan, at the place shown by the plans and profiles therefor, now on file in the office of the secretary of said board of education. Said party of the first part shall excavate, dig, and construct said tunnel in accordance with the plans, profiles, and specifications therefor now on file in the office of the secretary of said board of edu-

cation, which said plans and profiles are hereby expressly made a part of this contract, and a copy of which said specifications are hereto attached, marked Exhibit 'A,' and made a part thereof."

A copy of the specifications was attached to the contract. The specifications stated:

"Total length of tunnel 1,200 linear feet, more or less."

The contract further provided that the work should begin thereunder within ten days and should be completed within a period of not to exceed eight months from the date of the contract. It also provided for a bonus of $10 per day to be paid to Mr. MacRae for each day remaining between the date of the completion of the work and the expiration of said limit of eight months, and also for a penalty of a like amount for each day said work should remain incompleted after the expiration of said time limit. The contract also provided for the furnishing by defendant MacRae of a bond of $11,940 for the faithful performance of said contract, and also a bond in a like amount for the payment of all material and labor claims.

In accordance with said contract, defendant MacRae caused to be executed by himself, as principal, and by the defendant Ætna Accident & Liability Company, as surety, a bond for the faithful performance of said contract in the amount above named. The bond provided that no change should be made in the plans, specifications, terms, covenants, and conditions of such contract which should increase the amount to be paid the principal more than 20 per cent. of the penalty of the instrument, without the written consent of the surety.

Defendant MacRae started work upon the tunnel under said contract about September 15, 1914, when Mr. Goldsworthy, the engineer, gave Mr. Solberg, who

was foreman for Mr. MacRae, the location for starting the work on the north side of the hill. It was necessary to sink a shaft at the point where the sewer was to open into this tunnel in order to get a starting point for this tunnel work on the south side of the hill. A considerable part of the work of sinking this shaft was done by defendant MacRae under separate agreement, and was paid for by the plaintiff. Defendant MacRae also began excavation of the tunnel from this shaft as soon as it was sunk to the necessary depth, and work was proceeded with from both ends towards the center of the hill.

Defendant MacRae continued his work from about September 15, 1914, until the night of March 13, 1915. Estimates of the work done were furnished at regular intervals by the said engineer in charge, and payments were made by the plaintiff to the said defendant of 80 per cent. of the contract price for work done, 20 per cent. being retained pending completion of the work in accordance with the terms of the contract. These estimates and the school warrants and payment thereof are all shown in the record. A large part of the last estimate was paid to a justice of the peace to satisfy garnishee judgments against defendant MacRae. The defendant MacRae never did any work on this tunnel after said 13th day of March. Due notice was given the Ætna Accident & Liability Company, as surety, of the discontinuance of the work, and on May 13, 1915, being five days after the expiration of the time for completing the work under the contract, the secretary of the board of education sent, by registered mail, an official notice to both the defendants that the work of constructing this tunnel had not been completed, that a default had occurred on the part of defendant MacRae, and that there still remained a considerable amount of work to be done, for which said plaintiff would hold said defendants responsible.

The defendant the Ætna Company acknowledged receipt of this notice, and under date of June 1, 1915, Mr. Niemeyer, manager for said company, notified the president of the board of education that the surety upon the bond did not intend to proceed, or procure others to proceed, with the performance of the contract. Thereupon the plaintiff proceeded to advertise for bids for completing the tunnel, and at a meeting held on June 15, 1915, the board of education received bids and let the contract for completing the tunnel to W. S. Peters, the lowest bidder, for $21.25 per linear foot, together with additional compensation of $1,200 for finishing that portion of the work which was only partially completed by MacRae. In accordance with these proceedings a contract was entered into with Mr. Peters, and the work of finishing the tunnel was thereafter completed under this contract, and payment made to Mr. Peters therefor.

This suit was begun October 30, 1915. It was originally claimed by the plaintiff that the contract in question embraced that portion of the tunnel leading back from the shaft above mentioned to Sunday Lake, while defendant MacRae denied that this was included in his contract. Upon the trial of the case the plaintiff withdrew this portion of its claim, and asked for damages for failure to construct the tunnel from the shaft to the northern outlet only. The plaintiff also withdrew its claim for a penalty of $10 per day for all time after May 8, 1915, during which the tunnel was incompleted.

The total length of the tunnel as finally completed from the shaft to the outlet on the north side of the hill is 1,356 feet. Of this distance defendant MacRae either fully or partially completed 796 feet, leaving 560 linear feet in the center of the hill untouched.

It was the claim of the plaintiff that a considerable part of the work done by defendant MacRae was not

of the proper size, in that the tunnel was not high enough. It was estimated and testified to by the engineer in charge that the amount to be excavated under this partially finished portion amounted altogether to the equivalent of 54 linear feet of tunnel, which amount was deducted in the estimates of the engineer. As stated, defendant MacRae was paid for the work done by him, less 20 per cent. which was retained according to the terms of the contract pending the completion thereof. The total amount of such payments, as shown by the record, was $5,794.88, and the amount retained was $1,448.72, and a small balance left after paying the garnishee judgments.

The plaintiff claimed a net damage, after crediting the 20 per cent. and other item, of $5,493.38. In addition to this, plaintiff claimed damages for extra expense in constructing the balance of its sewer system on account of water accumulating therein and delaying the work, and making it more expensive, and also causing plaintiff to be put to great expense in removing this water, on account of failure to finish the tunnel in accordance with the contract, and thus afford an outlet for such sewer system.

The court refused to allow plaintiff to introduce testimony upon the point last above mentioned, upon which ruling error is assigned.

The defendant MacRae, by his notice under his plea, claims in defense of this action, among other things, that he was prevented from performing his contract with plaintiff, in that, after the making and execution of said contract, and without the knowledge and consent of said defendant, the plaintiff wrongfully, fraudulently, and with intent to deceive said defendant, so altered the position, lines, direction, and location of said tunnel as to increase the length thereof and the time necessary for its completion, and sought to require him to construct such tunnel in such changed

position and direction; also that the engineer employed by said plaintiff to direct said work, with the knowledge and consent and at the direction of the plaintiff, at the inception and during the progress of said work, fraudulently and with intent to deceive this defendant established false and incorrect lines, and gave false directions for the construction of said tunnel, and sought to, and did, by such deception and misrepresentations, induce and require this defendant to construct said tunnel on said false and incorrect lines, to his great damage, and in violation of the terms of said contract; also that said plaintiff and its engineer in charge of said work wrongfully, fraudulently, and in violation of the terms of said contract sought to compel and require said defendant to do and perform additional work, digging, and tunneling at great cost and expense and time to this defendant, which said work was not included in said contract, and fraudulently and wrongfully sought and attempted to require, and did require, the performance of such additional work as a condition precedent to the acceptance of said work included in the contract, and of the payment of the moneys due and to become due the said defendant thereunder; that on account of said fraudulent acts and said breach of contract on the part of said plaintiff said defendant MacRae was relieved from said performance, and was entitled to receive a reasonable value for the work done, notwithstanding the terms of said contract, and he also gave notice of set-off.

The defendant the Ætna Company gave notice of substantially the same defense, except as to set-off.

The trial resulted in a verdict and judgment against the plaintiff and in favor of the defendant MacRae in the sum of $11,319.02.

Upon the trial of the case much evidence was offered by both parties and received upon the issue as thus

made. The defendant called as a witness one James W. Oxnam, who was permitted to testify, over the objection and exception of plaintiff's counsel, that a few days before the letting of the contract for the construction of this tunnel, and after bids had been called for, he visited and examined the ground through which the tunnel would extend in company with Mr. Goldsworthy, the engineer, and that at that time Mr. Goldsworthy took the witness and his companions around to the north side of the hill and showed him where the north end of the tunnel was to be, and that after the tunnel had been started, and after defendant MacRae had quit work, the witness went back and examined the premises, and found that the tunnel as actually constructed did not come out at the place where Mr. Goldsworthy told him it would come out, but that it came out between 200 and 300 feet northeast from that place, and that the effect was that the tunnel was longer.

At the close of the testimony the plaintiff requested the court to charge the jury as follows:

"(2) I charge you that under the terms of that contract the defendant MacRae was obliged to build a tunnel through the hill north of Sunday Lake, 8 feet by 10 feet in size, for the distance of 1,200 feet, more or less, and that the words 'more or less,' as used in this contract, mean the number of linear feet of tunnel that the plaintiff might require for its necessities as an outlet for its sewer system, and that the difference between 1,200 feet and 1,356 feet, the distance that the tunnel actually was constructed, was a reasonable distance for the plaintiff to extend its work over 1,200 feet, and that the extension of the tunnel that distance by the plaintiff was not sufficient to constitute a breach of the contract on the part of the plaintiff, and that such extension alone on the part of the plaintiff would furnish no excuse or justification for the defendant MacRae quitting his work or abandoning his contract.

"(10) In this case it appears from the evidence

that defendant MacRae contracted to construct a tunnel approximately 1,200 feet in length, more or less. It further appears that this tunnel when fully completed was somewhat longer than 1,200 feet, the evidence on the part of the plaintiff showing it to be 1,356 feet long, and the evidence on the part of the defendants showing it to be —— feet in length. In this connection I charge you that it was the distinct understanding of the parties, by the use of the words 'more or less' in the contract, that the agreement in regard to the length of the tunnel in question should not fix the precise number of feet the tunnel should be constructed, and that the intent was that some deviation from a length of 1,200 feet should be allowed. The actual length of this tunnel, according to the evidence of either plaintiff or that of the defendants, is well within the limits to which such deviation might properly extend.

"(13) I further charge you that any change in the contract of plaintiff with defendant MacRae made after the execution thereof and by mutual consent, and any such change in the plans, specifications, terms, or conditions for performing any work under such contract, which did not increase the amount to be paid said defendant MacRae more than 20 per cent. of the penalty of the bond furnished, would not vitiate said contract or release the surety upon said bond.

"(15) I further charge you that, if you find the course of such tunnel was changed, after the execution of the contract and bond in evidence in this case, with the consent of the defendant MacRae, and such change did not increase the amount to be paid MacRae more than 20 per cent. of the amount of the penalty of the bond given, then both the defendants are liable to the plaintiff for all damages arising from the failure of defendant MacRae to complete his said contract."

All of which requests to charge were refused.

The court charged the jury, among other things, in the following language:

"In this case the contract says, or the contractor MacRae agreed, 'to construct a tunnel for a distance of approximately 1,200 feet, more or less, through the

hill just north of Sunday Lake, in said township.' As a matter of fact, it is admitted that the tunnel as laid out and as finally constructed along the lines on which Mr. MacRae was constructing it while he was at work was 1,356 feet long, and the defendant MacRae tells you that he did not know that the tunnel was to be of that length, that he deemed it to be 1,200 feet, and when he found that the tunnel was to be 1,356 feet long, he abandoned it, and his claim is that the tunnel for which he contracted was to be 1,200 feet long, and that somehow after the contract was let the course of that tunnel was so changed that it increased the length of the tunnel 156 feet.

"(7) Now, gentlemen, one of the questions for you to determine under the evidence in this case is: Was that tunnel changed? If it was not changed, and if Mr. MacRae contracted to build the tunnel which afterwards proved to be 1,356 feet long, and you find under this contract that 'approximately 1,200 feet, more or less,' would describe and define such a tunnel, then Mr. MacRae has no defense, and you would find for the plaintiff. If you find that Mr. MacRae was induced to take a contract to dig a tunnel 1,200 feet long, and that 'approximately 1,200 feet, more or less,' means 1,200 feet, and no more and no less, and that the tunnel as constructed was required to be 1,356 feet long, then you come to the question as to why he abandoned the contract. But in the first place, gentlemen, you have to determine under the evidence in this case and from your experience as men of affairs whether a contract which states 'approximately 1,200 feet, more or less,' could be a binding contract for a tunnel which was 1,356 feet long.

"(8) So you see there are two questions that you must determine before you come to the third and final question, which I shall give to you. As I say, the first question is: Did the contract as signed by Mr. MacRae cover a tunnel which proved to be 1,356 feet long? And the next question is: Was the course of that tunnel changed after the contract was let, and was it done fraudulently and wrongfully, and was it such a material change that the defendant was justified in annulling and throwing up the contract?

"(9) After answering those questions to your satis-

faction, if you find that the change was made, and it was such a material change as would justify a contractor in throwing up the contract, or if you find that the term in this contract 'approximately 1,200 feet, more or less,' would not cover a tunnel which was 1,356 feet long, then you come to the third question, and really the most important question of all: Did Mr. MacRae abandon the contract because of that fact? I mean: Did Mr. MacRae abandon the contract because the course was fraudulently changed? If you find that the course was fraudulently changed, and you find that Mr. MacRae had reason to abandon it, that it was such a change that it would affect the contract in such a way that he had a right to abandon it, and that he actually did abandon it for that reason, then you would consider the damages to the defendant, and the measure of damages in that case would be what the work which he performed, the nearly 800 feet, was actually worth, less what was paid to him. You have those figures. It is not necessary for me to repeat them."

There was a motion by plaintiff for a new trial, based on the refusal of the court to give plaintiff's requests to charge, and on the charge of the court as above indicated, and that the verdict was against the great weight of the evidence, and was grossly excessive and unreasonable. The motion for a new trial was denied, and exceptions duly taken. The plaintiff has brought error, and the questions discussed are properly raised by appropriate assignments of error.

There are many assignments of error relating to the admission of testimony. We have, after careful examination, reached the conclusion that none of the rulings of the court relating to the reception of testimony amounted to prejudicial error, except that part relating to the testimony of the witness Oxnam. The circumstance testified to by Oxnam took place many days before the contract was signed. It was offered as tending to show that the course of the tunnel was

changed after the execution of the contract. It did not tend to show that. The circumstance did not occur in the presence of defendant MacRae, nor did he have any knowledge of it when he signed the contract. The trial court at first stated an excellent reason for ruling this testimony out when it at first refused to receive it:

"It doesn't show the change from the defendant's course. Mr. Goldsworthy might have been mistaken that day, or some other event might have transpired."

The court erred in later receiving this testimony, and doubtless its effect was damaging to the plaintiff.

We are also of the opinion that the trial court erred in charging the jury in the language above quoted from the charge. Some testimony had been received upon the trial relating to the meaning, or construction that should be given to the words "more or less." The trial court finally struck out that testimony, so that there was no evidence before the jury as to the meaning of the term "1,200 feet, more or less," and yet the court submitted to the jury the question whether a contract which states approximately "1,200 feet, more or less," could be a binding contract for the tunnel, which was 1,356 feet long.

The undisputed evidence shows that the defendant MacRae never went to the northern terminus of the tunnel to make any examination until after work had begun. He claims that he and Mr. Hillis, the secretary of the board, examined the south end of the tunnel, and went a short distance up the hill, and had a conversation as to the general course of the tunnel. It does appear that the engineer, Mr. Goldsworthy, placed defendant MacRae's foreman at work at the north terminus of the tunnel, and that the work proceeded from that point without any complaint on the part of the defendant MacRae. The object and pur-

pose of the tunnel is clearly expressed in the contract, and there can be no doubt that the purpose was to dig and construct a tunnel through the hill north of Sunday Lake for the purpose named. There is evidence in the case that one could not tell by an inspection of the plans, profiles, and specifications the exact location on the ground of the tunnel, without actual measurement. If Mr. Goldsworthy, in good faith, started the defendant's foreman at work at a given place, and it turned out that by reason of the beginning of work at such place the tunnel was 1,356 feet long instead of 1,200 feet, this fact alone would not constitute a breach of the contract, if done, as we say, in good faith on the part of the engineer, he believing as he testifies, that that was the correct point. There is a good deal of conflict in the evidence in the case upon this subject. It is the claim of the engineer that the location never was changed from the first, and in this he is contradicted by the defendant MacRae. If, however, on the other hand, it should turn out that because of the cheapness or low price of the contract per foot the engineer, thinking he would lengthen and change the tunnel, acted fraudulently and dishonestly in the matter, and insisted that this was the starting point and course that should be pursued in the construction of the tunnel, then it might be reasonably said that there was a breach of the contract.

There seems to have been some controversy between the defendant MacRae and the school board and the engineer whether MacRae's contract extended south from the shaft to the lake, the defendant MacRae insisting all the time that this was not a part of his contract, the others asserting that it was. This did not prevent defendant MacRae from proceeding to finish his work in accordance with the terms of the contract. We have looked in vain in this record for any evidence that the plaintiff ever forbade or prohibited

the defendant MacRae from proceeding to finish his job in accordance with the contract. There is considerable force in the claim of plaintiff's counsel that defendant MacRae was looking for an opportunity to throw up this job because of the low bid which he made.

We are of the opinion that the trial court should have construed the words "approximately 1,200 feet in length, more or less, through the hill north of Sunday Lake," and should have instructed the jury that, if the engineer in good faith pointed out as the correct place for the northern terminus of the tunnel, the place where said defendant's foreman commenced work, and said work was commenced there without objection on the part of said defendant's foreman, that fact would not vitiate the contract, or justify the said defendant in abandoning it, even if it turned out that the length of such tunnel was thereby made 1,356 feet, instead of 1,200 feet. It should not have been left to the jury to say that this was such a material change that the said defendant would be justified in annulling and throwing up the contract, even if it was a change in the terminus of the tunnel, if made in good faith by the engineer, and acquiesced in by the representative of said defendant. It was the duty of the court to interpret the written contract. The terms "approximately" and "more or less," as contained in this contract, have certain well-settled legal meanings. The term "more or less," as used in such contracts, is held to be an expression which shows that the parties were to run the risk of gain or loss, as there might happen to be an excess or deficiency in the estimated quantity. 27 Cyc. p. 913; *Holland* v. *Rea*, 48 Mich. 218 (12 N. W. 167); *F. B. Holmes & Co.* v. *City of Detroit*, 158 Mich. 137, 141 (122 N. W. 506); *Cabot* v. *Winsor*, 1 Allen (Mass.), 546; *Brawley* v. *United States*, 96 U. S. 168.

In *F. B. Holmes & Co.* v. *City of Detroit, supra,* this court said:

"We find no difficulty in ascertaining the prime object and purpose of these parties as expressed in the writings considered. They had in mind so many barrels of cement as the operations of this department would require during this period. * * * The clause '5,000 barrels of Portland cement, more or less,' was the expression of an estimate subject to the controlling object of the agreement expressed in the words of the contract, 'all the Portland cement that may be required by the city of Detroit and ordered by the department of public works,' the last clause expressing the method required to secure the delivery of the property to defendant."

See cases there cited.

In *Cabot* v. *Winsor, supra,* it was held that the words "more or less" in a broker's note for the sale of goods as follows: "Sold to N. W. for account of S. C. five hundred bundles, more or less, gunny bags"—do not create a latent ambiguity, or authorize the introduction of parol evidence by the purchaser to show an understanding between the parties that he was to have either more or less than the number specified, as might reasonably be found necessary to fill a ship, although it appeared that both parties knew at the time of the purchase that the goods were bought for the purpose of filling a ship, and that it was uncertain what number would be necessary. And if the facts are not in dispute, it is for the court to determine what is a substantial compliance with the contract.

In our opinion, it was error for the court to submit to the jury as a fact the question:

"Did the contract as signed by Mr. MacRae cover a tunnel which proved to be 1,356 feet long?"

The case was a close one upon the facts, but we think there was a case for the jury. We think that plaintiff's 2d, 10th, 13th, and 15th requests

to charge should have been granted, and that there was reversible error in the charge as given.

We have examined the other assignments of error, but find no reversible error except as above pointed out.

The judgment of the circuit court is reversed, and a new trial granted, with costs to the appellant.

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

HOWARD *v.* LOVETT.

1. TRADE-NAMES—THEATERS—UNFAIR COMPETITION—INJUNCTION—EVIDENCE.

On a bill to enjoin the use of the alleged trade-name "Mercedes" by defendants, a rival vaudeville company, in an act produced by them, one of the defendants, a woman, and who bore such name, having been formerly a member of plaintiff's company, evidence *held*, to show that the word "Mercedes" was used to designate the actress in plaintiff's production and not as the name of the act.[1] STONE and BIRD, JJ., dissenting.

2. INJUNCTION—EQUITY—DISCRETION OF COURT.

The writ of injunction is not a writ of right, but its issuance rests in sound discretion, and such discretion should not be moved where the party applying does not bring his case within equitable principles, does not show superior equities that are entitled to protection at the hands of a court of equity, and does not make such a case as moves the conscience of the court to grant the relief.

[1]On right of members of organization to protection in use of name which their efforts have made valuable, see note in 28 L. R. A. (N. S.) 458.

On limitation of right to use one's own name as a trade-name, see notes in 1 L. R. A. (N. S.) 660; 28 L. R. A. (N. S.) 934; L. R. A. 1916C, 255.

Appeal from Wayne; Perkins, J., presiding. Submitted June 15, 1917. (Docket No. 58.) Decided December 27, 1917.

Bill by Joseph B. Howard against George Lovett, Elizabeth M. Crane and others to enjoin the use of a trade-name. Defendant filed a cross-bill to establish her right to said name. From a decree for plaintiff, defendant Crane appeals. Reversed, and bill and cross-bill dismissed.

George W. Bates (*Leo M. Butzel* and *Charles A. Wagner,* of counsel), for plaintiff.

Angell, Bodman & Turner, for appellant.

FELLOWS, J. I do not agree with Mr. Justice STONE in his conclusion in this case. Plaintiff's name by birth was Joseph Cohen; when only a youngster, he appropriated to himself the name of Joseph B. Howard, one Joseph Howard being somewhat prominent in the theatrical world; later plaintiff, by certain proceedings taken in the courts at Chicago, caused his name to be changed to Joseph Mercedes. Defendant had always been called by her family and friends Mercedes, or an abbreviation thereof, and was so known and called by plaintiff. I am convinced from this record that the performance here involved, and which is only a clever trick by its producers, was gotten up by the joint efforts of plaintiff, defendant, and defendant's father. I do not place credence in all the testimony of either of the parties, and feel that we should look beyond the oral proofs to documentary evidence, which may be corroborative of the claims asserted. The plaintiff admits that the act is not original with him, or original with the present generation; that he got the idea from a book on magic; that it probably appeared in books before he was born. Upon his cross-examination a book was submitted to him,

and on examination of it he admitted that it contained the idea of this trick. He was asked to turn to the fly leaf, and there appeared "J. M. Crane," who he admitted was the father of defendant. Mr. Crane was a newspaper man on a prominent Chicago paper; had been dead for some time. In view of the fact that plaintiff's testimony is not consistent with defendant's, or with itself, I am inclined from this circumstance to give credence to the idea of joint action by these three people in getting up this act.

I am not strongly impressed by the testimony of the witness who said that she "was a palmist at one time, and sang," and who testifies that in 1908, in the winter time, plaintiff called at her house three or four times to get her to work for him in this mind-reading act, and told her that he was going to call the act "Mercedes." She admits that she could not play the piano, which was an absolute essential to the act, while in an affidavit, sworn to by her and filed with the bill of complaint for the purpose of obtaining a temporary injunction, she fixes the conversation in the year 1909, in the summer time. In this affidavit she gives as the reason she did not enter the employ of plaintiff, not the fact that she could not play the piano, but that they "were unable to agree upon proper terms."

The testimony of another witness, much relied upon by plaintiff, that shortly before Labor Day, 1910, he saw a banner at plaintiff's "Temple of Knowledge" upon which was painted two women, one named "Mercedes" and the other "Vera," is not of probative force of plaintiff's claim. It is the claim of defendant that arrangements had been made some time before that for the production of the act, and, while plaintiff insists he did not know the defendant by any other name than Miss Crane, and did not know her given name, a letter was shown him on cross-examination, which he admits having written, addressing her as "Dear

Friend Merc." The letter was written in the spring of 1910, several months before the banner was painted. Under these circumstances, this painted banner is as consistent with defendant's claim as it is with plaintiff's.

When these parties produced the act, the advertising used and which appears in the record as exhibits, convinces me that the name "Mercedes" was not used as the name of the act, but of the actress. I quote from one of these exhibits:

MR. JOSEPH B. HOWARD
OFFERS
The Bewildering Sensation of the Hour
"MERCEDES"
The Psychic Wonder
Call Your Name!
SHE WILL Read Your Mind!
Answer Your Questions!

The parties continued together until defendant was forced by plaintiff's conduct towards her to sever relations with him, when she telegraphed her father for money and returned to Chicago. Thereafter, when defendant appeared on the stage, she appeared under the name of "Mercedes," although plaintiff claims his attorney prevented her from giving this performance.

I cannot reach the conclusion from plaintiff's advertising matter found in this record that the act was called "Mercedes." It was the actor, not the act. I quote three of these advertising bills offered by plaintiff to substantiate his claim. The first one at the Lyric Theater:

Mr. Joseph B. Howard presents
The Bewildering Sensation of the Hour
"MERCEDES"
Startling Sensational Mind Reader
LA PIANISTE DE MYSTERIE
Presenting an Act that Amazed and
Mystified the Entire World.

The second one, at the Garrick Theater, reads:

The Season's Greatest Sensation
"MERCEDES"
The Psychic Wonder
She Will Tell Your Name
Read Your Mind—Answer Your Questions.

The third one, at Keith's Theater, in Boston, is as follows:

"MERCEDES"
Accompanied by the Marvelous Mystic, Mlle. Stantone, in Their Unparalleled Occult Revelation
THE MUSICAL ENIGMA
Mercedes Transfers in Silence by Telepathic Waves to Mlle. Stantone Any Musical Selection Suggested by the Audience.
MOST EXTRAORDINARY POWER POSSESSED BY MAN.

I am convinced that the claim now asserted by plaintiff that "Mercedes" was the name of the act performed by him is an afterthought on his part, and that "Mercedes" was used to designate the performer, instead of the act performed.

But there is another feature of this case which I think should work its reversal. It is said that plaintiff has built up a valuable business in giving this performance, which should be protected by a court of equity. I realize that a certain degree of latitude is allowed in praising one's wares; but there is a limit to all things. The methods used by this plaintiff to establish his reputation and build up his business were not such, to my mind, as appeal to the conscience of a court of equity for relief through that court by the strong arm of a writ of injunction. We may lay aside the fact that the performance sought to be protected is a trick pure and simple, that the so-called "thought transfusion," "mind reading," or "psychic wonder," is simply the carrying out of a carefully devised code, understood alone by the performers; that, while it

amuses and interests, it at the same time deceives the public. All these may be laid aside while we examine the methods used by the plaintiff to establish his reputation. I quote from one of his press notices, published after he had appropriated to himself the name "Mercedes":

Mercedes' Life Story.

The life of Mercedes reads like a page from a book of fiction, teems with adventure, and is colored with real romance. Mercedes is, of course, a *nom de theatre.* It was chosen by the young man, who is mystifying the world with his peculiar demonstrations of telepathy, because it was the name of his mother, a Spanish lady. In reality Mercedes' name is Joseph Howard. His father, a Scotchman, wedded to a Spaniard, met reverses which necessitated the son seeking employment at a very early age. They lived in Chicago, and young Joe, or Mercedes, as you shall call him hereafter, found work in a factory. It was hard grinding toil and the boy's only relief—for he had the temperament and soul of an artist—was found at night-time, when he resorted to his room or to the homes of his friends and the companionship of his beloved violin. Near neighbor to him lived Nellie Stantone, whose parents were French. She and Mercedes were playmates from childhood and when the young man played his violin it was Nellie Stantone who thrummed out his accompaniments on the piano.

One day while at work in the Chicago factory Mercedes' third finger on the left hand was caught in a machine and smashed to a pulp. Blood poison set in and the boy's life was despaired of. For weeks he raved in delirium, but when convalescence came he sought the home of his girl friend, and as he lay, frail and sad, upon a couch, while she sat at the piano, the inspiring notes of his favorite violin solo rang through his thoughts. For weeks in his fever-tortured agony, this last piece he had played upon his violin was constantly with him. Hardly realizing what he was saying on his first day out, he turned to Miss Stantone, and said: "Nellie, I wish you would play that piece for me. It's haunted me."

Years of Very Hard Study.

The girl whirled around on her piano stool instantly and began to play Gounod's "Ave Marie." Mercedes was startled, for he had not mentioned the name of the selection. They were both children, and, had the boy failed to mention the incident to his father, it probably would have been forgotten, and what is now regarded as a scientific revelation might have been lost to the world. Mercedes' father was a great reader. He had heard a lot about telepathy and so he insisted that there should be a trial of the boy's powers. After much practice Mercedes and Miss Stantone brought their experiments to a successful conclusion. Mercedes thought of a selection he wished her to play and she played it without having any communication by word or sign from her violinist friend. This practice was kept up incessantly in spite of opposition from the young woman's family, for they believed that young Mercedes possessed some evil power over their daughter and they at length forbade the boy and the girl to meet. They did meet clandestinely, however, and tried out their skill in divers ways. At length the girl's family discovered these secret meetings, and, to rid of the incubus of the boy's evil influence, as they termed it, packed up their chattels and removed to Battle Creek, Mich. Mercedes' father, too, tired of the young man's persistence and gave him a sound thrashing one day that seems to have been the turning point in Mercedes' life. He ran away from home, went to Battle Creek, and sold newspapers on the streets for a living. He suffered a serious illness, was taken home, and, upon his recovery, his family being advised to allow him to pursue his bent, he was now unmolested in the pursuit of the secret of telepathy.

There were years of study, and finally, three years ago in Chicago, a public performance which made everybody talk of the strange occult influence of this boy over the girl at the piano. Since then Paris and London and the entire continent of Europe have been startled by the strange performances of this boy and girl, and now America is sitting up and taking notice of the strange things they are accomplishing.

Admittedly there is not one statement in this entire

article that is true, or that even approximates the truth. To put our approval upon such methods, by protecting with a writ of injunction a business built upon such a foundation, would, to my mind, disregard that maxim of equity that is hoary with age—that he who comes into a court of equity must come with clean hands. The writ of injunction is not a writ of right, but its issuance rests in sound judicial discretion; that discretion should not be moved where the party applying does not bring his case within equitable principles, does not show superior equities that are entitled to protection at the hands of a court of equity, does not make such a case as moves the conscience of the court to grant the relief.

I am persuaded that neither of these parties has shown such a clear right to the exclusive use of the name "Mercedes," in connection with this performance, as would justify this court in enjoining either, as against the other, from continuing to entertain, amuse, and deceive the public by it.

I think both the bill and cross-bill should be dismissed, with costs to the defendant.

KUHN, C. J., and MOORE, STEERE, and BROOKE, JJ., concurred with FELLOWS, J. OSTRANDER, J., concurred in the result, dismissing the bill.

STONE, J. (*dissenting*). This case is in this court on the appeal of the defendant Elizabeth M. Crane from a decree entered in the court below in favor of the plaintiff. There is some confusion in the statement of facts by counsel, due to the statement of those facts only which are favorable to their position, and the omission of those relied upon by the other party. The learned circuit judge, who heard the case and who saw and heard the witnesses testify, filed a written opinion, which is sustained by the record. It states the claims of the parties and the questions involved so

clearly that a portion of it is quoted as a statement of the case:

"The plaintiff claims that he is entitled to the exclusive use of the word 'Mercedes,' in connection with the production of a certain vaudeville play, which he claims he has been producing for the last five years and upwards; that he originated the word 'Mercedes,' in connection with this act, and applied it to the act, and has continued to apply it to the act during those years; that the act has been very successful, and is now producing a large income for himself and those associated with him; that the act is well known, and is produced only at the best vaudeville theaters in this country as a headliner, so-called.

"The defendants claim that the word 'Mercedes' is Miss Crane's middle name; that her name is Elizabeth Mercedes Crane; that she became associated with the defendant Lovett something less than a year ago in the production of a play or act similar to the production of the plaintiff's, but which varied somewhat by some additional features which have been added to the act; that her part in the production is substantially the same now, under the direction of Mr. Lovett, as when she was associated with the plaintiff in 1910. She claims that she was the essential feature of the act as produced by the plaintiff, when he produced this particular play in 1910. She claims that she was instrumental in originating it, that her father had more or less to do with the origin of this particular act, and that when she and the plaintiff began producing it they were partners, she receiving one-half of the net proceeds of their joint venture; that for some time the plaintiff and the defendant Crane continued to produce this act, until finally disagreements arose which separated them; she returning to her home in Chicago, and obtaining employment elsewhere.

"The plaintiff denies that there was any partnership between the parties, in this: That the act was exclusively his idea, that he employed the defendant Crane to assist him in the production of the act, and that that is as far as she had any connection with it. After the separation of the parties, the plaintiff employed another lady to take Miss Crane's part, and from that time on, the act itself, not the performer, was called

'Mercedes,' and the word 'Mercedes' has been applied to the act itself from that time on, and until this day.

"It seems, from the testimony of the defendants, that the defendant Lovett conceived the idea of putting on a similar act, as I have said, a year ago; that he employed Miss Crane to assist him in producing the act, which is, in substance, the same act, in its essential features, as the act of the plaintiff; that a trial performance, or a series of performances, was given in Chicago, later in Davenport, then in Winnipeg, and still later in Cincinnati. The advertisements that were used in Cincinnati are before the court. At first the act was called 'Concentration,' but the advertisements in Cincinnati show that emphasis is given to the word 'Mercedes,' in connection with the name 'Crane.' Advertisements of the defendants' performance, that were distributed in Detroit recently, also give emphasis to the word 'Mercedes,' which is the feature word of the advertisement. The word 'Crane' is placed in small letters in all of these later advertisements, and it is because the plaintiff claims that the defendants are unduly using the word 'Mercedes,' thereby taking away from him that which he claims is his own, that this proceeding is instituted, and the plaintiff claims that the defendants should be restrained absolutely from using the name 'Mercedes' in connection with their production.

"The defendants, on the other hand, claim that, because the name 'Mercedes' is the middle name of Miss Crane, she has a right to use it in connection with the production of the defendants, and because of the further right, which was hers, and which she never abandoned, while she was associated with the plaintiff, when her middle name was used in connection with the plaintiff's production at that time. And the defendants pray that the plaintiff be restrained from the use of the name 'Mercedes,' and that he be required to account for the profits that he has made. Both sides ask, in other words, for a permanent restraining order, each against the other, and for an account of the profits each may have made out of the use of the word 'Mercedes.'

(Counsel for plaintiff here announced that they did not ask for an accounting.)

"I think I have sufficiently stated the substance of the pleadings and claims, so that the real issue involved may appear clearly to all of us. This is as to whether the plaintiff may exclusively use this word 'Mercedes' in connection with his vaudeville production. It was conceded by both sides at the beginning of the hearing that that was substantially the issue to be determined by the court. There is no complaint against the defendants by the plaintiff that, in the production of this particular vaudeville act by them, they may use the word 'Concentration,' or any other word they may choose to select. It is the use by the defendants of the word 'Mercedes' that must be determined. I think it appears beyond question that the word 'Mercedes,' in connection with this particular vaudeville act, has become a valuable asset to the plaintiff, and would be a valuable asset to the defendants, if they could appropriate it and use it. The fact that it is a valuable asset is the fact which leads both parties into a court of equity to restrain the other from its use.

"The principal contention of the defendants that the word 'Mercedes' is a part of Miss Crane's name, and therefore they have an exclusive right to use it, is not controlling by any means. A name may be used without question, if the use of it does not infringe upon the rights of another, in the prosecution of his business, whereby the public is likely to be misled, as has been said by counsel.

"This question of the right to use names in connection with one's own business—particular names, proper names, common names, any name—has been before the courts a number of times, in this and other States. It seems to me that the question involved here has been determined by the decisions of our own court, and it is not necessary to go outside of Michigan to find the law fully and completely stated. The case of *Lamb Knit Goods Co.* v. *Lamb Glove & Mitten Co.*, 120 Mich. 159 (78 N. W. 1072, 44 L. R. A. 841), is a case where the use of a proper name was enjoined, under the circumstances shown there, because its use by the latter concern, in the judgment of the court, would lead to confusion; the public would be misled in dealing with the two institutions, and would be unable to determine, by the use of that name, which of the two

they were really dealing with. In a case that arose in this city, I think (*Penberthy Injector Co.* v. *Lee*, 120 Mich. 174 [78 N. W. 1074]), a similar question arose, and the use of the word 'Penberthy' was enjoined.

(The court then referred to *Michigan Savings Bank* v. *Dime Savings Bank*, 162 Mich. 297 [127 N. W. 364, 139 Am. St. Rep. 558.])

"It seems to me that the law is so well settled along this line that it is hardly worth while to discuss it, or to argue it. The books are full of cases in which parties have been restrained from using their own names, in a way to appropriate the good will of a business already established by others under that particular name, and that is this case exactly. Assuming all that the defendants claim to be true, still it appears undisputed that, from 1910 down to the present time plaintiff has used the name 'Mercedes' in connection with this particular production, and that it has been during these five years that the name has achieved its notoriety, its importance, its association with the act itself —its popularity, its money-making qualities. It also appears that within the past eight months the defendant Lovett, in connection with Miss Crane, who was formerly associated with the plaintiff, produced a similar act, and used Miss Crane's middle name, which happens to be 'Mercedes,' as featuring principally the act.

"It does not make any difference whether up to 1910, while Miss Crane was associated with the plaintiff, she was called 'Mercedes,' and designated as 'Mercedes' upon the advertisements of the plaintiff, or not. She claims that is the fact. The plaintiff claims that the word 'Mercedes' was used to designate the act, but that is not very material. The fact is that for five years the act itself has been described as 'Mercedes,' and that it has gained its popularity, its popular favor as an act, known as 'Mercedes,' and, as I have said, during the last year the defendants have been using this word, and I think unlawfully. * * *

"An injunction, plain, simple, and in few words, will be issued, restraining the defendants, and each of them, from further use of the word 'Mercedes' in connection with their production."

The decree adjudged that the plaintiff, since the 10th day of August, 1910, had been, and then was,

"the sole and exclusive owner of the trade-mark and trade-name of 'Mercedes,' as applied to that alleged psychic performance of thought transference as performed by the said Joseph B. Howard, which consists of a woman, blindfolded, playing upon the piano on the stage such musical selections as may have been communicated to her by alleged thought transference through the agency of the said Joseph B. Howard, which said selections of music were made by some person in the audience, and, after having informed the said Joseph B. Howard of such selections, such persons then ask the blindfolded woman, at the piano, to play such selections, who thereupon plays the same."

It adjudged that the defendants had no right therein or title thereto, but had unlawfully infringed upon the rights and property of the plaintiff therein. It enjoined and restrained the defendants from using the name "Mercedes," or any combination thereof, in relation to the said psychic performance as stated, and from giving any public or private performance of the same under said name "Mercedes," and from giving any such performance under the name "Concentration," in connection with or under the name "Mercedes," and from using the name "Elizabeth Mercedes Crane" in connection with the name "Concentration" as applied to such performance, either wholly or in part, and from advertising or making any public performance thereof, under the name "Mercedes," or that of "Concentration," in connection with the name "Elizabeth Mercedes Crane," or that of "Mercedes Crane," either wholly or in part, or in any other combination of names containing the word "Mercedes," or that of "Concentration," as so applied, or any variation thereof whatsoever, and that the defendants, and each of them, do henceforth refrain from using said word "Mercedes," or that of "Concentration," in con-

nection with the name "Elizabeth Mercedes Crane," either wholly or in part, in any signs, advertisements, labels, cards, letter heads, or other ways whatsoever, or in any manner calculated or tending to infringe upon plaintiff's exclusive title aforesaid. The cross-bill of defendants was dismissed.

Upon the argument of this case I was in doubt whether the evidence warranted the finding and decree below. A careful review of the evidence and examination of the exhibits have satisfied me that the trial court reached the correct conclusion. There is an irreconcilable conflict in the evidence, especially in that of the plaintiff and the defendant Crane. It is the claim of the plaintiff that as early as 1908, while he was conducting a performance in which the girl on the stage identified articles handed him by persons in the audience, he conceived the idea of a musical transference act like the one in question. His testimony on this point is corroborated by that of two other witnesses. It is undisputed that he then spoke of calling the pianist in the act "Mercedes;" that he adopted the name from that of the betrothed wife of the Count of Monte Cristo, of which he had read. Applying the rule suggested by appellant's counsel that "trade-names are acquired by adoption and user, and belong to the one who first used them and gave them a value" (38 Cyc. p. 765), we think that it appears that plaintiff originated the name and first used it in connection with the act in question. It is true that he did not use it until the year 1910, when he employed Miss Crane as pianist. We do not think that any partnership existed, and it does appear that he paid Miss Crane wages, and continued to use the name in connection with the act, after Miss Crane left his employment; and he continued to use it down to the time of the hearing in the court below. In our opinion it is not significant or important that Miss Crane's middle name is Mercedes,

nor that she was addressed as "Mercedes," or "Merce," or "Merc," by her friends, instead of "Elizabeth." Nor do we think it important or controlling that Miss Crane used the name "Mercedes" in another and different act after she left the employment of the plaintiff, as appears by her exhibits on pages 170 and 171 of the record.

We are of the opinion that it appears that the plaintiff has rightfully been using this name in connection with and to advertise this act since 1911, and has given the act its present standing before the public, and that he should therefore be protected in its exclusive use. In addition to the cases cited by the circuit judge the following have a bearing upon the use of names: *Gordon Grate Co.* v. *Gordon,* 142 Mich. 488 (105 N. W. 1118); *Dayton* v. *Imperial Sales & Parts Co.,* 195 Mich. 397 (161 N. W. 958).

It is urged that the injunction is too broad. The court below enjoined the use of the name "Elizabeth Mercedes Crane," or any combination of that name with the word "Mercedes," in connection with this particular act, as described in the decree. Personally, Miss Crane can use her name as she sees fit, except that she cannot use it in connection with this act, or any similar act. If the injunction is to have any practical effect, it should stand as ordered. We are of the opinion that there was ample evidence to sustain the finding of the court below, and that the correct conclusion was reached.

The decree of the circuit court should be affirmed. The plaintiff should recover his costs of this court against the defendant Crane.

BIRD, J., concurred with STONE, J.

HARTWIG *v.* GRACE HOSPITAL.

1. DEEDS—COVENANTS—BUILDING RESTRICTIONS.
   There is a violation of the restrictive covenant in a deed against the erection of anything but a residence and buildings pertaining thereto by the remodeling of an existing dwelling and using it as a hospital.[1]
2. SAME—BUILDING RESTRICTIONS—PRESUMPTIONS.
   The character of a building restriction in a deed to land *held*, to raise the presumption that such restriction was intended for the benefit of subsequent purchasers, especially when the quantity of the land affected and its general location are considered.
3. SAME.
   A building restriction in a deed to land, inserted for the benefit of the land retained by the grantor, may be enforced by subsequent purchasers *inter se*.
4. SAME—VIOLATION OF BUILDING RESTRICTIONS—ACQUIESCENCE—INJUNCTION.
   Long acquiescence in the violation of a building restriction in a deed to land limiting the use of the land to residence purposes by the changing of a residence thereon into a hospital will defeat the right to enjoin such violation when only by the making of expensive changes in the structure could the residence character of the building be restored.
5. SAME—BUILDING RESTRICTIONS—"RESIDENCE."
   A home for nurses of a hospital is not a residence within the meaning of a building restriction in a deed to land.

Appeal from Wayne; Codd, J. Submitted June 15, 1917. (Docket No. 59.) Decided December 27, 1917.

Bill by William J. Hartwig and others against the Grace Hospital to enjoin the violation of building restrictions. From a decree dismissing the bill, plaintiffs appeal. Reversed in part.

[1]For authorities discussing the question as to whether a multiple residence structure is a violation of restrictive covenant, see note in 45 L. R. A. (N. S.) 726.

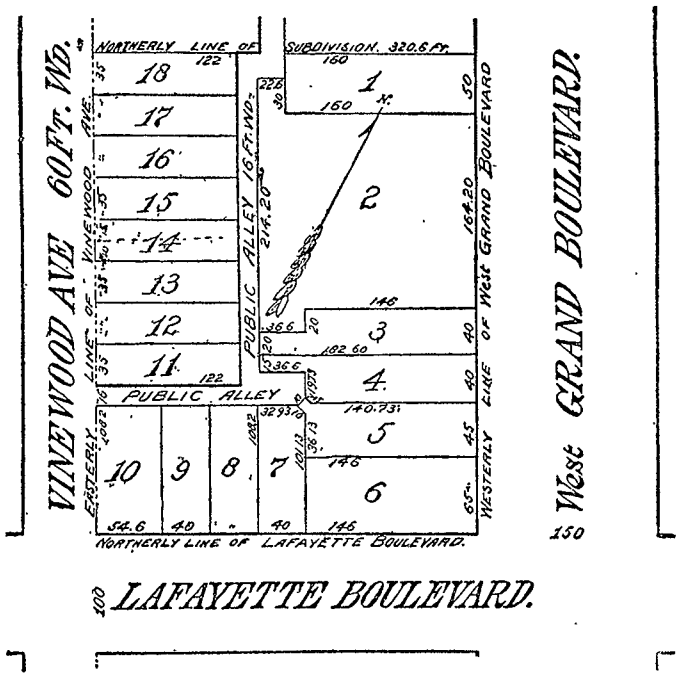
Corliss, Leete & Moody, for plaintiffs.

Angell, Bodman & Turner and *C. G. Dyer,* for defendant.

Prior to September 30, 1897, the heirs of Bela Hubbard owned a block bounded by West Grand boulevard, Vinewood avenue, Lafayette boulevard, and Porter street, and other lands in the vicinity, in a division of which lands title to the southerly 400 feet of the block was on the day aforesaid vested in Henry G. Hubbard, evidenced by a deed dated on that day, made by Collins B. Hubbard and others as grantors, and recorded. The deed contained the following:

"Provided, however, and as a part of the consideration hereof, its conveyance is made subject to the following conditions, to wit: Up to and until the 1st day of January, 1925, no building other than a residence and buildings pertaining thereto shall be erected upon said premises. No bay window, approach, or other structure to be erected or placed within 30 feet of the boulevard and Vinewood avenue. Up to the date last aforesaid no residence building shall be built or placed on said premises costing less than $2,500 fronting on the boulevard, or less than $2,000 if fronting on Vinewood avenue. Upon any breach of the foregoing conditions, or any part thereof, the title hereby conveyed of the property upon which said breach is made shall revert to and vest in the parties of the first part, their heirs and assigns, forever, and it shall be lawful for the first party, their heirs and assigns, to re-enter upon said premises, and the party of the second part, his heirs and assigns, to remove and put out."

After the decease of Henry G. Hubbard, his heirs conveyed the land aforesaid to Hubbard Land Company, a corporation created to sell the property, which sold it on land contract to Frank A. Reed, who in May, 1906, subdivided it, made a plat, as shown by the annexed drawing, and recorded it. No evidence of restrictions is found in the plat.



All deeds of the lots in this plat were made by the Hubbard Land Company as grantor. Lot 1 was deeded March 22, 1906, to Jessie Kennedy, with no restriction in the deed. Lot 4 was deeded June 7, 1906, to Angus H. Cameron; the deed containing the condition following:

"(1) No building other than one single tenement dwelling house shall be erected upon said premises, and no bay window, porch, or other structure shall be erected or placed within 30 feet of the boulevard.

"(2) No single tenement dwelling house shall be built or placed on said premises costing less than $3,000.

"(3) No fences or buildings, except the one single tenement dwelling house described, shall be erected on the above-described premises while the main entrance of the house on lot 2 of the above subdivision faces the south as it now does.

"Upon breach of the foregoing conditions, or any part thereof, the title hereto conveyed to any person or persons of the above described premises * * * shall revert to and vest in the party of the first part."

Lot 5 was conveyed to William R. Kales March 22, 1906; the deed containing conditions 1 and 2 as above, except that after the word "dwelling house" there is inserted, "and buildings appertaining thereto." Lots 6 and 7 were deeded to John A. Mercier and wife March 22, 1906, the deed having the same conditions as the deed to Kales, except that the minimum cost of a dwelling house is not inserted. Lots 8 and 9 were conveyed to Etta E. Reed January 3, 1908, the deed containing conditions found in Kales' deed, except in paragraph 2 the minimum cost of house is fixed at $2,000. Lot 10 was conveyed to Jacob Seidel and wife August 10, 1908, with the conditions:

"(1) No building other than one single tenement dwelling house and buildings appertaining thereto shall be erected upon said premises, and no bay window, porch, or other structure shall be placed within 30 feet of Lafayette or Vinewood avenue.

"(2) No single tenement dwelling house shall be built or placed upon said premises costing less than $2,000."

Lot 11 and south 20 feet of lot 12 were conveyed to James S. Park May 6, 1907, the conditions in the deed being:

"(1) No building other than one single tenement dwelling house and buildings appertaining thereto shall be erected upon said premises, and no bay window, porch, or other structure shall be erected or placed within 30 feet of Vinewood avenue.

"(2) No single tenement dwelling house shall be erected or placed on said premises costing less than $2,000."

South 20 feet of lot 13 and north 15 feet of lot 12 went to James A. Ballard and wife March 29, 1906, upon condition:

"Provided, however, that said premises are to be used for residence purposes only, and no house costing less than $2,000 shall be erected thereon, and no buildings shall be erected nearer than 30 feet to the easterly line of Vinewood avenue."

Edward L. Holmes and wife, March 29, 1906, acquired the north 15 feet of lot 13 and south 20 feet of lot 14; condition being:

"Said premises are to be used for residence purposes only. No house costing less than $2,000 shall be erected thereon, nor be erected within 30 feet of the easterly line of Vinewood avenue."

Lot 15 and north 15 feet of lot 14 was deeded to William J. Hartwig December 9, 1907; the deed containing no restrictions or conditions. Frank W. Snyder and wife, March 22, 1906, acquired lot 16 upon condition:

"No building other than one single tenement dwelling house and buildings appertaining thereto shall be erected upon said premises, and no bay window, porch, or other structure shall be erected or placed within 30 feet of Vinewood avenue. No single tenement dwelling house shall be built or placed on said premises costing less than $2,000."

And on October 2, 1908, lot 17 was conveyed to Goodenow and Girr, without condition, and lot 18, June 7, 1906, to August C. Schultz and wife, the deed containing same condition as in the deed to Snyder. Some of the grantees in these deeds conveyed the land by deeds containing no conditions. Kales, Mercier, Seidel, and Holmes all of them conveyed by deed containing no condition.

Lot 2 was deeded by the Hubbard Land Company to Joseph Boyer, and lot 3 to Lafayette D. Vorce and wife; the deeds containing substantially the condition in the deed to Henry G. Hubbard. These lots were acquired by Henry M. Leland in 1911 from Boyer and Vorce, respectively, and he, by deed of gift, trans-

ferred the property to Grace Hospital July 7, 1913. Boyer's deed to Leland and Leland's to the defendant provide that the land shall be subject to conditions set forth in the deeds to them, but waive the same so far as they have power so to do. The family residence of Bela Hubbard stands on what is now lot 2, and was erected before any restrictions as to use were attempted.

Lot 3 is, and has been, vacant unoccupied property. Mr. Reed, who contracted to purchase all of the land, who platted it, proposed to establish in the residence on lot 2 a school for stammerers. Public notice of this purpose was given, a sign was placed on the building, and about June 1, 1906, a substantial addition to the building was begun. He proposed to erect on lot 3 a dormitory to be used in connection with the school. Mr. Reed died in October, 1906. The building was never used for a school, and stood vacant until the month of August, 1909, when some one equipped it for a Swedish massage institute, and it was opened as such November 15, 1909. The addition to the building begun by Reed was completed. During the period from November 15, 1909, to December 25, 1910, the place was operated as a cure, containing as many as 27 patients at one time; some patients remaining as long as three months. Then, and until October 1, 1913, a rooming house was conducted there—for invalids. After October 1, 1913, various changes were made, and the hospital was formally opened January 1, 1914. Early in 1914 work was begun upon an addition to the building, to be used as a surgical room, which was completed in November of that year. The building of a nurses' home on lot 3 was projected, but not begun. In March, 1916, a written protest was made by owners of adjoining property, received, and referred to the defendant's board of trustees. Defendant expended about $5,600 for alterations of the building.

It proposes to erect on some portion of the premises, lot 2 or lot 3, a nurses' home to accommodate 20 to 22 nurses, to be used only for a home.

On the 16 lots, other than 2 and 3, there have been erected seven single residences and five designed for use of more than one family. Of the five, two are upon lots deeded without condition, and three upon lots restricted to a single tenement dwelling.

Eighteen persons, who are described as owning lots 1, 4, 5, 6, 7, 9, 10, 11, 12, 13, 16, 17 and 18 of the subdivision, join as plaintiffs in a bill of complaint, which was filed June 12, 1916, in which they charge that the defendant has begun to use the residence on lot 2 for hospital purposes, and is maintaining there a general hospital for the care of sick and injured people, with surgical department and operating room, and is proposing to extend the said hospital so maintained on said premises by the alteration and removal of the old building and by the erection of a large new hospital building, and that it is further proposed to extend said building upon the vacant lot 3, and intends—

"to commence the construction of a nurse home, so-called, upon a portion of said premises, all of which said present use and such proposed extension are contrary to the restrictions upon said premises as hereinbefore set forth."

It is prayed that preliminary injunctions, to be later made permanent, may issue to restrain defendant from erecting on lot 3 any building which does not correspond with the conditions referred to, and from carrying on and maintaining on said lot a nurses' home or hospital, and that as to lot 2 it be restrained from using it for any other than residence purposes, and from maintaining or conducting and carrying on any hospital, dispensary, or surgical department on said lot.

Defendant answered, there has been a hearing, and

a decree has been entered dismissing the bill. In an opinion delivered by the learned trial judge, he says, among other things:

"As far as I can find from the testimony, the purchase of all the other property by plaintiffs or others in this subdivision was made after the property on lot 2 had been diverted from residence to business purposes. Under all these circumstances, I cannot believe that the plaintiffs can insist on the preservation of a restriction that has never been operative upon this property. The only other question as to lot 2 involves the use of the property for hospital purposes and a claimed nuisance arising therefrom. I cannot find from the testimony that such exists. The use of the property is hardly different than it has been for some years, and to hold in accordance with plaintiffs' claim would be to declare a hospital a nuisance *per se*. That I am not prepared to do. A different question is involved in the consideration of the erection of the proposed nurses' home on lot 3. This lot has never been diverted to business use, and there is a restriction upon it. I cannot conceive, nor does the testimony disclose, that any serious detriment will come to any adjacent property by reason of this building. The question, however, resolves itself into the plain proposition: Would this proposed building be a viclation of the restriction at present existing upon this lot? That the building is to be used for residence purposes is clearly shown and can hardly be in dispute. Does it comply with the term 'single dwelling house;' or, if not, has the strict construction of this part of the restriction been abandoned in this subdivision? The undisputed testimony shows that there has been erected without protest upon this subdivision buildings that do not strictly comply with the term 'single dwelling house,' and that, too, by some of the plaintiffs in this case. There is no doubt that the use of the lot must be confined solely to dwelling purposes, but I cannot find that the building, the nurses' home as contemplated, is any other than that purpose. I believe this case is greatly controlled by *James* v. *Irvine*, 141 Mich. 376 (104 N. W. 631)."

Upon the hearing in this court, on appeal, it was

distinctly stated that no relief was sought by plaintiffs upon the theory that defendant was maintaining a nuisance on lot 2—upon the theory that the hospital was, in and of itself, a nuisance in a residence district.

OSTRANDER, J. (*after stating the facts*). It requires no argument to prove that all of the property embraced in the Reed plat is in its use restricted to residence purposes. None is required, either, to prove that the use of the Bela Hubbard home, with or without additions thereto, for a hospital, violates the restriction, and is a breach of the condition. The Bela Hubbard house was a single residence when the partition of lands was made. No objection is perceived to including it in the general plan evidenced by the restrictive covenant since the partition. No owner of the title thereto has devoted it to any other use until defendant acquired it, and in fact any other use of it has been, until defendant bought it, temporary. Both its form and its use have been changed in violation of the restriction. It is equally clear, I think, that it will be a further violation of the restriction if the nurses' home is built on either lot 2 or lot 3.

The real question in this case is not whether a plain restriction has been and is proposed to be violated by defendant, the deed by which it acquired title and its use of the premises answering any suggestion to the contrary, but whether it can be brought to account therefor by adjoining proprietors, at some of whom the defendant points an accusing finger, asserting that "You did it first," or have otherwise lost the right to complain.

Defendant says the restrictions in the deed given by the heirs of Bela Hubbard to Henry G. Hubbard cannot be enforced by plaintiffs because, when a restrictive covenant is imposed for the benefit of the land still retained by the grantor, the restriction is not enforceable by subsequent purchasers *inter se*. As

applied to this case, this proposition rests upon the assertion that there is no evidence that the restriction in the deed to Henry G. Hubbard was inserted for the purpose of protecting or benefiting subsequent purchasers of the land. The evidence that the restriction was intended for the benefit of purchasers of the land is patent. The very character of the restriction is evidence of the fact, especially when the quantity of the land affected and its general location are considered. The presumption is that a restricted residence district was intended. Moreover, the contention is ruled against defendant by *Schadt* v. *Brill*, 173 Mich. 647 (139 N. W. 878, 45 L. R. A. [N. S.] 726); *Erichsen* v. *Tapert*, 172 Mich. 457 (138 N. W. 330); *Zoller* v. *Goldberg*, 183 Mich. 197 (149 N. W. 989).

It is next contended that restrictions in the deeds given by the Hubbard Land Company to purchasers of lots cannot be enforced by plaintiffs in this action. The argument is that (*a*) the evidence does not show any general plan of improvement maintained from its inception and understood and acted upon by all in interest; (*b*) the plaintiffs did not, in purchasing the property, rely upon the restrictions; (*c*) the restrictions were inserted for the benefit of lot 2, which was to be retained by Reed, who platted and sold the property. The cases of *Allen* v. *City of Detroit*, 167 Mich. 464 (133 N. W. 317, 36 L. R. A. [N. S.] 890), and *Summers* v. *Beeler*, 48 L. R. A. 54 (90 Md. 474, 45 Atl. 19, 78 Am. St. Rep. 446), are cited. It is quite reasonable to say that the deeds given by the Hubbard Land Company recognized the restrictions in the earlier deed, and that they were intended for the benefit of any purchaser of the land. If the earlier general restriction thus recognized is enforced, it is not important in this case to spend time in debating whether those laid by the Hubbard Land Company are precisely enforceable. As has been pointed out, there

is no occasion here to rely upon an advertised general plan and scheme of selling lots in order to find the intention to make a restricted district.

It is further contended, and is the contention of merit, that plaintiffs have acquiesced in a use of lot 2 for such a period of time that equity will not now grant them relief by injunction. In this connection, reliance is placed upon the fact that Reed expended money and made some changes in the residence building; Malmberg, in fitting it for a Swedish massage institute, expended a considerable sum of money; and defendant has at some expense made additional changes.

The case is not free from doubt; and while, perhaps, a doubt ought never to be resolved in favor of a covenantee who buys with purpose to breach his plain covenant, it remains that every one who, since the platting, has been lawfully in possession of lot 2, has used it visibly for other than residence purposes. The additions made to the building denote—advertise—the fact that a residence is not and will not be maintained there. Owners of adjoining property, and some of the plaintiffs who purchased from Reed, have been advised by the record and by their deeds of the restrictions sought now to be enforced. It is to be inferred that the building on lot 2 has physically lost its character as a residence, and only by expensive changes can the residence character thereof be restored. There is fair ground for refusing to plaintiffs the injunction so tardily asked for, and it will be refused as interfering with the use by defendant of lot 2.

It is held, and has been already stated, that the proposed nurses' home will not be a residence within the meaning of the condition, and plaintiffs may have the writ of injunction to restrain the erection of the building on lot 3.

Neither party will recover costs of this appeal as against the other, but one-half the cost of preparing and printing the record will be borne by plaintiffs and one-half by defendant.

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

KRUCE *v.* LAKESIDE BISCUIT CO.

ACTIONS—MULTIPLICITY OF SUITS.

Where several claims are involved or due and payable under one and the same contract at the time of bringing suit, such claims must be sued on in one action, in order to avoid multiplicity of suits.

Error to Wayne; Des Voignes, J., presiding. Submitted October 3, 1917. (Docket No. 7.) Decided December 27, 1917.

Assumpsit in justice's court by Edwin J. Kruce against the Lakeside Biscuit Company for goods sold and delivered. From an order overruling a plea in abatement, defendant appealed to the circuit court by writ of certiorari. Judgment for plaintiff. Defendant brings error. Reversed.

Angell, Bodman & Turner, and *C. G. Dyer,* for appellant.

Sidney S. Cole (*Henry C. L. Forler,* of counsel), for appellee.

On March 31, 1914, plaintiff entered into a lease and agreement with defendant. By section 10 of said instrument it was agreed:

"The lessee (the Lakeside Biscuit Company) hereby agrees to purchase from the lessor on the execution of this lease all manufactured and unmanufactured goods now located on said premises and all cans and crates on said premises and in the possession of customers, as shown on the books of the lessor, in the manner following: Lessee shall pay for all manufactured goods the inventory price thereof, less 25 per cent., and for all unmanufactured goods the price shown by invoices, and for cans and crates their cost as shown by invoices."

Section 14 of said instrument provides:

"Cans and crates belonging to the lessor, as the same are returned by customers to the lessee, shall be credited upon the books of the lessee at their cost, and shall be paid for by the lessee to the lessor on or before the 5th day of each month for all cans and crates returned during the preceding month."

The agreement became effective April 1, 1914. During several months following cans and crates which were in the possession of former customers of the plaintiff were returned to the defendant, and on July 14, 1914, $1,000 was paid by defendant to plaintiff to apply on the amount then due for cans and crates so returned. A dispute having arisen between the parties as to the number of cans and crates returned and as to the amount paid therefor, no further payments were made. On March 16, 1915, eight months after the last payment, plaintiff instituted 11 separate suits in the justice's court for the city of Detroit, and filed bills of particulars therein in an amount totaling $5,260.20. These suits were numbered in justice's court from 14506-14516, inclusive. The bills of particulars so filed did not indicate the dates on which the

cans and crates were returned, and the various items were divided between the several suits with no reference to the months in which the returns had been made. The defendant objected to the splitting up of the claim into 11 different suits in order to confer jurisdiction on the justice's court, and brought the matter to the attention of the court by a plea in abatement, pleading the pendency of suit No. 14506 in abatement of the other ten suits. Upon the argument of the plea the justice ruled that the cans and crates returned during one month should be included in one suit, but that plaintiff could bring a separate suit for the cans and crates returned in each of the several months, granting the right to plaintiff to file new bills of particulars upon that basis. Plaintiff then dismissed all but five of the suits which he had started, and in those five filed new bills of particulars as follows:

"No. 14516. A statement of the cans and crates returned during April, amounting to $739.60, against which he credited a sufficient amount of the $1,000 paid in July to balance the claim and dismissed that suit.

"No. 14515. A statement of cans and crates returned during May, amounting to $757.70, against which he credited the balance of the $1,000, $260.40, paid in July, leaving a balance due of $497.20.

"No. 14514. A statement of cans and crates returned during the month of June, amounting to $250.20.

"No. 14513. A statement of cans and crates returned during the month of July, amounting to $24.

"No. 14512. A statement of cans and crates returned during the month of August, amounting to $16."

Upon the filing of the amended bills of particulars, defendant renewed its plea in abatement, alleging the pendency of suit No. 14512 in abatement of the other four suits. This plea was overruled on July 29, 1915,

and judgment was rendered in case No. 14513 in favor of the plaintiff and against the defendant in the sum of $24 and $1.75 costs. Defendant thereupon removed that suit by certiorari to the circuit court for the county of Wayne upon the ground that the justice had erred: (*a*) in overruling the defendant's motion to dismiss for want of jurisdiction of the court; (*b*) in overruling the defendant's plea in abatement; (*c*) in rendering judgment in favor of the plaintiff and against the defendant in the sum of $24 damages and $1.75 costs.

At circuit the judgment of the justice's court was affirmed. The case is now in this court upon writ of error.

BROOKE, J. (*after stating the facts*). It may be stated at the outset that the authorities upon the question presented are not entirely harmonious. A review of all of the law upon the question leads the writer in volume 1, Corpus Juris, p. 1112, § 287, to enunciate the rule as follows:

"The decided weight of authority is to the effect that, if an action is not brought until more than one breach of the same contract, or until more than one claim or installment is due thereunder, all such breaches or claims or installments constitute but one cause of action, and must be included in one action, the theory being that, while the different breaches or installments give rise to separate causes of action as they occur or become due, yet all which occur or become due before action is brought are merged or consolidated into a single cause of action; and in some cases it is stated broadly that this rule applies to all claims or demands arising out of the same contract, although based upon separate and distinct covenants or stipulations thereof. There has, however, been some conflict of authority in regard to this rule, even in the decisions of the same jurisdiction, and there are accordingly decisions to the effect that separate demands, although they arise out of the same contract or transaction and are due at the

time of the first action, need not be joined. Causes of action arising out of entirely separate and distinct contracts need not be joined, although they are of such a character that a joinder would be permissible, and causes of action arising after an action is instituted need not be added by amendment."

The cases cited support the text.

The question was before this court in the early case of *Dutton* v. *Shaw*, 35 Mich. 431. In that case Shaw had sold and delivered to Dutton several lots of staves, all at a price fixed by a contract, whereby Shaw was to deliver and Dutton to accept all the staves to be got out by Shaw in 1863. After all the staves had been delivered Shaw sued Dutton upon the contract, and the case went to judgment. During the trial Shaw failed to prove one item of 2,546 staves, and that item he withdrew. In the case considered by this court Shaw sued Dutton to recover the item thus withdrawn. This court said:

"This item, being within the former declaration, and being a part of the articles furnished under a single contract entirely executed, cannot, on any known principle, be distinguished from any other case in which a party has failed for lack of proof. It was not a distinct cause of action, and the former judgment was a final determination of the damages to which Shaw was entitled under the contract. The principle which prevents the splitting up of causes of action, and forbids double vexation for the same thing, is a rule of justice, and not to be classed among technicalities. It was intended to suppress serious grievances."

The question was again considered in the case of *Stickel* v. *Steel*, 41 Mich. 350 (1 N. W. 1046). There Stickel bought of Steel on the same day two bills of goods, the first bill with a credit of four months from September 15th following, and the second with a credit of four months from October 1st following. The court held that the two bills constituted distinct demands, and warranted the bringing of two separate actions.

In the case of *Milroy* v. *Mining Co.*, 43 Mich. 231 (5 N. W. 287), plaintiff and his minor son had worked for the defendant a period of six months, and had earned the sum of $676. Of this claim he had assigned to one Bigelow the sum of $100, which sum had been placed in judgment by Bigelow. The judgment not having been satisfied, Milroy sued in his own name for the entire sum of $676. The court held that the Bigelow judgment was a bar to the subsequent action, saying:

"There can be no question, either upon reason or authority, that a claim like the present cannot be split and cut up into separate causes of action to suit the convenience or whim of the plaintiff. If so, he could assign, after working six months, a month's wages to an individual or firm, and so of each and every month, and thus have six separate suits commenced, or he might commence six separate actions in his own name. The assignment, and the fact that the suit was commenced in the assignor's name for the use and benefit of the assignees, can in law make no difference. * * *

"To permit separate causes under such circumstances would be to subject the debtor to costs and expenses far in excess of the principal debt, besides the annoyance and injury which so many suits would necessarily be to him. This the law will not tolerate or permit. It gives the creditor a remedy against his debtor to enable him to collect his demand and the whole thereof, and it at the same time protects the debtor against needless and vexatious causes of action."

In *Reid, Murdoch & Co.* v. *Ferris*, 112 Mich. 693 (71 N. W. 484, 67 Am. St. Rep. 437), plaintiff had sold to defendant various bills of goods at different times and on different terms of credit. Some of the goods were replevined by plaintiff from defendant, and an action in trover was brought for the remainder. It was held that, where fraudulent purchases are made on different occasions, each constitutes a distinct and separate

fraud for which the seller is entitled to maintain a separate action.

In the case of *Phelps* v. *Abbott*, 116 Mich. 624 (74 N. W. 1010), it was held that a creditor might bring separate suits upon claims embraced in an open account subject to the penalty of loss of costs in subsequent suits where the whole of the claim upon such account is not included in one action, citing *Stickel* v. *Steel, supra,* and *Reid, Murdoch & Co.* v. *Ferris, supra.* See, also, *Jensen* v. *Gamble,* 191 Mich. 233 (157 N. W. 440).

We are of opinion that the facts in the case at bar bring it within the principle of the decisions in *Dutton* v. *Shaw, supra,* and *Milroy* v. *Mining Co., supra,* and that the cases of *Stickel* v. *Steel, supra,* and *Phelps* v. *Abbott, supra,* are distinguishable. In the case at bar the 11 suits were started as the result of successive breaches by the defendant of the *same* provision of a single contract. The alleged indebtedness of the defendant accrued from time to time under and by virtue of a single contract, and the entire demand was due at the time the 11 suits were brought. We conclude that, where several claims are involved, or due and payable under one and the same contract at the time of bringing suit, such claims must be brought in one action in order that the defendant may not be harassed by a multiplicity of suits.

The judgment is reversed, with costs, and a new trial granted.

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

In re CANTERBURY'S ESTATE.

HANSEN *v.* MANNING.

WILLS—EXECUTION—SIGNATURE BY MARK—VALIDITY.

A will executed by a testator who can write by affixing his mark, his signature having been affixed by another, at his direction, is as validly executed as if he had himself written his signature with his own hand.[1]

Error to Wayne; Kendrick, J., presiding. Submitted October 15, 1917. (Docket No. 137.) Decided December 27, 1917.

Sarah Hansen presented for probate the last will of Catherine Canterbury, deceased. The will was allowed in the probate court, and Hattie Manning appealed to the circuit court. Judgment for proponent. Contestant brings error. Affirmed.

Willis G. Clarke, for appellant.

C. Henri Lewis, Jr., for appellee.

BROOKE, J. The only question raised upon this record is as to the regularity of the execution of the will of the decedent, Catherine Canterbury. The will was drawn by one George E. Smedley, who was one of the subscribing witnesses, and who, with reference to its execution by the testatrix, testified as follows:

"I wrote 'Catherine Canterbury, her mark.' She put her mark there. I said to her, 'Will you write your name?' Then she said, 'I will make my mark.'

[1]As to whether ability to write invalidates signature made by mark or by aid of other person guiding the pen, see note in 7 L. R. A. (N. S.) 1193.

On the subject of signature by mark generally, see note in 22 L. R. A. 370.

Catherine Canterbury was about 60 years old when she made the will. She was in good mental condition, was able to use her arms and limbs and walk around. She could see out of one eye."

The other subscribing witness testified that she executed the will as a witness, and gave further evidence to the effect that the testatrix was unable to write. Sarah Hansen, the beneficiary under the will, testified:

"I was in the room when the deceased signed her will. I saw her do it. She said she could not write. She says, 'You know I do not write.' "

On behalf of the contestant, the testimony of three witnesses was introduced tending to show that the testatrix was able to write.

With reference to the manner of execution, the court charged the jury as follows:

"The facts in this case tend to show that the deceased was somewhat enfeebled, and that she was suffering from defective eyesight, and that she, soon after the making of this will, went to a hospital and there passed away. The signature of the will, if the party desired so to make it, could be by a cross, whether they write or not; but the fact that one does make it with a cross, or what is known as a 'mark,' instead of signing their name, is an element and a condition to be taken into consideration as to whether she did in fact sign the will with a cross. That would be one element to consider as to whether she did do so, if she could write; however, that in no way would invalidate the instrument, providing she did in fact ask that it be done by making her cross and did place her mark there, as has been explained."

The will was sustained.

On behalf of contestant it is claimed broadly:

"If a man can write his name, his mark is not his signature. Any other rule would open the door too wide for fraud."

Section 11821, 3 Comp. Laws 1915, provides:

"No will made within this State * * * shall be effectual to pass any estate, whether real or personal, nor to charge or in any way affect the same, unless it be in writing, and signed by the testator, or by some person in his presence, and by his express direction," etc.

In *McGinnis* v. *Kempsey*, 27 Mich. 375, this court said:

"It is sufficient if it be by a cross or other mark by the testator as and for his signature."

In *Just* v. *Township of Wise*, 42 Mich. 573 (4 N. W. 298), it was said:

"Where one who cannot write directs another person to sign for him, and the latter signs in his presence, the signature is binding whether the former does or does not attach his mark."

In the absence of any testimony to the contrary, we are of opinion that the evidence offered on behalf of the proponent should be construed as an express direction from the testatrix to Smedley, the scrivener, to sign her name. We have no hesitation in reaching the conclusion that a will executed by a testator who can write by affixing his mark, his signature having been written by another at his direction, is as validly executed as if he himself had written his signature with his own hand.

The judgment is affirmed.

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

MATTHEWS *v.* LAMBERTON.

1. APPEAL AND ERROR—ADMISSION OF TESTIMONY—HARMLESS ERROR.

In an action for damages for assault and battery, a question put to a physician as to whether in the treatment which he was required to give plaintiff it was necessary that he make any investigation as to whether or not the patient had a hernia and its answer was harmless error where the objectionable part of the question, as to whether it was necessary to make such investigation, was not answered.

2. EVIDENCE—ADMISSIBILITY—DAMAGES.

In an action for damages for assault and battery, evidence of the conduct of plaintiff in attempting to do work after the assault is admissible to show the extent, nature and probable effects of the injury.

3. SAME—ADMISSIBILITY—OPINIONS—HARMLESS ERROR.

In an action for damages for assault and battery, the affirmative answer of plaintiff's wife as to whether plaintiff after the injury had any pain about his head was harmless error, where the ruling was made by the court that the witness could state what she noticed, and she subsequently testified that while in bed he often moaned and groaned and rolled and tossed from side to side.

4. WITNESSES — EXAMINATION — CORRECTING MISTAKES IN TESTIMONY—QUESTION FOR JURY—HARMLESS ERROR.

In an action for damages for assault and battery, it was harmless error to permit plaintiff's counsel to take an answer of plaintiff upon redirect examination as to whether he understood a question put to him by defendant's counsel and to correct his answer, where the court stated that it was for the jury to say whether he in fact misapprehended the question.

5. SAME—EXPERT TESTIMONY—HYPOTHETICAL QUESTIONS—APPEAL AND ERROR.

In an action for damages for assault and battery, any error based upon a hypothetical question put to a physician, whose answer was not based upon an opinion and indicated a knowledge of the facts acquired as an attending physi-

sian, cannot be complained of by defendant, where no objection was made to the withdrawal of such question and plaintiff's counsel examined the physician as to his actual knowledge of plaintiff's condition, based upon his personal observation.

6. SAME.

In an action for damages for assault and battery, it is not error to allow a physician testifying for plaintiff to answer a question as to whether, if plaintiff's ear was filled with dirt, gravel and blood, as the witness found upon his examination, that would be the natural and most probable way of having germs introduced into the ear, where the answer of the witness was based entirely upon his personal observation and not upon hypothesis.

7. SAME.

A physician who has examined a patient may, in an action for damages for assault and battery, state whether or not the patient is unable to hear.

8. SAME.

It is the better practice to reduce a hypothetical question to writing where the facts are confusing or complicated.

9. SAME.

There is no reversible error in the allowance of a hypothetical question not reduced to writing, where the facts are complicated and confusing, where the jury is instructed that before they can consider a hypothetical question and its answer they must find that the assumed facts have been established by a preponderance of the evidence.

10. SAME—INSTRUCTIONS.

It is harmless error to allow a hypothetical question not reduced to writing which assumes facts set forth in a prior question, where the jury was instructed after the giving of the prior question that before they could consider a hypothetical question and its answer they must find that the assumed facts have been established by a preponderance of the evidence.

11. NEW TRIAL—MISCONDUCT OF SPECTATORS.

It was not ground for a new trial, in an action for damages for assault and battery, that the wife and daughter of plaintiff, witnesses in the case, wept when plaintiff's counsel, in his closing argument, referred to the fact that plaintiff would permanently be affected in his hearing.

12. DAMAGES—ASSAULT AND BATTERY—EXCESSIVE VERDICT.
In an action for assault and battery, a verdict for $2,500 was not excessive where plaintiff lost some teeth as the result of the assault, was in bed for a week, and later went to a hospital and underwent an operation for hernia, suffered the entire loss of hearing in one ear and 50 per cent. loss in the other, and expended the sum of $337 for medical and hospital fees.[1]

Error to Cass; Des Voignes, J. Submitted October 24, 1917. (Docket No. 119.) Decided December 27, 1917.

Case by William H. Matthews against Frank B. Lamberton for an assault and battery. Judgment for plaintiff. Defendant brings error. Affirmed.

Coolidge & White and *Hendryks & Mosier*, for appellant.

Wilbur N. Burns, C. M. Lyle, and *Carr & Eby*, for appellee.

Plaintiff brought suit against defendant for damages alleged to have resulted from assault and battery committed upon him by defendant. Upon the first trial plaintiff secured a judgment for $1,000 against the defendant, which was reversed in this court, upon the ground that certain testimony had been erroneously admitted, and that the court had given erroneous instructions to the jury. Upon a new trial plaintiff recovered a judgment in the sum of $2,500 which is now here for review upon writ of error. A brief statement of the facts follows:

The parties are farmers residing upon neighboring farms. It seems to have been reported to defendant that plaintiff had said that defendant had not paid his hired man, one Fred Timm, whereupon defendant, tak-

[1] On excessiveness of verdicts in actions for personal injuries other than death, see comprehensive note in L. R. A. 1915F, 30.

ing Timm with him, went upon the plaintiff's farm to a field where plaintiff was plowing, some 30 rods from the highway, and asked plaintiff if he had made the statement. Plaintiff denied making the statement, but said that he had heard it down town at the hotel. An altercation between the two men followed, and finally resulted in a physical encounter, in which plaintiff was thrown down into the furrow, while defendant, who was on top of him, seems to have administered a rather severe beating. As a result of the affray plaintiff lost some teeth. He was confined to his bed for over a week, and later went to a hospital, where he submitted to a radical operation for hernia, which he claims he suffered as a direct result of the assault and battery. As a further result plaintiff claims to have suffered the entire loss of hearing in one ear, and about 50 per cent. loss in the other. It seems to be undisputed upon the record that he expended for medical and hospital fees the sum of $337. The case was bitterly contested, and was submitted to the jury under a careful charge, to which no exception was taken. A motion for a new trial was made, based upon 18 different grounds, the first 15 upon alleged errors in the admission or exclusion of testimony, the 16th upon the assertion that plaintiff's wife and daughter were guilty of misconduct during the trial, the 17th upon the ground that the verdict was excessive, and the 18th upon the ground that it was against the great weight of the evidence. This motion was denied.

In this court counsel for defendant presents his argument under 17 assignments of error; the first 15 based upon the rulings of the court upon the admission or exclusion of testimony, and the 16th and the 17th upon the refusal of the court to grant a new trial.

BROOKE, J. (*after stating the facts*). The first assignment argued by counsel for defendant is the fourth. The following question was asked:

"*Q.* Doctor, in the treatment which you were required to give to Mr. Matthews on the occasion when you treated him, was it necessary that you make any investigation as to whether or not the patient had a hernia?"

This was objected to as incompetent, irrelevant, and immaterial. After argument the question was allowed, and was answered as follows:

"*A.* I made such an examination as far as I thought advisable or necessary; there were no indications that called for any further examination. I have had occasion to treat patients suffering with hernia, and have had occasion to examine them as the hernia was caused or developed or as it was forming. I have examined them in all stages; an enlarged incomplete hernia might be forming and afterwards become a complete hernia."

It is asserted by counsel for defendant that this is reversible error under the authority of *Maynard* v. *Vinton*, 59 Mich. 154 (26 N. W. 401, 60 Am. Rep. 276). We are unable to agree with this contention, for the very good reason that the objectionable part of the question was not answered. The physician did not testify whether or not it was necessary for him to make the investigation, but did testify simply as to what examination he made.

Second. It is argued under the 5th, 6th, and 8th assignments that the court erred in permitting testimony of the witnesses who had observed the plaintiff in his attempts at doing work after the fight. The argument is made that:

"If this testimony was proper, then one seeking to recover damages could go about among his friends and acquaintances and affect all sorts of complaints and injuries, and then call in these friends and acquaintances as witnesses to show the character of work that he was able to perform."

We are of opinion that this testimony was admis-

sible. *Foster* v. *Krause*, 187 Mich. 630 (153 N. W. 1066). See, also, 13 Cyc. p. 204, where the rule is stated as follows:

"Evidence of the conduct, general health and physical condition of the plaintiff both before and after the infliction of an injury, or a comparison of one's health before and after such time, is admissible as tending to prove the extent, nature and probable effects of the injury"—citing cases.

Third. Error is assigned upon the following question addressed to plaintiff's wife:

"*Q.* During that time did he have any pain about the head and his—

"*A.* He did."

Objection being interposed, the court said:

"She can state what she noticed."

After which the witness replied:

"*A.* Why, when he was in bed, he often moaned and groaned and rolled and tossed from side to side."

In the light of the ruling of the court and the subsequent testimony of the witnesses, we are of opinion that there was no error.

Fourth. Error is assigned upon the action of the court in permitting counsel for plaintiff upon redirect examination of plaintiff to take an answer to the following question:

"*Q.* Now counsel asked you if you stood—if he stayed right there, and you replied that he did. Now I ask you if you understood that question, if—and just what Mr. Lamberton did as he raised his hand."

A colloquy followed, in the course of which the witness said that he did not understand the question put to him by defendant's counsel. After further objection the court said:

"Yes, but he says he didn't understand the question; he has a right of course—it is for the jury, it is

all before them as to whether he did understand it or not. A man always may be called back to correct anything; if he misapprehends questions, it is for the jury to say whether he did misapprehend or not; it is all before them. You may save an exception.

"*A.* He crowded right upon me."

We are unable to discover any reversible error in the foregoing.

Fifth. Under this head the 2d, 3d, 10th, 11th, 12th, 13th, and 14th assignments are argued. They all relate to questions addressed to the expert witnesses Dr. Ullrey and Dr. Carr. Dr. Ullrey was the physician who treated plaintiff immediately after the affray and who had treated him for an incomplete rupture some 15 years prior to the injury complained of in this case. Dr. Carr, a physician making a specialty of eye, ear, nose, and throat, and who made an examination of the plaintiff just prior to the trial, gave testimony touching the condition in which he found him, particularly with reference to his hearing. As before recited, it was the contention of plaintiff that although he had suffered from a partial hernia some 15 years earlier, he had completely recovered from that ailment, and that the hernia for which he underwent a major operation after the affray was caused entirely by the injuries inflicted upon him at that time. On the part of defendant it was claimed, and this claim was supported by some testimony, that plaintiff was suffering from a hernia at the time of the affray.

After stating the various claims of the parties upon this point, the court charged the jury as follows:

"If you find that plaintiff was so suffering at the time of the affray from this hernia and had that hernia, plaintiff cannot recover for any alleged injury of rupture or hernia. If you find from the evidence that there had been a recovery as contended by plaintiff from this injury or threatened injury of hernia before the affray, then plaintiff is entitled to recover on

that item. However, it appears from the testimony that plaintiff in January of the present year underwent an operation for this rupture or hernia, and that such operation was successful. Therefore you are not permitted to consider the element of permanent damage or injury by reason of this hernia. And upon the question of damage on this item, no damage can be rendered for causing rupture to the plaintiff, unless you find that such rupture was the direct result of blows or violence inflicted by the defendant upon the body of the plaintiff."

The first specific assignment under this head is based upon a hypothetical question propounded to Dr. Ullrey. Dr. Ullrey's answer to this question indicated a knowledge of the facts acquired as attending physician, and was not based upon opinion, whereupon the court instructed the jury:

"So the hypothetical question will be stricken out, gentlemen, and what the court said in relation to it to you, you will not consider that at all. Counsel may now proceed to examine the witness anew."

Thereafter the physician was examined as to his actual knowledge of plaintiff's condition, based upon his personal observation. No objection appears to have been made by defendant's counsel to the withdrawal of the hypothetical question. He cannot now complain. 1 Thompson on Trials (2d Ed.), § 722.

Error is assigned upon the following question propounded to Dr. Ullrey:

"Well, if his ear was filled with dirt, gravel, and blood, as you found upon your first examination, that would be natural—the most probable way of having germs introduced into the ear, would it not?

"*Mr. Hendryx:* Wait a minute, now, we object to that question as leading, and as not based—as not a properly hypothetical question, and assumes facts that are not proven, and asks for that which is not within the range of expert testimony."

The question being answered in the affirmative, Mr. Hendryx said:

"Your honor, I move to strike that out, the question isn't—and the answer to it—isn't whether that would be a probable way, but it was the probable way, and for that reason it's highly objectionable.

"*The Court:* This is the physician. If this testimony was received upon a hypothetical basis, your objection would be good; but here it is a physician who testifies to seeing the condition and administering the first treatment, and I will let it stand for what it may be worth to the jury in arriving at a determination."

A careful reading of the entire testimony given by this physician indicates that it was based entirely upon his personal observation and knowledge, and not upon hypothesis. The ruling was correct.

It is next urged that error was committed in permitting the following question to be answered by Dr. Carr, the expert who had made an examination of the plaintiff, particularly with reference to his hearing:

"State, doctor, from the condition which you found upon your examination, whether or not the plaintiff's hearing is or is not destroyed in his right ear."

To which the physician replied:

"Why, I know that the hearing is destroyed in the right ear."

Counsel criticize this by saying:

"How did he know it? He never told the jury why. Neither the question or his answer gives any reason. The reason, if any, was lodged in his own breast. How was defendant to meet testimony of this character? No facts were stated upon which the opinion was based, and he was powerless to contradict."

A very extended cross-examination of this physician was entered upon in the course of which it was brought out that the plaintiff's condition of health as to his deafness might be due to causes other than the injury. We presume that after examination a com-

petent physician may be able to determine whether a patient is or is not deaf. We can see no impropriety in the course of the examination followed herein.

The next assignment of error is predicated upon the allowance of a hypothetical question asked Dr. Carr. The question, with various amendments, objections, and colloquy, covers some four pages of the record. After stating the facts it proceeds:

"Assuming all these facts to be true, state, doctor, whether in your opinion the injuries to the ear, the head and abdomen might have been the natural and approximate results of the fight.

"*A.* It is my opinion that the present condition would be the natural results."

While the better practice requires (*Mayo* v. *Wright,* 63 Mich. 32 [29 N. W. 832]; *Jones* v. *Village of Portland,* 88 Mich. 613 [50 N. W. 731, 16 L. R. A. 437]) the reducing of a hypothetical question to writing, where the facts are confusing or complicated, we are unable to find reversible error in its allowance in this case. Immediately after the question was answered the court instructed the jury as follows:

"Now, gentlemen, lest I forget it, and it would be harmless if I instruct you at this time. Hypothetical questions are permitted under the law to be asked in certain cases. But before you can consider a hypothetical question in any manner in any case, you must find as a matter of fact that the conditions as stated in the hypothetical question have been proven by a preponderance of the evidence, to wit: All of the things that enter into that question which are assumed. Before you can consider the reply or the answer of a witness to a hypothetical question, you must have found that all of the elements that enter into that question have been proved to your satisfaction by a preponderance of the evidence."

Objection is made to another hypothetical question asked this witness immediately following that last considered. The objection is made that:

"In the question here objected to counsel does not set forth all of the assumed facts relied upon. To supply this deficiency counsel assumes all the facts which were stated in a former hypothetical question."

In the light of the caution delivered by the court upon this point above quoted, we think there was no reversible error. The next two assignments discussed are of like character, and require no further discussion. With reference to all these assignments, it may be said generally that the testimony of Dr. Carr was merely cumulative in character. Every fact testified to by him was supported by other testimony sufficient if believed by the jury to warrant their verdict.

Sixth. It is asserted that the court should have granted a new trial because of the alleged misconduct of plaintiff's wife and daughter in the course of the trial. Touching this allegation, the court in denying a motion for a new trial said:

"During the progress of the trial the wife and daughter of plaintiff occupied a seat back of counsel a great portion of the time. They were witnesses in the case. The court did not observe any unseemly conduct on their part, neither did defendant's counsel call the court's attention or make any objection at the time. The court did notice that during the closing argument by plaintiff's counsel when he referred to the fact that plaintiff would always be affected in his hearing that there were tears in the eyes of both wife and daughter, and they placed their handkerchiefs to their eyes, but there was no sobbing or crying aloud, or any unusual emotion noticeable to the court, and it is my opinion that it was not responsible in any manner for the verdict."

The question here raised is one which addresses itself particularly to the sound discretion of the trial judge. We have read the affidavits in support of the motion upon this point, and are not disposed to disagree with his conclusion.

Seventh. While the verdict was substantial, and,

considering the situation of the parties, might perhaps be considered large, the learned circuit judge refused to disturb it on the ground that it was excessive. Upon this record we are of opinion that his disposition of this question should not be questioned. On the whole we are satisfied that throughout the rather extended trial and under a careful charge, the rights of the defendant were fully protected. A different result would not likely be reached on another trial.

The judgment is affirmed.

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

VEZINA *v.* SHERMER.

1. APPEAL AND ERROR—MOTION FOR NEW TRIAL—SCOPE OF REVIEW.
   Where no request was made to the trial court to file its reasons for denying a motion for a new trial by defendant, and no reasons were filed by it, and no exception was taken to the denial of the motion, the propriety of denying the motion is not available on appeal.

2. DAMAGES—PERSONAL INJURIES—PLEADING—SUFFICIENCY.
   In a personal injury action, a declaration stating that by "means of the premises the said plaintiff was forced and obliged and did lay out and spend a large amount of money, to wit, $200, in and about endeavoring to be cured of said sickness, lameness, nervousness, and disorders occasioned as aforesaid," and that he will be forced to pay out further sums in the future, and that the disabilities were permanent in character, *held*, sufficient to support proof as to number of visits paid by plaintiff's doctor and the amount of his charges.

3. SAME—PERSONAL INJURIES—ABILITY TO WORK—EVIDENCE.
   The answer of plaintiff to the question as to how much time

he could work because of his injury, that he could work probably four days in the week, was not objectionable as being speculative, uncertain, remote, and a mere guess, where plaintiff was carefully examined both on direct and cross-examination as to his ability to labor.

4. EVIDENCE—AUTOMOBILES—COLLISIONS—OPINION OF WITNESS—CONCLUSIONS.

A question put to a witness, in an action by a bicycle rider against the driver of an automobile to recover damages for personal injuries, as to whether defendant appeared to have his car under control was not objectionable as calling for a conclusion.

5. SAME.

The exclusion of the answer of a witness to a question whether defendant had his automobile under control, on the ground that it called for a conclusion, was harmless error, where, in later examination, the witness stated that the car did not run more than six feet after the collision and that defendant put his foot on the brake and the clutch at the same time and stopped the car almost instantly.

6. TRIAL—STRIKING OUT TESTIMONY—OPINIONS.

In an action by a bicycle rider against the driver of an automobile for personal injuries sustained in a collision, the testimony of defendant's wife that she knew defendant was not looking back because he never did look back when driving was properly stricken out.

7. AUTOMOBILES—HIGHWAYS AND STREETS—CROSSING ACCIDENTS—COLLISIONS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action by a bicycle rider against the driver of an automobile to recover for personal injuries received in a collision near a street intersection occurring after plaintiff had crossed the intersecting street and defendant had turned on the latter street to go in the same direction as plaintiff, *held*, that the questions of negligence and contributory negligence were for the jury.[1]

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[1]On liability of owner of automobile for collision with bicyclist, see note in 28 L. R. A. (N. S.) 944.

On rule of the road governing vehicles at intersection of streets and when turning across street, see note in 41 L. R. A. (N. S.) 346. On liability for collision between automobiles or an automobile and another vehicle at or near corner of street or highway, see note in L. R. A. 1916A, 745.

Error to Grand Traverse; Mayne, J. Submitted October 10, 1917. (Docket No. 81.) Decided December 27, 1917.

Case by Arthur F. Vezina against Philip Shermer for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

John J. Tweddle, for appellant.

Frank J. Powers, for appellee.

On the evening of September 2, 1915, at about 7:30 p. m., plaintiff, a man 58 years of age, was riding a bicycle in an easterly direction on Front street near Division street, in the city of Traverse City. Front street runs east and west, and Division street north and south. Plaintiff had just passed the easterly line of Division street, being south of the center line of Front street when he collided with the automobile of the defendant. Defendant himself was driving the machine, and had been going north on Division street, but when he reached Front street he turned to the right to go east on Front street. The collision occurred about 20 feet east of the east line of Division street and south of the center of Front street.

It was the claim of the plaintiff that when he approached Division street, coming from the west, he saw defendant's automobile coming north about a quarter of a block away; that he proceeded across Division street at a slow and careful rate of speed, and when about 20 feet east of the east line of said street defendant's automobile overtook him, striking the hind wheel. It is undisputed that the automobile struck the bicycle, and that after the automobile stopped, within a few feet, both plaintiff and his bicycle were under the automobile. As a result of the accident plaintiff sustained a scalp wound, an injury to one of his hands, and two broken ribs.

It was the claim of the defendant, supported by the testimony of others, that driving north on Division street as he approached the corner of Front he had his car fully under control, and turned east on Front street at a very slow rate of speed; that just as he was turning into Front street plaintiff came from the north side of Front street in a southeasterly direction, directly in front of his automobile, too close to permit him to stop his machine in time to avoid a collision.

Under a careful charge the trial judge submitted the conflicting theories of the parties to the jury. At the end of the charge he said:

"Have I covered every point, gentlemen?

"*Mr. Tweddle* (counsel for defendant): Yes, sir; I think so.

"*Mr. Powers* (counsel for plaintiff): Yes, sir; but this bicycle, your honor, will it go with the jury to their jury room or not?"

The jury returned a verdict against the defendant in the sum of $912.83, upon which judgment was duly entered. A motion for a new trial was made based upon 15 several grounds, which motion was denied.

BROOKE, J. (*after stating the facts*). The first assignment of error is based upon the refusal of the court to grant defendant's motion for a new trial. No request was made to the trial court to file reasons for denying the motion, and no reasons were filed by the trial court. No exception was taken to the denial of the motion. We must hold that this question is not before us on this appeal. *Groat* v. *Railway*, 153 Mich. 165 (116 N. W. 1081); *Blakeslee & Co.* v. *Manufacturing Co.*, 153 Mich. 230 (117 N. W. 92); Act No. 314, chap. 18, § 63, Pub. Acts 1915 (3 Comp. Laws 1915, § 12635).

Defendant next argues his 2d, 5th, and 6th assignments, based upon the alleged erroneous admission of the testimony of the physician who attended plain-

tiff; the objection being that the declaration was insufficient to support proof under the rule that special damages must be specially alleged. The declaration recites:

"By means of the premises the said plaintiff was forced and obliged and did lay out and spend a large amount of money, to wit, $200, in and about endeavoring to be cured of said sickness, lameness, nervousness, and disorders occasioned as aforesaid, and this plaintiff will be forced to lay out large sums of money endeavoring to be cured of said sickness, lameness and disorders, occasioned as aforesaid, all of which disabilities are permanent in character."

We are of opinion that this averment in the declaration was sufficient to support proofs as to the number of visits paid by the doctor and the amount of his charges.

The 8th assignment is based upon the admission of the following testimony over objection:

"Now because of your injured condition, how much of the time can you work?

"*A.* Probably four days a week, four days out of six."

The objection urged is that the testimony is speculative, uncertain, remote, and a mere guess on the part of the witness. We think the objection untenable, particularly in view of the fact that plaintiff was examined carefully both upon direct and cross-examination as to his ability to labor.

Error is assigned upon the following, John Nerlinger, a witness for the defendant, being upon the stand:

"*Q.* Now, whether or not Mr. Shermer appeared to have his car under control?

"*Mr. Powers:* We object to that as a conclusion; let him tell what he did, and the jury will determine the other.

"*The Court:* Sustained.

"*Q.* Well, did he have his car under control?

"*Mr. Powers:* Of course, we make the same objection to the same question.

"*The Court:* Sustained.

"*Q.* How far did the car run after the bicycle and the car came together?

"*A.* Well, I should say not over six feet, but I could not be positive as to that.

"*Q.* What did Mr. Shermer do, if you know, to stop the car?

"*A.* Well, he put his foot on the brake and the clutch at the same time, and stopped the car almost instantly."

While we are of opinion that the court might very well have permitted the answer to the question, and that the answer would not necessarily have involved a conclusion by the witness, in view of the later examination of the witness, the exclusion of this answer is certainly not reversible error.

The 12th assignment of error is based upon the action of the court in striking out the answer of the defendant's wife to the following question:

"*Q.* Now, Mrs. Shermer, you wouldn't know whether or not he was looking back; now is that the truth of it?

"*A.* Well, I know he was not because he never does look back when he drives."

When this question and answer is read with the context, it plainly appears that the ruling of the court was proper.

The 13th, 14th, 15th and 16th assignments of error are based upon the refusal of the court to direct a verdict upon the ground that under the testimony plaintiff was clearly guilty of contributory negligence, as a matter of law. Replying to the arguments made in support of these assignments, it is only necessary to say that we have read this entire record with care, and are satisfied that the question of plaintiff's contributory negligence as well as the question of defend-

ant's negligence raised issues of fact properly determinable by the jury alone.

The 18th and 19th assignments of error are based upon alleged errors in the charge of the court. They are without merit.

The judgment is affirmed.

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

ANDERS *v.* CLOVER.

1. ASSAULT AND BATTERY—SELF-DEFENSE—RIGHTS OF PERSON ASSAULTED.

   One assaulted may justly exercise such reasonable force as may be, or as appears to him at the time to be necessary to protect himself from bodily harm in repelling the assault.[1]

2. SAME—EVIDENCE—BURDEN OF PROOF.

   In an action for damages for assault and battery, it is incumbent on the one starting the affray to show, by a preponderance of evidence, that defendant in repelling such assault employed more force than was necessary.

3. SAME—EVIDENCE—SUFFICIENCY.

   Evidence *held*, sufficient to show that plaintiff started the affray.

4. SAME—SELF-DEFENSE — EVIDENCE — INSTRUCTIONS — BURDEN OF PROOF.

   An instruction that the fact that the defendant pleaded guilty in a criminal proceeding started against him by his

[1]On right of self-defense against assault provoked by abusive language, see note in 51 L. R. A. (N. S.) 838.

Generally, as to the right of accused who began conflict to plead self-defense, see note in 45 L. R. A. 687.

own procurement was not conclusive against his contention that he was acting in self-defense, and that it should be given such weight by the jury as they believed it entitled to, was proper.

Error to Van Buren; Des Voignes, J. Submitted October 11, 1917. (Docket No. 91.) Decided December 27, 1917.

Case in justice's court by Albert Anders against Roll Clover for assault and battery. There was judgment for defendant, and plaintiff appealed to the circuit court. Judgment for defendant. Plaintiff brings error. Affirmed.

W. J. Barnard, for appellant.

C. M. Van Riper and *Thomas J. Cavanaugh,* for appellee.

BROOKE, J. This case originated in justice's court, where plaintiff filed a written declaration, claiming damages in the sum of $100 as the result of an alleged unlawful assault and battery committed upon him by the defendant. The jury in the justice's court returned a verdict in favor of defendant. Plaintiff thereupon appealed the case to the circuit court for the county of Van Buren. At the trial in the circuit court, plaintiff did not take the stand. He called defendant as a witness, under the statute, and elicited testimony from him tending to support the following facts: Defendant was standing on the sidewalk just outside the door of a grocery store of which one McAllister was proprietor. This entrance was protected by a heavy screen door. Plaintiff in entering the door jerked the screen door open violently, striking defendant on the arm and inflicting a wound thereon of a more or less serious nature, at the same time saying to defendant: "Get out of the road, you big fat slob!" Immediately

thereafter plaintiff, being just inside the doorway, seized a small box and raised it as if to strike defendant, whereupon defendant struck plaintiff in the face, blacking one of his eyes. The parties thereafter, apparently by mutual consent, separated, and defendant requested one Olds, with whom he had been in conversation at the time the screen door was forcibly thrown against him, to accompany him to a justice of the peace and there make a complaint against him (defendant) for assault and battery. Olds made the complaint; the justice issued the warrant; the defendant was arraigned and pleaded guilty and was sentenced to pay a fine of $1 and costs of prosecution, taxed at 50 cents. Defendant immediately paid the fine and costs and was discharged. Plaintiff introduced no further evidence as to the affray, but did introduce the evidence of two witnesses who swore that they saw plaintiff within a day or two after the assault, and that he then had "a real black eye; a fairly black eye."

To the plaintiff's declaration the defendant interposed in justice's court verbally, the plea of the general issue. In his defense, in addition to testimony given by himself when called as a witness for the plaintiff, defendant introduced the testimony of several witnesses to the affray all tending in a greater or lesser degree to support his contention that plaintiff was not only the aggressor, having made an unprovoked assault upon him by violently jerking the screen door against his arm, but that plaintiff, at or immediately before the moment when defendant struck him, was in the act of further assaulting him with a box of some kind.

Plaintiff preferred the following request to charge:

"You are instructed that you must find a verdict for the plaintiff in this case, as the defendant cannot interpose the defense of self-defense, as no notice of such plea is set forth by defendant's plea. The only

question for you to consider is the question of damages."

This instruction was refused by the court, and the case was submitted to the jury under a very careful charge, in which the jury were advised that the plaintiff would recover only if he had convinced them by a preponderance of the evidence that he himself was not the aggressor, or, if he were the aggressor, that the defendant in repelling his attack had used more force than was necessary. With reference to the fact that defendant had pleaded guilty in the criminal case which was started against him by his own procurement, the court advised the jury that his plea of guilty therein should be given such weight as they believed it to be entitled to, but that it was not conclusive against his contention that in making the assault upon plaintiff he was acting in self-defense.

In this court counsel for plaintiff contends broadly that, under the plea of the general issue, matters of justification cannot be given in evidence, but must be pleaded specially. In support of this proposition, many authorities from foreign jurisdictions are cited by plaintiff's counsel which will be found collected in 3 Cyc. p. 1084, but which we deem it unnecessary to discuss at large. No case from this State is cited in support of the rule; but, assuming the rule to be as stated, we are unable to see how plaintiff is aided. His own testimony, or rather that offered in his behalf, shows that he made an unprovoked and unwarranted assault upon the defendant, at the same time addressing him in a scurrilous manner. There can be no doubt that one assaulted may justly exercise such reasonable force as may be, or as appears to him at the time to be, necessary to protect himself from bodily harm in repelling said assault. Assuming then, what the record conclusively establishes, that the plaintiff started the affray, it was incumbent upon him to show

by a preponderance of the evidence that the defendant in repelling said assault employed more force than was necessary. *Ayres* v. *Birtch,* 35 Mich. 501. This plaintiff utterly failed to do; indeed, having established the fact of his original trespass, he offered no excuse or explanation in palliation of his wrongful conduct.

We are of opinion that the learned circuit judge properly instructed the jury upon the question of the plea of guilty interposed by defendant in the self-induced criminal proceeding. Under the circumstances of the case as disclosed by himself, the plea could at most be considered as evidence of his guilt of the offense charged in the case at bar; the weight thereof being for the jury.

Judgment affirmed.

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

ROBINSON *v.* TABER.

1. TAXATION—DELINQUENT TAX LIST—FAILURE OF TREASURER TO FILE SWORN STATEMENT—EFFECT.

   The failure of a township treasurer, in making his return to the county treasurer for unpaid taxes, to make the sworn statement required by law relative to such taxes, was not fatal so as to prevent the collection of taxes.

2. CORPORATIONS—POWER OF STOCKHOLDERS—AUTHORITY TO MAKE CONVEYANCES.

   The property of a corporation is not subject to the control of the stockholders and may not be conveyed by them, even though those joining in the conveyance own nearly all the stock.

Error to Ogemaw; Sharpe, J. Submitted October 17, 1917. (Docket No. 166.) Decided December 27, 1917.

Replevin by Samuel A. Robinson against Charles Taber, treasurer of Goodar township, and another, for property levied on for taxes. Judgment for defendants. Plaintiff brings error. Affirmed.

Victor Spike (*Gilbett & Clark,* of counsel), for appellant.

William T. Yeo, for appellees.

In the spring of 1915, plaintiff was the supervisor of Goodar township. At the same time he was secretary and a director of the Robinson Lumber Company, and was likewise the owner of nearly one-half of the capital stock of said corporation. That company was conducting operations in Goodar township. Acting as supervisor of his township, plaintiff assessed the personal property of the Robinson Lumber Company in that township at the sum of $27,000. Included in that assessment is the following item:

> All machinery not affixed to real property, two locomotives and railroad equipment.....$3,000.00

The amount of the tax against the Robinson Lumber Company so assessed was $766.64. The township treasurer in making his return to the county treasurer for unpaid taxes for that year failed to make the sworn statement required by law relative to said taxes. The county treasurer, however, gave him a warrant back for the collection of such taxes and this warrant was turned over by him to his successor, the defendant Taber. On September 13, 1916, Taber, as such treasurer, levied on the two locomotives and certain other railroad equipment for the purpose of enforcing the collec-

tion of such taxes, and while the same was in the possession of said treasurer and after it had been advertised by him for sale, it was taken, on September 20th, by the sheriff under the writ of replevin in this case.

While the record does not disclose the fact, it is apparent that defendants waived a return of the property, and they were awarded a judgment for the amount of the special interest therein, representing the tax lien, in the sum of $798.88.

It was the claim of plaintiff that, while the property seized was, at the time the assessment was made, the property of the Robinson Lumber Company, title thereto had, between the time of the assessment and the date of the seizure, passed from said company to himself. This claim is based upon the following facts:

On the 16th day of March, 1914, S. L. Eastman, who then owned 235 shares of the Robinson Lumber Company stock, and the plaintiff who owned 230 shares thereof, having had some differences, met at the office of Gillett & Clark in Bay City, and there undertook an adjustment of their difficulties. At that time there was at least one other stockholder, W. H. Erwin, who was vice president and a director of the Robinson Lumber Company. Without notice to Erwin, or any waiver from him, so far as the record shows, an alleged stockholders' meeting was held, where a resolution was passed, instructing the directors of said company to hold a meeting and empowering them to—

"formulate an agreement agreeable to all shareholders and directors of said company for the final closing up of the affairs of the Robinson Lumber Company of Goodar, Ogemaw county, Mich., authorizing the president and secretary to assign, transfer, or deed any or all the property of said company necessary for the payment of the obligations of said company."

On the same day an alleged meeting of the directors

of the Robinson Lumber Company was held by Eastman and plaintiff, without notice to or waiver from Director Erwin. At said meeting a resolution was passed by Eastman and Robinson, by the terms of which Mr. Gillett was employed to draft an agreement in behalf of said company, S. L. Eastman, and S. A. Robinson, preparatory to the dissolution of said Robinson Lumber Company and following the passage of said resolution an agreement was prepared between the Robinson Lumber Company of the first part, and S. L. Eastman and William H. Erwin of the second part, and S. A. Robinson of the third part. This agreement provides for the operation of the mill belonging to the company by Robinson at a certain price per thousand feet, and that the net proceeds of the lumber should be used for the payment and retirement of the obligations of the Robinson Lumber Company. The agreement then proceeds:

"The foregoing arrangement is made as an adjustment of all differences between the parties, and as a preliminary step towards the liquidation of the affairs of the company, in the following manner."

Then follows several provisions as to the disposition of the various portions of the property of the corporation, and it is further provided:

"It is further mutually understood and agreed that the affairs of the company shall be liquidated as soon as the logs now cut are manufactured, and the sawing contract completed, but not later, however, than November 1st, by the formal conveyance to the parties hereto of the properties hereinbefore mentioned, and by the assumption by the said Eastman of any outstanding obligations and debts of the said Robinson Lumber Company."

This contract is executed by neither Director William H. Erwin nor the Robinson Lumber Company, but it is executed by S. L. Eastman and plaintiff Samuel A. Robinson. By the terms of the contract the prop-

erty here in question was to be conveyed to Eastman. It is the claim of plaintiff that said personal property was conveyed by the corporation to Eastman, although no instrument of conveyance was produced. He did, however, produce a bill of sale from Eastman to himself covering the property in question and bearing date of the 3d day of November, 1915.

BROOKE, J. (*after stating the facts*). The learned circuit judge held that the failure of the township treasurer to make the sworn statement required by law was not fatal, under the authority of *Northwestern Cooperage & Lumber Co.* v. *Scott,* 123 Mich. 357 (82 N. W. 76). In this we think he was correct.

He next held that the title to the property on which the levy was made was, at the time of the levy, the property of the Robinson Lumber Company, and as such liable to seizure for the payment of the corporate taxes. This conclusion was reached upon the theory that the contract of March 16, 1914, executed by two of the stockholders only, in their individual capacity, did not constitute a legal authority for the sale or conveyance of the property of the corporation, and that, if such sale was made in pursuance of said contract, it was void as against the tax levy. Upon this point the learned circuit judge cited and relied upon *Rough* v. *Breitung,* 117 Mich. 48 (75 N. W. 147), where it is said:

"Stockholders do not own the corporate property, and cannot mortgage, sell, or convey it. The title is in the artificial being called the corporation, not in the stockholders. Such property is not under the control of its stockholders, whether they act separately or collectively. The laws under which these corporations are organized provide the agencies and methods by which their property can be sold and transferred."

Many cases are cited in support of the principle announced, among them *Randall* v. *Dudley,* 111 Mich. 437 (69 N. W. 729), where it is said:

"The mere fact that one has become the owner of all the stock of a private corporation does not entitle him to sue in his own name upon an account stated with the corporation, but his succession to its interests must be averred and proved."

Again in *Chase* v. *Telephone Co.*, 121 Mich. 631 (80 N. W. 717), this court said:

"Although one person owns a majority of the stock, or all but two shares, or all of it, he does not thereby acquire the right of acting for the corporation, or as the corporation, independently of the directors." Citing cases.

The question has been repeatedly before the Supreme Court of the United States. See *Pullman's Palace Car Co.* v. *Railway Co.*, 115 U. S. 587 (6 Sup. Ct. 194). And in *Humphreys* v. *McKissock*, 140 U. S. 304 (11 Sup. Ct. 779), that court says:

"The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither encumber nor transfer that property, nor authorize others to do so."

We are of opinion that the corporation never legally authorized the sale of its property to Eastman, and therefore that plaintiff acquired no title thereto through the bill of sale from Eastman.

Judgment is affirmed.

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

SAGINAW MILLING CO. *v.* SCHRAM.

1. APPEAL AND ERROR—LAW OF CASE—RES ADJUDICATA.
   The decision on a former appeal is the law of the case.

2. TRIAL—REQUESTS TO CHARGE—INSTRUCTIONS.
   In an action by the purchaser of hay to recover money paid on the contract with damages for nonfulfillment thereof, and in which defendant sought to recoup damages for failure of plaintiff to take the hay, including commission on resale, work and labor, storage, cost of baling hay and interest, *held*, that the charge sufficiently presented to the jury the theories of the respective parties on the controlling issues so that the refusal of a requested instruction was not erroneous.

Error to Sanilac; Beach, J. Submitted October 16, 1917. (Docket No. 151.) Decided December 27, 1917.

Assumpsit in justice's court by the Saginaw Milling Company against John Schram for breach of a contract for the sale of hay. There was judgment of recoupment for defendant, and plaintiff appealed to the circuit court. Judgment for defendant. Plaintiff brings error. Affirmed.

E. L. Beach, for appellant.

C. F. Gates, for appellee.

BROOKE, J. This case upon its first appearance in this court will be found reported in 186 Mich. 52 (152 N. W. 945), where a statement of the facts will be found. We there reversed a judgment in favor of the plaintiff for $100, which had been directed by the court. In considering the questions involved it was held that the contract, being ambiguous in its terms, might be explained by oral testimony, and that evidence relating to the custom of baling hay in the vicin-

ity was admissible. Upon a retrial of the case it appeared beyond dispute that it was the duty of plaintiff to bale the hay or at any rate to pay for said baling. It was the claim of plaintiff that under the contract either party could have done the pressing, and it introduced testimony tending to show that the plaintiff's failure to bale the hay prior to December 15th was for the benefit of the defendant in relation to his other work. Under the evidence introduced the court instructed the jury to determine—

"whether the defendant relied upon Simmons to provide the pressing or whether he was lulled into security as to the delivery of the hay by Simmons' talk and conversation as to pressing or whether the delay was for the defendant's own accommodation."

Upon the question of the time of the breach of the contract and who was responsible for such breach, the court charged:

"If Mr. Schram's conduct and acts procured the delay beyond the time for its fulfillment he would be responsible for the $100 and its return. If the milling company is responsible for the delay, if the conduct and acts of Simmons lulled the defendant, Schram, into security, supposing he could deliver his hay up to the date of expiration and beyond, if such conduct and acts did produce that feeling in Schram and he so acted upon it, and did so reasonably under the circumstances then the defendant would be entitled to his damages to be set off against the $100."

Upon the question of the measure of damages the court charged:

"I say to you the usual rule of fixing damages is the difference between the contract price and the market price at the time and place of the breach or at the nearest market taking out the expenses of getting to the nearest market. Now, the testimony, as I say to you, is conflicting upon that question, as to whether there was a market here in January, 1913, or not. If there was a market, the market price at that time at

Sandusky would govern, measuring his damages. If there was no market, and the circumstances reasonably required Mr. Schram, in order to save himself, to market this hay on commission, he would be entitled to do so, but he must do so within a reasonable time; he must use diligence after the breach of the contract to save himself and the milling company all the damages possible. Now, you have heard the testimony as to when the hay was pressed by Mr. Schram after the breach. Whether that was a reasonable time or not and whether he used due diligence in getting a sale for his hay is a question of fact for you to determine."

The jury returned a verdict in favor of the defendant for $100.

The first 19 assignments are based upon alleged erroneous admission or exclusion of testimony. Proceeding under our opinion rendered when the case was first before us (which must be considered the law of the case), we are of opinion that the learned trial judge committed no reversible error in this regard.

The 20th assignment is based upon the refusal of the court to charge the jury as requested by plaintiff. We have quoted some portions of the charge above. Without going into the matter more fully we may say that we have read the charge in its entirety, and believe that plaintiff's rights were fully protected thereunder. The theories of the several parties were plainly presented to the jury upon each of the controlling issues, and those issues have been determined by the jury against the contention of the plaintiff.

The judgment is affirmed.

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

McNAMARA *v.* LANGGUTH.

1. HUSBAND AND WIFE—BANK DEPOSITS—PRINCIPAL AND AGENT—EVIDENCE—SUFFICIENCY.

   Evidence *held*, insufficient to show that the wife of a marine engineer who received part of his wages during his absence, acted as his agent in creating a bank account in her own name and in purchasing a home in her own name from the proceeds.

2. EVIDENCE—ADMISSIBILITY—ORAL TESTIMONY—REAL PROPERTY—TRUSTS.

   Oral testimony cannot be resorted to in order to create a trust in real estate.

3. USES AND TRUSTS—HUSBAND AND WIFE—OWNERSHIP OF PROPERTY—EVIDENCE—SUFFICIENCY—STATUTES.

   Under 3 Comp. Laws, § 8835 (3 Comp. Laws 1915, § 11571), providing that where a grant for a valuable consideration is made to one person and the consideration paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall rest in the person named as alienee except when a trust results in favor of creditors under the next section, and section 8837 (3 Comp. Laws 1915, § 11573), providing that section 8835 shall not extend to cases where the alienee shall have taken the conveyance as an absolute one in his own name, without the knowledge or consent of the person paying the consideration, or when such alienee, in violation of some trust, shall have purchased the land with money belonging to another, no trust is created in a husband where a wife takes title to real estate in her own name, and it is not shown that the husband did not have knowledge thereof and consent thereto and that the consideration was paid by the husband.

4. SAME.

   Where a wife prior to her marriage had been personally engaged in business and during her married life deposited her own money and that received by her as agent for her husband in a bank account in her own name, a finding as to what portion of the bank account belonged to the husband and what belonged to the wife would be based upon mere conjecture.

Appeal from Wayne; Collingwood, J., presiding. Submitted October 8, 1917. (Docket No. 48.) Decided December 27, 1917. Decree modified on motion for rehearing July 18, 1918.

Bill by Michael McNamara against Josephine Langguth and others to quiet title. From a decree dismissing the bill, plaintiff appeals. Affirmed, without prejudice to an action at law.

James H. Pound, for plaintiff.

Charles P. O'Neil, for defendants.

BROOKE, J. On December 12, 1892, plaintiff, who was then a widower with three living children, intermarried with one Margaret Merritt. He and said Margaret Merritt McNamara continued to live together as husband and wife until March 14, 1915, when she died, intestate. It appears that at the time of the death of said Margaret McNamara, the title to a house and lot which had been used by her and her husband, the plaintiff, as a home since April 20, 1910, stood in her individual name. It likewise appears that a bank account in the Detroit Savings Bank showing a balance at the time of her death of $1,923.91 stood in her name. Margaret Merritt McNamara had been married twice prior to her marriage to plaintiff, but bore no children to either of her three husbands. She left several brothers and sisters her surviving, two of whom, Arthur Webber and Minnie B. O'Sullivan, on June 14, 1915, quitclaimed to plaintiff all of their interest in the real estate left by their sister Margaret. Being unable to secure quitclaim deeds from the others, said brothers and sisters, plaintiff filed his bill of complaint herein, praying that the title to said house and lot and the money in the bank standing in the name of said Margaret McNamara be decreed to be in him. To this bill six of said defendants

interposed a demurrer. The record shows no disposition of the demurrer. There is in the record, however, an answer filed on behalf of all the defendants, and the case went to a hearing upon the merits, resulting in the entry of a decree dismissing plaintiff's bill of complaint. From this decree plaintiff appeals.

Plaintiff, who at the time of the trial was about 70 years of age, introduced testimony tending to show that during all the years he and Margaret McNamara lived together as husband and wife, he followed the occupation of a marine engineer, sailing the Great Lakes; that his occupation kept him from home 9 or 10 months of each year; and that while away from home he from time to time forwarded to his wife various sums of money from his wages. It is in evidence that Margaret McNamara upon receipt of these money orders or checks cashed them, paid the household expenses out of their avails, and deposited the balance thereof in the Detroit Savings Bank. No witness was sworn who was able to give the number or amount of the several deposits made in said bank out of the moneys represented by said checks. The bank account introduced in evidence shows that it was started in 1893, with a deposit of $527. Deposits and withdrawals continued until the end of 1910, when the balance was upwards of $4,500. In 1911 $2,400 was withdrawn from the account to pay for the house which was built upon the lot, the deed to which had been taken in the name of Margaret McNamara, on April 20, 1910.

Plaintiff's counsel states his position as follows:

"*First.* Michael McNamara was the head of his family by law.

"*Second.* That as such it was his duty to support his family, consisting of his wife, Margaret, and his three little children.

"*Third.* That the law of this State enforced this duty against him and properly so, too. It made of

him a criminal if he did not support, maintain, and provide for them.

"*Fourth.* Michael McNamara did not need this stimulation. He was an honest, upright, manly, good citizen, and natural father, and the support by him of his wife and children was a labor of love; that it was a pleasure to discharge as well as a duty, and he gladly did it.

"*Fifth.* That by the adjudged laws of this State a wife is presumptively, and as a matter of legal inference, her husband's agent in the dispatch of his necessary business in his absence. *People* v. *Horton,* 4 Mich. 67.

"*Sixth.* Michael McNamara was off on the waters of the Great Lakes 10 months out of the 12. He was not in reach of his family, daily, weekly, or monthly. He got his pay. It was his money. He had a paramount duty, to support his wife and children. He recognized it. He passed all of his money practically over to his agent, his wife, the only adult he had to take charge of it; the only person he could give it to without insulting her. He gave it to her to take care of, care for, and disburse upon his and his family's account, first, to feed them, second, to clothe them, and third and lastly to defray any incidental expenses such as might arise from sickness, accidents, or any other unfortunate emergency arising suddenly. This she did with the highest integrity and probity. The rest was his. He does not question the expenditure of his money by his wife so far as it was disbursed for the purposes indicated."

Much reliance is placed upon the following testimony given by Arthur Webber, brother of Margaret McNamara:

"*Q.* Now, tell the court in your own way, as near as you can recollect it, what it was that she said to you?

"*A.* I was in the commission business at 24-26 Western Market, and my sister Maggie came down to market one morning, and she stopped over to see me. * * * Well, now, I couldn't just give you the date, because I let it slip my mind, and didn't do what she asked me to, and, of course, when she came up there,

I shook hands with her, and said, 'You are looking fine; how do you feel?' She said, 'I am not feeling very well.' She said, 'Arthur, I don't think I will live very long; I haven't been feeling very well, and I tell you what I want you to do; I want you to fetch up somebody to make a will.' I said, 'You do?' in an off-hand way, and I said I would go up and make it myself. Well, that wouldn't do. She said, 'I want somebody to make a will.' I said, 'What are you going to do, will it to me? I need it all in my business.' And she said, 'No, I want to will it to Mike.'

"*Mr. O'Neil:* I insist that be stricken out, on the ground it hasn't any bearing on the particular question involved here.

"*The Court:* Oh, I think I will let it in. (Exception.)

"*Q.* Why did she want to will it to Mike?

"*A.* Well, she said Mike was getting old; he was very good to her; he gave her every dollar; he trusted her more than he trusted himself; he sent his money when he was on the ship, for fear the ship would sink; and he trusted it to her; and she said, 'I have got the house built in my own name, the money in my own name, the house in my own name, and if I should die I don't know what they would do to Mike.' She said, 'It wouldn't be you because I know you wouldn't want it.' I said, 'All right, I will fetch somebody,' but I was very busy, and I neglected to fetch them up.

"*Q.* Another way. How long was it before she died that she had this talk?

"*A.* Well, this was, oh, I don't know.

"*Q.* A month or a year?

"*A.* Oh, it was more than a month; I couldn't just tell exactly.

"*Q.* About?

"*A.* Oh, well, probably three months.

"*Q.* It was inside of a year?

"*A.* Oh, yes."

Giving the strongest probative force to this testimony as well as all other testimony in the record offered on behalf of the plaintiff, we are of opinion that it fails to establish the claim of plaintiff that in acquir-

ing the real estate and creating the bank account, Margaret McNamara acted as the agent of her husband, indeed, it would rather tend to support the conclusion that she claimed all of such property as her own, but desired by the execution of a will to place title thereto in her husband at her death. This she failed to do, and her unexecuted intention in that regard cannot aid the plaintiff. With reference to the real estate, we are at once met with the statute (4 How. Stat. [2d Ed.], § 10675, 3 Comp. Laws 1915, § 11571), which provides:

"When a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section."

Section 10677 (3 Comp. Laws 1915, § 11573) reads as follows:

"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 person 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."

The record is absolutely barren of evidence tending to show that Margaret McNamara took title to the lot in question without the knowledge and consent of her husband, the plaintiff. It is likewise barren of evidence showing conclusively that the consideration was paid by the plaintiff. In the case of *Waterman* v. *Seeley*, 28 Mich. 77, it is said:

"In order to maintain such a trust, there must have been an intention to create it, and there must have

been an actual payment of the consideration, made out beyond any doubt to have been the individual money of the party seeking to raise the trust. Proof of such payment will usually, as between strangers, raise a presumption in favor of such an intention, but even then, the trust raised by parol may be rebutted by parol. * * * No such presumption arises where the title is taken in the name of a wife or child, and the principle covers cases where, without legal relationship, the person paying the purchase money stands, or assumes to stand, *in loco parentis* to the grantee. The presumption there is both natural and legal. that in paying for land to be granted to the child so situated, it is intended as a donation or advancement, and not as a trust in favor of the donor."

Again in the late case of *Rothschild* v. *Dickinson,* 169 Mich. 200 (134 N. W. 1035), this court said:

"We do not think that oral testimony can be resorted to, to create a trust in real estate"—citing cases.

Touching the bank account, we are met with another difficulty. Evidence introduced tends to show that prior to her marriage to the plaintiff, Margaret McNamara had been engaged in business on her own account. Exactly what property she had at the time of her marriage is not shown by the evidence, but plaintiff's bill asserts that at the time of the marriage—

"she had no money or property, real or personal, except a small bank account in the Detroit Savings Bank, where she innocently deposited all her money which she became in possession of, both her own and complainant's."

Assuming, then, what the evidence in the record tends to establish that some portion of the bank account is represented by deposits made out of the funds sent to Margaret by her husband, the plaintiff, and assuming, further (which we do not hold, see *Wipfler* v. *Detroit Pattern Works,* 140 Mich. 677 [104 N. W.

545, 112 Am. St. Rep. 430]), that as to such portion, Margaret should be considered as the agent of the plaintiff instead of as the absolute donee of the fund, how may the court determine what proportion of said bank account properly belongs to the estate of Margaret McNamara, and what proportion thereof to the plaintiff? It is obvious that upon this point no conclusion can be reached based upon the testimony in the record, and the court would be obliged to resort to mere conjecture. This we may not do.

The decree must be affirmed.

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

PEOPLE'S STATE BANK OF HOLLAND *v.* MILLER'S ESTATE.

1. GIFTS—BANK DEPOSITS—JOINT DEPOSITS—RIGHT OF SURVIVORSHIP—STATUTES—INTENT.

Where a decedent left at the plaintiff's bank an order that her account therein should be a joint account with another person payable to either or the survivor, *held*, that if decedent's intention was that such person should take by right of survivorship such intent would be given force under section 3 of Act No. 248, Pub. Acts 1909 (2 Comp. Laws 1915, § 8040), relating to the creation of a joint tenancy with rights of survivorship in a deposit made in the name of the depositor and another person, in form to be paid to either or the survivor of them.

2. SAME.

An order upon a bank by a depositor to make her deposit a joint one payable to either or the survivor, is sufficient to bring it within section 3 of Act No. 248, Pub. Acts 1909.

[1]As to whether deposit in joint names is gift to codepositor, see note in 12 L. R. A. (N. S.) 355.

Appeal from Ottawa; Cross, J. Submitted October 19, 1917. (Docket No. 73.) Decided December 27, 1917.

Bill of interpleader by the People's State Bank of Holland against Mrs. Fred Zuber and Fred T. Miles, administrator of the estate of Florence Miller, deceased, to determine the title to a deposit. From a decree for defendant Zuber, defendant Miles appeals. Affirmed.

Charles E. Misner and *Fred T. Miles,* for appellant.

Lillie, Lillie & Lillie, for appellee.

FELLOWS, J. Florence Miller had a deposit in plaintiff bank of between $1,700 and $1,800. She was afflicted with tuberculosis, and the record discloses that she had on several occasions expressed her desire and intent that defendant Mrs. Fred Zuber should have what property she left at her decease. In June, 1916, Mrs. Zuber presented an order together with Miss Miller's bank book to the cashier of the bank. The order was not preserved, and its exact purport does not appear, except that it was the intent of the order, as the cashier now remembers it, to make the account a joint one, substantially as was the order hereafter set out. The cashier was not acquainted with Mrs. Zuber, and did not honor this order, but prepared an order himself and called on Miss Miller. She said it was just as she wanted it, and signed it in the presence of two witnesses. The order is as follows:

"June 27, 1916.

"PEOPLE'S STATE BANK,
"Holland, Michigan.

"*Gentlemen:* Please enter the name of Mrs. Fred Zuber on the signature card of my savings account No. 320 in your bank. I want to make it a joint account

payable to either or survivor. The signature of Mrs. Fred Zuber will be honored by me.

[Signed] "FLORENCE MILLER.

"Witnessed:
"JOHN J. MERSEN,
"HENRY WINTER.
"6/28/1916."

This order was taken by the cashier and pasted on the account of Miss Miller in the bank's book. Thereafter Mrs. Zuber drew small amounts for Miss Miller, and after her death claimed the balance due on this account. Defendant Miles was duly appointed administrator of Miss Miller's estate, and also claimed the fund. Thereupon plaintiff filed this bill of interpleader. A decree in favor of defendant Mrs. Zuber is appealed from by the administrator.

The testimony is overwhelming and undisputed that the deceased desired and intended that Mrs. Zuber should have this money after her death, and that she caused the account to be changed to carry out such intent. The testimony does not admit of the construction that the account was changed solely to convenience its withdrawal during Miss Miller's illness. If Miss Miller intended, as we believe she did, in making this change to so fix the account at the bank that Mrs. Zuber would take by right of survivorship, her intent will be given force by the courts. Section 3, Act No. 248, Pub. Acts 1909 (2 Comp. Laws 1915, § 8040); *In re Rehfeld's Estate, ante* 249 (164 N. W. 372). Nor are we able to follow counsel's contention that the language used was not sufficient to bring the case within the statute cited. The language of the order is, "make it a joint account payable to either or survivor;" the language of the act is, "in form to be paid to either or the survivor of them." It was not necessary, as we have already stated, that the transaction contemplated or that the order or account show a present gift.

There is no testimony or inference that may legitimately be drawn from the testimony that would permit us to conclude that it was not the intention of Miss Miller in making this change to give Mrs. Zuber what money she had in the bank at the time of her death. Indeed the testimony is all to the effect that she felt under many obligations to Mrs. Zuber for what she had done for her during both her health and her sickness; that she had treated her as a sister would, while her near relatives, who were of the half blood, had been indifferent to her welfare. There is no claim of mental incapacity or undue influence. There is nothing upon this record calling upon us or justifying us in reaching a different conclusion from that reached by the trial judge.

The decree is affirmed. Mrs. Zuber will recover costs of this court from the appellant.

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

INDEX.

ABANDONMENT—See DEEDS (7); HOMESTEADS.

ABILITY TO WORK—See DAMAGES (6).

ABUSE OF DISCRETION—See INJUNCTION (3); JUSTICES OF THE PEACE (1); TRIAL (8).

ACCEPTANCE—See SCHOOLS AND SCHOOL DISTRICTS.

ACCEPTANCE OF WORKMEN'S COMPENSATION ACT—See MASTER AND SERVANT (15, 17).

"ACCIDENTS"—See MASTER AND SERVANT (14); NEGLIGENCE (12).

ACCOUNTING—See BUILDING AND LOAN ASSOCIATIONS (2).

ACQUIESCENCE—See DEEDS (13); NEGLIGENCE (2).

"ACT OF GOD"—See THEATRES AND SHOWS (8).

ACTIONS.

1. The possession of a second-hand automobile by an automobile dealer originates in contract and not in trespass where he obtains possession lawfully in the course of a contract for the sale of another car whereby credit is to be given for the second-hand car, which is canceled by mutual agreement, and the dealer wrongfully withholds the second-hand car, and the tort may be waived and assumpsit maintained to recover the agreed price of the second-hand car. *McDonald* v. *Young*, 620.

2. Where several claims are involved or due and payable under one and the same contract at the time of bringing suit, such claims must be sued on in one action, in order to avoid multiplicity of suits. *Kruce* v. *Lakeside Biscuit Co.*, 736.

See BILLS AND NOTES (4); CARRIERS (10); CORPORATIONS (1, 2); THEATRES AND SHOWS (1).

ADMISSIBILITY OF EVIDENCE—See BOUNDARIES; CARRIERS (1); EVIDENCE; TRIAL (2).

ADMISSION OF TESTIMONY—See APPEAL AND ERROR (18).

ADMISSIONS—See COMPROMISE AND SETTLEMENT (1); EVIDENCE 3, 12); PRINCIPAL AND AGENT (2); TRIAL (7, 11).

ADVERSE POSSESSION.

In an action of ejectment, in which the boundary line between two tracts of land was in dispute, the charge dealing with the manner of making government surveys and their conclusiveness, the establishment of boundary lines by adverse possession, and the burden of proof, *held*, to be sufficient. *Wilcox* v. *Jenison*, 183.

AFFIDAVITS—See APPEAL AND ERROR (9).

AGENCY—See PRINCIPAL AND AGENT.

ALIBI—See TRIAL (10).

ALTERATIONS—See EVIDENCE (15).

ALTERNATIVE LEGACIES—See WILLS (5, 6).

AMENDMENTS—See EQUITY (1-3).

ANCIENT RECORDS—See BOUNDARIES (2).

ANIMALS—See ELECTRICITY.

ANTENUPTIAL ASSIGNMENTS—See HUSBAND AND WIFE (1).

APPEAL AND ERROR.

1. In an action to recover damages for personal injuries sustained by a patron of defendant's show, as a result of a windstorm upon the show tent, while plaintiff was attending the show, where a jury was secured without difficulty, and the damages awarded were not claimed to be excessive, *held*, that there was no inevitable legal inference from undisputed facts that local prejudice existed or that the court below abused judicial discretion in denying motion for a change of venue. *Jacobs* v. *Hagenbeck-Wallace Shows*, 73.

2. An assignment of error that there is no evidence in the case to support a verdict for plaintiff is definite. *Sandstrom* v. *Minneapolis, etc., R. Co.*, 99.

3. The determination on a former appeal that the evidence made a question for the jury is the law of the case on a subsequent trial where the testimony is substantially the same as on the first trial. *Rouse* v. *Blair*, 176.

4. In an action for damages for personal injuries sustained in a collision between plaintiff's automobile and defendant's train at a crossing, the testimony was substantially the same as that presented on the first trial so as to render the determination on a former appeal that the evidence made a question for the jury the law of the case on the second trial, where the defendant offered no evidence on the first trial and called a large number of witnesses to establish its defense on the second trial and their tes-

APPEAL AND ERROR—Continued.

timony, if believed, would have warranted a judgment for defendant, but it related to questions within the realm of fact. *Id.*

5. Where the charge of the court, taken as a whole, correctly states the law as applicable to the particular case, and clearly defines the issue, the fact that sentences are objectionable, when considered independent of the context, does not constitute reversible error. *Wilcox* v. *Jenison*, 183.

6. An order dissolving a preliminary injunction is not a final, appealable order. *Freeman* v. *Mitchell*, 208.

7. A motion to dismiss a bill as insufficient, under the judicature act (Act No. 314, Pub. Acts 1915, chap 14, § 4, 3 Comp. Laws 1915, § 12456), raises only such questions as previous to the enactment of such law could be raised by demurrer. *Id.*

8. On demurrer to a bill the allegations of facts properly pleaded are treated as true. *Id.*

9. In a suit in equity defendant's affidavits in denial and explanation have no place in a demurrer. *Id.*

10. Where the question of excessive verdict is raised in a personal injury action, by a motion for new trial, and the motion is denied, and the reasons therefor filed, but no exception is filed, the question will not be considered on appeal. *Sergeant* v. *Grand Rapids, etc., R. Co.*, 385.

11. A plaintiff cannot complain of a verdict in favor of defendant on his claim of recoupment for less than the evidence warrants, where the latter does not appeal. *Sparks* v. *Lord*, 415.

12. Where no bill of exceptions was settled, it will be presumed, upon appeal, that the testimony supported the findings of fact made by the trial judge. *Loveland* v. *Bump*, 564.

13. Where, in an action against a mill owner to recover damages for flooding plaintiff's farm land caused by the building of a new dam higher than the old one, the trial court holds open the question of damages after March 1st of a particular year contingent on the dam being reduced by the middle of May, with the right to plaintiff to make a showing as to damages, and does not pass on them, the question of damages after March 1st will not be considered on appeal. *Potter* v. *Dundee Hydraulic Power Co.*, 585.

14. Recovery can be had for a tort under the common counts in assumpsit, and if no objection is made to the form of action until after all the evidence is in it will not prevail. *McDonald* v. *Young*, 620.

APPEAL AND ERROR—Continued.

15. Where an adverse directed verdict is contended for, the testimony introduced by plaintiff is to be taken as true and viewed in the light most favorable to his contention. *Flokstra* v. *Grand Rapids Railway Co.*, 630.

16. The evidence in a chancery case will not be reviewed on appeal where it is not taken down nor returned pursuant to Act No. 314, Pub. Acts 1915, chap. 17, § 5 (3 Comp. Laws 1915, § 12493), relating to the exclusion of testimony by the trial court, and providing that the court may, in its discretion, if the excluded evidence is brief, permit the same to be taken down by the stenographer separate and apart from other testimony and to be returned to the appellate court under certificate of the trial court. *Pellston Planing Mill & Lumber Co.* v. *Van Wormer*, 648.

17. The question of what law governs the contract involved may not be raised for the first time on appeal. *Harrison* v. *Grier*, 672.

18. In an action for damages for assault and battery, a question put to a physician as to whether in the treatment which he was required to give plaintiff it was necessary that he make any investigation as to whether or not the patient had a hernia and its answer was harmless error where the objectionable part of the question, as to whether it was necessary to make such investigation, was not answered. *Matthews* v. *Lamberton*, 746.

19. Where no request was made to the trial court to file its reasons for denying a motion for a new trial by defendant, and no reasons were filed by it, and no exception was taken to the denial of the motion, the propriety of denying the motion is not available on appeal. *Vezina* v. *Shermer*, 757.

20. The decision on a former appeal is the law of the case. *Saginaw Milling Co.* v. *Schram*, 773.

See BREACH OF PROMISE OF MARRIAGE (2); EVIDENCE (3); TRIAL (11-13, 17); WITNESSES (4).

APPEALS—See JUSTICES OF THE PEACE.

APPROVAL OF PLATS—See MUNICIPAL CORPORATIONS.

ARGUMENT OF COUNSEL—See TRIAL (5, 6, 12).

ASSAULT AND BATTERY.

1. One assaulted may justly exercise such reasonable force as may be, or as appears to him at the time to be necessary to protect himself from bodily harm in repelling the assault. *Anders* v. *Clover*, 763.

2. In an action for damages for assault and battery, it is incumbent on the one starting the affray to show, by a preponderance of evidence, that defendant in repelling such assault employed more force than was necessary. *Id.*

ASSAULT AND BATTERY—Continued.

3. Evidence *held*, sufficient to show that plaintiff started the affray. *Id.*

4. An instruction that the fact that the defendant pleaded guilty in a criminal proceeding started against him by his own procurement was not conclusive against his contention that he was acting in self-defense, and that it should be given such weight by the jury as they believed it entitled to, was proper. *Id.*

See DAMAGES (4); EVIDENCE (16, 17); WITNESSES (3-6).

ASSIGNMENT OF CONTRACT—See HUSBAND AND WIFE (1-3); MECHANICS' LIENS (5); REAL PROPERTY (1, 3).

ASSUMPSIT—See ACTIONS (1); ELECTION OF REMEDIES (1).

AUTHORITY TO MAKE AGENCY CONTRACT—See CORPORATIONS (8).

AUTHORITY TO MAKE CONVEYANCES—See CORPORATIONS (9).

AUTOMOBILES.

1. In an action by an occupant of an automobile against the owner of another automobile to recover damages for injuries sustained in a collision, the evidence *held*, to present a question for the jury as to whether defendant was negligent or plaintiff was guilty of contributory negligence. *Hopkins* v. *Tripp*, 94.

2. Under Act No. 302, Pub. Acts 1915, § 29 (1 Comp. Laws 1915, § 4825), providing that the owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle when it is being driven by another with his express or implied consent or knowledge, where the owner loans it to a company for use in its business and a wagon and team belonging to a third person are injured as the result of the negligence of the company's driver, the owner is liable. *Stapleton* v. *Independent Brewing Co.*, 170.

3. Act No. 302, Pub. Acts 1915, § 29, relating to the liability of the owner of a motor vehicle for injury occasioned by negligence in operation while it is being driven by another by his express knowledge and consent, while safeguarding the rights of persons having occasion to use the streets, does not unreasonably infringe upon the rights of those able to own automobiles, and is within the police power of the State. *Id.*

4. The negligence of the driver of an automobile cannot be imputed to an infant occupying it as a passenger. *Donlin* v. *Detroit United Ry.*, 328.

5. Evidence *held*, insufficient to show that the occupant of the automobile, which was driven by another, was guilty of contributory negligence. *Id.*

AUTOMOBILES—Continued.

6. In an action by a bicycle rider against the driver of an automobile to recover for personal injuries received in a collision near a street intersection occurring after plaintiff had crossed the intersecting street and defendant had turned on the latter street to go in the same direction as plaintiff, *held*, that the questions of negligence and contributory negligence were for the jury. *Vezina* v. *Shermer*, 758.

See CONTRIBUTORY NEGLIGENCE; EVIDENCE (18, 19); RAILROADS (4); STREET RAILWAYS (1, 7, 8).

AVOIDANCE—See COMPROMISE AND SETTLEMENT (4).

BANK DEPOSITS—See GIFTS; HUSBAND AND WIFE (4).

BANKRUPTCY.

1. In a suit by a trustee in bankruptcy, a decree setting aside a sale of a bankrupt partnership's property as fraudulent against creditors need not provide for the payment of the debts due the purchaser, as persons having claims should go into the bankruptcy court and have their rights determined. *Rennells* v. *Potter*, 50.

2. A trustee in bankruptcy, who is granted the right to intervene in a suit involving the rights of the bankrupt, becomes a party for all the purposes of the suit, and thus carries with him his character as trustee in bankruptcy. *Id.*

See CORPORATIONS (4).

BANKS AND BANKING.

Under Act No. 248, Pub. Acts 1909, § 3 (2 Comp. Laws 1915, § 8040), providing that when a deposit shall be made in a bank by any person in the name of the depositor or any other person, and in form to be paid to either or the survivor of them, such deposit shall be the property of such persons as joint tenants, and may be paid to either during the lifetime of both, or to the survivor, the ownership of the fund is actually fixed, and the fund, in the absence of competent evidence to the contrary, when deposited, becomes the property of such persons as joint tenants, with the attendant right of survivorship. *In re Rehfeld's Estate*, 249.

BAR TO ACTION—See LIMITATION OF ACTIONS (6).

BARRIERS—See NEGLIGENCE (10).

BILL IN AID OF EXECUTION—See FRAUDULENT CONVEYANCES (2-4, 6).

BILL OF REVIEW—See EQUITY (5).

BILLS AND NOTES.

1. In an action on a note, as collateral to which a certificate for shares of stock was indorsed in blank and delivered to plaintiff at the time of making the loan, evidence *held*, insufficient to show that there was any understanding at the time the note was given that if it was not paid the plaintiff would sell the stock or would hold same as payment. *Allen* v. *Hook*, 122.

2. One who holds corporate stock as collateral security for a note has the right to retain it until the note is paid, and he is under no obligation to sell the collateral before bringing suit, nor can he be charged with negligence in failing to do so, nor can he be charged with the loss, even though the stock depreciates in value after maturity. *Id.*

3. There is no conversion of a stock certificate which is indorsed in blank at the time it is delivered as collateral security for a note to the pledgee where the latter does not cause it to be transferred to himself upon the books of the company, but still has possession of it at the time of trial of the action on the note and at no time refuses to deliver it upon tender of payment of the note. *Id.* 123.

4. Unless the subsequent purchaser of a note establishes that he is a *bona fide* holder thereof, the note is open to the defenses available as between the original parties. *Harrison* v. *Grier*, 672.

5. Evidence *held*, to present a jury question as to whether plaintiff was a *bona fide* holder of the note sued on. *Id.*

BONA FIDES—See BILLS AND NOTES (4, 5); HIGHWAYS AND STREETS (2, 3); MORTGAGES (8); STREET RAILWAYS (4).

BONDS—See MECHANICS' LIENS (5).

BOUNDARIES.

1. Surveys of State, but not Territorial, surveyors, are admissible in evidence under Act No. 196, Pub. Acts 1915, § 102 (1 Comp. Laws 1915, § 2486), providing that "records of surveys, field notes, and calculations made by any former county surveyor which has been, or shall be, on file in the office of the county surveyor, register of deeds or county clerk for a period of fifteen years or upward * * * shall be admissible in evidence of the facts they contain in any court of record." *Wilcox* v. *Jenison*, 182.

2. Records of surveys and other papers that have been subject of statutory regulation are not admissible as ancient records. *Id.* 183.

See ADVERSE POSSESSION.

BREACH OF CONDITION—See INSURANCE (2).

BREACH OF CONTRACT—See CONTRACTS (4, 5, 8); INSURANCE (8).

BREACH OF PROMISE OF MARRIAGE.

1. In actions to recover damages for breach of promise of marriage, aggravated by seduction, a wide range of inquiry as to the conduct of the parties during the existence of the claimed contract, as well as the causes attending the breaking of the engagement, is permissible. *Bischoff* v. *Harris*, 59.

2. In an action to recover damages for breach of a marriage promise, aggravated by seduction, where the theories of the parties are simple and are stated in their essentials by the court in its charge, it is the duty of a party desiring a more explicit statement of his claims to present requests therefor to the court. *Id.*

3. In an action to recover damages for breach of marriage promise, aggravated by seduction, a verdict for $5,000 *held*, excessive to the extent of $2,500. *Id.* 60.

4. In an action for breach of marriage promise, aggravated by seduction, a requested instruction that if the jury found that the only consideration for the promise, if any promise was made, of marriage, was a promise that, if plaintiff would submit herself to have sexual intercourse with defendant, he would marry her in case she became pregnant, and that was the only consideration, the contract rested upon an immoral consideration and was void, was improperly refused. *Gagush* v. *Hoeft*, 263.

5. If a woman submits herself to the sexual embraces of a man solely in consideration of his promise to marry her if she becomes pregnant, such consideration is immoral and a promise based thereon is void. *Id.*

BROKERS.

1. Where a broker has been accustomed to invest money for certain persons and to give them advice in real estate matters and they only contract to purchase land from other persons on the broker's assurance that the investment will be profitable and that he will handle the land, which is to be improved, divided into lots and sold for a share in the profits, fiduciary relations exist between the parties, and any right of recovery of compensation for platting and improving the property and endeavoring to market the same upon the ground that the broker was prevented from performing the contract by the opposition of the purchasers is barred by the concealment of the receipt of a commission from the vendor for the sale of the property. *Brown* v. *Hurt*, 276.

2. Where the evidence was conflicting as to whether or not by the terms of the contract plaintiff had agreed to assist defendant broker in the sale of another saloon, and plaintiff had failed to do so, and that in that regard the contract for commissions differed from that testified to by plaintiff, the court erred in directing a verdict for plaintiff. *Dattner* v. *Weisz*, 368.

BUILDING AND LOAN ASSOCIATIONS.

1. Section 10007, 2 Comp. Laws 1915, does not forbid the foreclosure of a building and loan association mortgage by advertisement, and such right of foreclosure is expressly granted by the general statute, 3 Comp. Laws 1915, § 14949, relating to foreclosures by advertisement, where there is a power of sale. *Flax* v. *Mutual Building & Loan Ass'n*, 676.

2. On the foreclosure of a building and loan association mortgage there is no more necessity for an accounting than in any other case where money is borrowed and partial payments made from time to time. *Id.*

3. It is a question of fact whether, on foreclosure of a building and loan association mortgage by advertisement, contiguous pieces of land should have been sold as one parcel. *Id.*

4. Under the evidence and the statutes, *held*, that the separate sale of contiguous pieces of land, under foreclosure of a building and loan association mortgage by advertisement, was proper. *Id.*

5. The notice of foreclosure sale by advertisement under a building and loan association mortgage and the sheriff's deed covered both the land and its appurtenances and were sufficient to include an easement appurtenant to the land without a specific sale and description thereof. *Id.*

See USURY (2, 3).

BUILDING RESTRICTIONS—See DEEDS (7-14).

BURDEN OF PROOF—See ADVERSE POSSESSION; ASSAULT AND BATTERY (2, 4); COMPROMISE AND SETTLEMENT (3); DEEDS (1); THEATRES AND SHOWS (10) WILLS (2, 3).

CANCELLATION OF INSTRUMENTS—See DEEDS (1); SPECIFIC PERFORMANCE (1).

CARRIERS.

1. In an action against a street railway to recover for the negligent death of a passenger due to the car, in the vestibule of which deceased was riding, colliding with a car on the opposite track which became derailed, evidence that it was the duty of the city to relay foundations for the track and that it had refused to do so was admissible to explain the condition of the roadbed. *Bury* v. *Detroit United Ry.*, 447.

2. Evidence *held*, insufficient to show such a condition of the roadbed as to warrant defendant in refusing to operate cars because of the failure of the city to repair the foundations. *Id.*

3. While a street railway is not responsible for the condition of its roadbed due to the failure of a city to make repairs to the foundation it is chargeable with notice of such con-

CARRIERS—Continued.

dition, and in the operation of its cars is required to exercise the care made necessary by conditions. *Id.*

4. The motormen of street cars approaching on opposite tracks, on which derailments have occurred, should govern their cars with reference to all known conditions which make for danger for the loads carried and each observe the other approaching car. *Id.*

5. Evidence *held*, to present a question for the jury whether either or both cars in meeting were handled with the high degree of care required by known conditions. *Id.*

6. Derailment of a car, in and of itself, is not evidence of negligence. *Id.*

7. If other circumstances, with the fact that an accident has occurred, give rise to an inference of negligence, the inference may be rebutted by showing that the appliances of a street car are in proper condition and order, and that the servants of the carrier did all that a high degree of care required in the conduct of the business. *Id.* 448.

8. Evidence *held*, to support an inference of negligence of defendant street railway. *Id.*

9. Where the Michigan railroad commission determined that certain rates previously published and exacted from shippers by a carrier were unreasonable and ought not to be exacted, and that other rates were and would be reasonable and proper to be exacted and should thereafter be exacted, there was created a legislative rate, immediately in effect, although liable to be set aside by the courts. *Fletcher Paper Co.* v. *Detroit, etc., R. Co.*, 469.

10. Upon the railroad commission deciding that a certain rate charged a shipper is unreasonable, and that another is reasonable, a shipper may recover the money illegally exacted through the charging of a higher than the fixed rate, irrespective of whether it declare upon Act No. 300, Pub. Acts 1909, § 10, subd. *g* (2 Comp. Laws 1915, § 8118*g*), and the action of the commission or on the common counts. *Id.*

11. If the charges exacted by a carrier have been duly fixed by the railroad commission, and are attacked, the commission should be first applied to, since it is the rate-maker, and it would be wholly incongruous from an administrative standpoint to have successive juries, or different courts or judges, passing upon the reasonableness of a rate already fixed by the commission. *Id.* 470.

12. In an action by a shipper against a carrier to recover the difference between the amount paid under a tariff published by defendant and that designated by the railroad commission, the question of the reasonableness of the exactions was not a proper one for consideration. *Id.*

CARRIERS—Continued.

13. Where rates charged by a railroad are condemned by the railroad commission as unreasonable, and new ones approved as reasonable, the collection of the old rate while a temporary injunction against the new rate is in effect does not legalize the exaction nor prevent recovery of the excess charges by the shipper, upon the representations upon which the injunction was based later being shown to be unfounded. *Id.*

14. An order of the railroad commission fixing rates to apply to a shipper of logs when manufactured product is reshipped via the carrier's line, and, when not so shipped, allowing the collection of an additional charge per thousand feet, to be refunded, however, if shipper later ships out the manufactured product, or some part of it, does not provide for a rebate or discrimination, and is not necessarily unlawful, under Act No. 300, Pub. Acts 1909, § 11 (2 Comp. Laws 1915, § 8119), providing that nothing in the act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances and conditions. *Id.*

15. The order of the railroad commission must be construed as referring to tonnage generally of a product similar to that of the logs shipped in and not of particular logs shipped in. *Id.* 471.

16. Where a carrier simply refused to put into effect a tariff ordered by the railroad commission which was temporarily suspended by injunction in a court of chancery and the shipper was compensated by the return of the money exacted with interest, double damages will not be awarded a shipper under Act No. 300, Pub. Acts 1909, § 19 (2 Comp. Laws 1915, § 8127). *Id.*

CERTIFICATE OF AUTHORITY—See INSURANCE (5).

CHANCERY APPEALS—See APPEAL AND ERROR (16).

CHANGE OF VENUE—See APPEAL AND ERROR (1).

CHANGED CONDITIONS—See EQUITY (1).

CHARGE AS WHOLE—See APPEAL AND ERROR (5).

CHARITABLE BEQUESTS—See PERPETUITIES; WILLS (5, 6).

CHATTEL MORTGAGES—See CORPORATIONS (4).

CHECKS—See COMPROMISE AND SETTLEMENT (1).

CHILDREN—See NEGLIGENCE (1, 3, 10, 11).

CIRCUIT JUDGES—See ELECTIONS.

CLAIMS—See BANKRUPTCY (1).

COLLATERAL SECURITY—See BILLS AND NOTES (1, 3).

COLLISIONS—See AUTOMOBILES (1, 6); CONTRIBUTORY NEGLIGENCE; EVIDENCE (18); STREET RAILWAYS (1, 7-10).

COMMISSIONS—See BROKERS.

COMMON-LAW DEFENSES—See MASTER AND SERVANT (16).

COMPETENCY—See EVIDENCE (12).

COMPROMISE AND SETTLEMENT.

1. Where the purchasers of steel claimed credit for labor in tagging the pieces in a letter inclosing a check for the balance, after deducting the amount of the claim, a letter in reply from the seller asking the purchasers to forward bills for the charges so that they could be passed upon and credited, if correct, did not constitute an admission that the check was received as payment. *Trussed Concrete Steel Co.* v. *Rosema*, 160.

2. In an action to recover for personal injuries in which the defense set up was a complete settlement and release, and the testimony was in conflict, it was a question for the jury as to the terms of the contract and whether the release was procured by fraud from plaintiff, he claiming that he thought it was a receipt for money paid under the contract, as he was assured by a representative of defendant and of the insurance company. *Porth* v. *Cadillac Motor Car Co.*, 501.

3. One signing a release of damages for personal injuries is presumed to have executed it understandingly, and *prima facie* it must be taken as truly stating the agreement of the parties, and the burden of proof is upon him not only to show by a preponderance of evidence that it is not true, but that he was fraudulently deceived and misled by what was done and said into believing that he was signing a mere receipt for money paid under a contract different from that stated in it. *Id.*

4. If the contract under which the money was paid to plaintiff was limited to his loss of time, extra expenses and total incapacity for a year following the time it was entered into, with the matter of full compensation left open, owing to the uncertainty at that time of the permanency of the injuries and the extent of possible recovery, and plaintiff affirmed the contract, he was under no obligation to return the money paid in fraudulent settlement of it. *Id.*

CONCLUSIONS—See EVIDENCE (18).

CONDUCT OF COUNSEL—See TRIAL (5, 6, 12).

CONDUCT OF COURT—See TRIAL (3).

CONDUCT OF PLAINTIFF—See TRIAL (4).

CONFIDENTIAL RELATIONS—See LIMITATION OF ACTIONS (4).

CONFLICTING EQUITIES—See MORTGAGES (2, 3).

CONJECTURAL DAMAGES—See DAMAGES (3).

CONSENT OF VENDOR—See REAL PROPERTY (3).

CONSENT OF WIFE—See HOMESTEADS (2).

CONSIDERATION—See EVIDENCE (13); FRAUDULENT CONVEYANCES (1, 2).

CONSPIRACY—See CORPORATIONS (2).

CONSTITUTIONAL LAW—See AUTOMOBILES (3); PERPETUITIES; SCHOOLS AND SCHOOL DISTRICTS (5).

CONSTRUCTION BY DEPARTMENTAL STATE OFFICERS—See STATUTES (1).

CONSTRUCTION OF CHARGE TO JURY—See TRIAL (1).

CONSTRUCTION OF CONTRACT—See CONTRACTS (1, 2, 6-8); VENDOR AND PURCHASER.

CONSTRUCTION OF FRANCHISE—See STREET RAILWAYS (6).

CONSTRUCTION OF STATUTES—See INSURANCE (2, 5, 14-16); OFFICERS; STATUTES.

CONTRACTS.

1. A scheme for the sale of groceries as an incident to the giving of certificates in a so-called advertising campaign, which certificates, at the end of the period, are to be counted to determine which one of 100 candidates should have a piano and other various articles, and which scheme is part of a contract of sale of the prizes, is illegal. *Boston Piano & Music Co.* v. *Seckinger*, 312.

2. A contract for the purchase of a piano and other articles to be used to put in operation a so-called advertising campaign by a merchant, including an illegal scheme for the furtherance of such campaign which is the inducement to the contract, is void and unenforceable. *Id.*

3. Where a person accepts a contract and acts upon it he is bound to know its terms and conditions, and he cannot accept its benefits, or a part thereof, and reject the balance, or plead ignorance of its conditions. *Warren* v. *Federal Life Ins. Co.*, 342.

4. The act of an engineer in starting a tunnel contractor's foreman at what he erroneously believes is the correct point, necessitating the construction of a longer tunnel than that covered by the contract, does not constitute a breach of the contract. *Township School District of Wakefield* v. *McRae*, 694.

CONTRACTS—Continued.

5. The mere fact that there is a controversy between a tunnel contractor and a school board and its engineer as to whether certain work should be done is no excuse for the failure of the contractor to go ahead and complete the work under the terms of the contract at a certain rate per foot as claimed by him where such work would merely mean an extension of the tunnel. *Id.*

6. It is the duty of the trial court to construe a written contract. *Id.*

7. The term "more or less" as used in a tunnel construction contract in referring to the number of feet the tunnel is to be driven, is an expression which shows that the parties are to run the risk of gain or loss, as there might happen to be an excess or deficiency in the estimated quantity. *Id.*

8. Where the facts are not in dispute it is for the court to determine what is a substantial compliance with a construction contract. *Id.*

See ACTIONS; BREACH OF PROMISE OF MARRIAGE; BROKERS; CORPORATIONS (5-8); ELECTION OF REMEDIES; EVIDENCE (7, 15); EXECUTION (2); INSURANCE (2); TRIAL (4, 17).

CONTRIBUTORY NEGLIGENCE.

The driver of an automobile who approaches a street railway track, his view of which is obstructed, at so high a rate of speed as to make it impossible to stop before the track is reached, where the sense of seeing is for the first time available, is guilty of contributory negligence, as a matter of law. *Donlin* v. *Detroit United Ry.*, 327.

See AUTOMOBILES (1, 5, 6); MASTER AND SERVANT (11, 18); NEGLIGENCE (4, 11); STREET RAILWAYS (1, 3, 8, 9).

CONVERSION—See BILLS AND NOTES (3).

CONVEYANCES—See CORPORATIONS (9).

CORPORATE STOCK—See BILLS AND NOTES (3).

CORPORATIONS.

1. Where the directors of a corporation are charged with fraud in carrying out a scheme to wreck the corporation by giving a mortgage for an unwarranted amount, timed and intended to be promptly foreclosed, as is done, it is unnecessary that a stockholder apply to such directors to commence a suit for redress before individually seeking relief in equity. *Freeman* v. *Mitchell*, 208.

2. A bill of complaint by a stockholder against directors of a corporation charging fraud and conspiracy in giving a mortgage for an unwarranted amount, timed and intended to be promptly foreclosed, and the purchase by such directors indirectly of all the assets of the corporation at the foreclosure sale, *held*, sufficient to warrant a court

CORPORATIONS—Continued.

of chancery taking cognizance under its general equity jurisdiction. *Id.*

3. The question of whether the acts of a summer resort corporation are beyond its powers cannot be raised in a suit to enjoin it from making an addition to one of its hotel buildings on the ground that the land on which the hotel is located is a public park. *Weihe* v. *Macatawa Resort Co.*, 335.

4. The receiver in bankruptcy of the property of a foreign corporation which is engaged in business in the State without compliance with the law relating to the transaction by foreign corporations of business within the State, is estopped to raise the question of the invalidity of a mortgage of corporate chattels in an action of replevin to recover such chattels, he having no greater rights than the corporation. *Goldberg* v. *Parker*, 396.

5. It will not be assumed that a corporation's president had authority to contract to pay for unearned wages or to waive performance of the contract by an officer. *Wray* v. *Tilden Saw Co.*, 461.

6. In an action by an officer of a corporation to recover on a contract for wages earned, where the defendant did not so arrange or force matters that plaintiff was admitted to earn his salary, the result was the same as if defendant had denied plaintiff opportunity to perform the contract, and, even if the contract was for a fixed period, plaintiff could not recover wages as such by a showing that he stood ready to perform, since defendant had the right to terminate the contract at any time. *Id.*

7. Where plaintiff did not perform any service he did not earn any salary which could be recovered, and it is immaterial that defendant secured a decree restraining certain persons from in any manner interfering with the management of the business by plaintiff as manager. *Id.*

8. Evidence *held*, to show that the president and general manager of defendant corporation had authority to make an agency contract. *Neal* v. *Novelty Leather Works*, 598.

9. The property of a corporation is not subject to the control of the stockholders and may not be conveyed by them, even though those joining in the conveyance own nearly all the stock. *Robinson* v. *Taber*, 767.

See EVIDENCE (12).

CORRECTING MISTAKES IN TESTIMONY—See WITNESSES (3).

COUNTY SURVEYORS—See BOUNDARIES (1); EVIDENCE (5).

COURT RULES—See JUSTICES OF THE PEACE (2); TRIAL (7).

COVENANTS—See DEEDS (7-10).

CREDIBILITY OF WITNESSES—See EVIDENCE (8, 14); WITNESSES (1).

CRIMINAL LAW.

1. An information for murder in the form of the statute, 3 Comp. Laws 1915, § 15739, is sufficient, although it does not state that the murder was committed while a robbery was being perpetrated or attempted. *People* v. *Page*, 524.

2. Under 3 Comp. Laws 1915, § 15192, the killing of a human being, which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, constitutes murder in the first degree. *Id.*

CROSS-EXAMINATION—See EVIDENCE (8); WITNESSES (2).

CROSSING ACCIDENTS—See AUTOMOBILES (6); RAILROADS (1, 4); STREET RAILWAYS (7-11).

CUSTOM—See NEGLIGENCE (2).

DAMAGES.

1. A verdict for $35,000 in favor of a railroad employee for the loss of one arm below the shoulder and the other at the wrist and other injuries, *held* not excessive. *Guy* v. *Cincinnati Northern R. Co.*, 140.

2. A judgment for $840 damages for overflowing plaintiff's farm of 40 acres for 4 years, *held*, excessive to the extent of $200. *Potter* v. *Dundee Hydraulic Power Co.*, 585.

3. On a bill to set aside a sheriff's deed to an execution creditor, evidence of the loss of profits from the operation of a mill, *held*, too speculative and conjectural to be allowed. *Pellston Planing Mill & Lumber Co.* v. *Van Wormer*, 649.

4. In an action for assault and battery, a verdict for $2,500 was not excessive where plaintiff lost some teeth as the result of the assault, was in bed for a week, and later went to a hospital and underwent an operation for hernia, suffered the entire loss of hearing in one ear and 50 per cent. loss in the other, and expended the sum of $337 for medical and hospital fees. *Matthews* v. *Lamberton*, 748.

5. In a personal injury action, a declaration stating that by "means of the premises the said plaintiff was forced and obliged and did lay out and spend a large amount of money, to wit, $200, in and about endeavoring to be cured of said sickness, lameness, nervousness, and disorders occasioned as aforesaid," and that he will be forced to pay out further sums in the future, and that the disabilities were permanent in character, *held*, sufficient to support proof as to number of visits paid by plaintiff's doctor and the amount of his charges. *Vezina* v. *Shermer*, 757.

6. The answer of plaintiff to the question as to how much time he could work because of his injury, that he could

DAMAGES—Continued.

work probably four days in the week, was not objectionable as being speculative, uncertain, remote, and a mere guess, where plaintiff was carefully examined both on direct and cross-examination as to his ability to labor. *Id.*

See APPEAL AND ERROR (1, 10, 11, 13); ASSAULT AND BATTERY (2); AUTOMOBILES (1, 2); BREACH OF PROMISE OF MARRIAGE (2, 3); CARRIERS (16); EVIDENCE (16); INJUNCTION (1); MASTER AND SERVANT (8); THEATRES AND SHOWS (1, 4); WATERS AND WATERCOURSES (1).

DAMS—See INJUNCTION (1); WATERS AND WATERCOURSES.

DEATH.

Where there are no eyewitnesses to the instantaneous death of a boy by drowning by falling through soft ice in a river while skating, it must be presumed that he was in the exercise of due care at the time of his death. *Parsons* v. *E. I. Du Pont de Nemours Powder Co.*, 409.

See NEGLIGENCE (1, 3, 4, 10).

DECLARATIONS OF DECEASED SURVEYOR—See EVIDENCE (6).

DEDICATION.

1. The question of dedication of land for public purposes is one largely of intention. *Weihe* v. *Macatawa Resort Co.*, 334.

2. Evidence *held*, insufficient to show dedication of land of a summer resort corporation used for hotel purposes for a public park. *Id.* 335.

DEEDS.

1. In a suit by an aged father against his son and daughter-in-law to set aside a deed of property to them subject to a life lease, in consideration of maintenance and support, the burden is on defendants to show that the agreement with the father is not to his disadvantage, is fair to him and of his own free will; that no advantage has been taken by them because of his age, mental condition, or confidence in them and that they have fulfilled the terms of their agreement, in letter and spirit, so far as permitted by him, and are ready and willing to continue so to do. *Williams* v. *Williams*, 1.

2. Evidence *held*, sufficient to show that plaintiff had not made out a case and that the contract was yet in force. *Id.*

3. Where a contract for a lease for the lifetime of the lessor, containing a provision for a deed thereafter, was made, and a warranty deed was delivered in escrow to a third person, to take effect at the death of the lessor, *held*, that it was the lessor's intention, that if the lessees per-

DEEDS—Continued.

formed the contract and survived her, they should, upon her death, have the fee of the land, she, in the meanwhile, to own and control the property herself and retain all interest therein except a determinable leasehold. *Pollock* v. *McCarty*, 66.

4. The test of a conveyance is whether it can be said that the delivery of the deed is such as to convey a present interest in land. *Id.*

5. One of the essential requisites to the validity of a deed, so as to pass title, is delivery. *Id.* 67.

6. The act of delivery of a deed is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him, but it is that act of the grantor, indicated either by acts or words, or both, which shows an intention on his part to perfect the transaction, by a surrender of the instrument to the grantee, or to some third person for his use and benefit. *Id.*

7. There was no abandonment of mutual covenants in a deed of one-half of all the portion of a block fronting on a certain street restricting the use of the premises conveyed "only for residence purposes" by subsequent deeds of each of the owners of a portion of the land of each, the two strips sold adjoining, where, although the covenants were not in all respects similar, they were essentially similar, it being asserted in each deed that the property conveyed was to be used "only for residence purposes." *Andre* v. *Donovan*, 256.

8. A covenant against the use of premises for other than residential purposes is not broken by the use of a barn located on a corner of the premises as a garage and of a house formerly standing on the premises as a rooming house, where no objections were offered by other property owners or by their predecessors in title. *Id.*

9. Where the entire portion of a block fronting on a certain street was subject to restrictive covenants against use for other than residence purposes, there is no change in the character of the neighborhood through the encroachment of business rendering enforcement of the covenants inequitable, where both sides of the street up to and including the property in question are residential in character, some of the residences being very costly, and to permit the erection of store buildings would be an injury to residence owners, although the part of the block not subject to the restrictions has become business in character. *Id.* 257.

10. There is a violation of the restrictive covenant in a deed against the erection of anything but a residence and buildings pertaining thereto by the remodeling of an existing dwelling and using it as a hospital. *Hartwig* v. *Grace Hospital*, 725.

DEEDS—Continued.

11. The character of a building restriction in a deed to land *held*, to raise the presumption that such restriction was intended for the benefit of subsequent purchasers, especially when the quantity of the land affected and its general location are considered. *Id.*

12. A building restriction in a deed to land, inserted for the benefit of the land retained by the grantor, may be enforced by subsequent purchasers *inter se*. *Id.*

13. Long acquiescence in the violation of a building restriction in a deed to land limiting the use of the land to residence purposes by the changing of a residence thereon into a hospital will defeat the right to enjoin such violation when only by the making of expensive changes in the structure could the residence character of the building be restored. *Id.*

14. A home for nurses of a hospital is not a residence within the meaning of a building restriction in a deed to land. *Id.*

See EQUITY (1, 4).

DEFECTIVE ROADBED—See CARRIERS (1-3).

DEFENSES—See BILLS AND NOTES (4).

DEFINITENESS OF ASSIGNMENT—See APPEAL AND ERROR (2).

DEFINITION—See PROXIMATE CAUSE.

DEGREE OF CARE REQUIRED—See CARRIERS (4).

DELAY—See LIMITATION OF ACTIONS (6).

DELINQUENT TAX LIST—See TAXATION.

DELIVERY—See DEEDS (4-6).

DEMURRER—See APPEAL AND ERROR (7-9).

DENIAL OF MOTION FOR NEW TRIAL—See APPEAL AND ERROR (10, 19).

DERAILMENT OF CAR—See CARRIERS (6).

DIRECTED VERDICT—See APPEAL AND ERROR (15); BROKERS (2); NEGLIGENCE (3).

DISCRETION OF COURT—See APPEAL AND ERROR (1, 16); INJUNCTION (3, 5); JUSTICES OF THE PEACE (1); SPECIFIC PERFORMANCE (2); TRIAL (4, 8); WITNESSES (2).

"DISEASE"—See MASTER AND SERVANT (14).

DIVORCE.

1. On a bill for divorce by a husband against his wife, evidence *held*, sufficient to show extreme cruelty on the part of the wife. *Benore* v. *Benore*, 113.

DIVORCE—Continued.

2. Evidence *held*, insufficient to show such fraud upon the part of the wife in procuring a deed to all of plaintiff's property as would support a decree canceling and setting aside the conveyance, and to not justify a decree for divorce, where the bill for divorce would not have been filed, but for the purpose of canceling the conveyance. *Id.*

DOCUMENTARY EVIDENCE—See BOUNDARIES (1).

DOUBLE DAMAGES—See CARRIERS (16).

DOWER—See HUSBAND AND WIFE (1).

DROWNING—See DEATH; NEGLIGENCE (11).

DUTY OF COURT—See CONTRACTS (6); EQUITY (1).

DUTY OF PROPRIETORS—See THEATRES AND SHOWS (2, 5-7).

DUTY OF STATE BOARD OF CANVASSERS—See ELECTIONS (1).

EJECTMENT—See ADVERSE POSSESSION.

ELECTION OF REMEDIES.

1. If no objection is made to the form of action in an action of assumpsit to recover a money judgment for the value of a second-hand automobile which defendant has wrongfully retained after cancellation of a contract for the exchange of a new car for the old car, both the question of title and right of possession may be tried as well as in an action of trover on defendant's denial of ownership and possession. *McDonald* v. *Young*, 620.

2. There is an election of remedies precluding the bringing of an action of tort based upon the inconsistent theory that defendant was not the owner, but was in tortious possession of a second-hand automobile which he had turned in as part payment in an exchange for a new car, where the contract was canceled by mutual agreement and a deposit returned, and plaintiff maintains an action of assumpsit for the value of the second-hand car upon the theory that defendant became the owner of the car and was liable for the purchase price, and the case is tried on the merits and the judgment in defendant's favor is not appealed from. *Id.* 621.

See APPEAL AND ERROR (14).

ELECTIONS.

1. In the absence of a contest over the election of a circuit judge, it is the ministerial duty of the State board of canvassers to canvass the returns and issue to the officer elected a certificate of election. *Dingeman* v. *State Board of Canvassers*, 135.

ELECTIONS—Continued.

2. The legislature, sitting in joint convention, has exclusive jurisdiction of a recount contest on the election of a circuit judge. *Id.*

ELECTRICITY.

The proximate cause of the death of horses killed during an electrical storm because of electricity communicated from a trolley wire to a wire fence along an electric railroad right of way was the failure for three months to repair a "pull off" wire, which, when in its proper place, ran from the top of a line pole to the trolley wire over the center of the track, but the end of which had in some way become detached and fallen and become entangled with the fence, and the other end of which remained attached to the eye bolt of a span wire on the pole connected with the trolley wire by an insulated "hanger" or circuit breaker, which became charged during the storm, communicating electricity to the fence, and not the electrical storm, since the danger of charging the wire by an electrical storm was a danger which should have been foreseen and guarded against. *Wilmarth* v. *Michigan United Traction Co.*, 428.

EQUITY.

1. If, as the result of unkind feeling developed between the parties to a deed by an aged father to his son and daughter-in-law in consideration of care and support on the premises in which the father retains a life lease, the father cannot agreeably and contentedly live with the children in the friendly relations contemplated by their agreement, it is within the power of the chancery court to subsequently require other suitable provisions to be made for him in other congenial surroundings by them or at their expense. *Williams* v. *Williams*, 1.

2. A trustee in bankruptcy appointed since the commencement of a suit may be brought before the court by an amendment to the bill, and a supplemental bill is unnecessary, he being a new party claiming only such interest as is acquired by operation of law. *Rennells* v. *Potter*, 50.

3. Facts which existed at the time an original bill of complaint was filed, but which were not known to plaintiff because they were concealed by the defendants themselves, may be presented to the court by way of amendment instead of a supplemental bill. *Id.*

4. A bill is not multifarious and sets up a case of fraud where it is alleged that plaintiffs, owners of land, delivered an abstract to one of the defendants, an attorney, for examination; that he advised them that the title was defective and that they should file a bill to quiet title; that he filed suit against a person having no title and

EQUITY—Continued.

set out a former chancery proceeding by another person against the defendant in the suit to quiet title and set up that such defendant had ceased to have title because she made no tender; that, as a result of a conspiracy between the attorneys for both parties, a decree was rendered in favor of the defendant in the suit to quiet title; that plaintiffs' attorney satisfied the decree without authority and fixed title in defendant; that such attorney secured a deed to the premises in the name of his mother-in-law, another defendant, and acted as agent for her in the sale of lots to other defendants; that such attorney in furtherance of the conspiracy refused to allow an appeal from the decree and advised plaintiffs that they had an adequate remedy on their warranty deed; that in pursuance of such conspiracy a suit was brought against the grantor and discontinued after considerable expense to plaintiffs, and prayed that title be declared to be in them; that the decree in the suit to quiet title and the subsequent deeds be set aside; that plaintiffs' former attorney be compelled to deliver an abstract of title, repay money paid for services, and that the attorneys for defendant in the suit to quiet title be required to pay the expenses of plaintiffs in the latter suit, in the proceedings against the grantor and in the instant suit, including an attorney's fees. *Raniak* v. *Pokorney*, 567.

5. A bill of complaint is not a bill for review where it does not assume the validity of the pleadings in the case sought to be reviewed. *Id.*

6. A court of equity may relieve against fraud, even to the extent of setting aside its own decrees, when founded thereon. *Id.*

7. The stating part of a bill of complaint determines its character, and it is immaterial that the prayer for relief is inconsistent. *Id.* 568.

See CORPORATIONS (1, 2); INJUNCTION; MORTGAGES (2, 3).

ESCROWS—See DEEDS (3).

ESTATES IN TRUST—See WILLS (1).

ESTATES OF DECEDENTS—See EXECUTORS AND ADMINISTRATORS; WILLS.

ESTOPPEL—See CORPORATIONS (4); HUSBAND AND WIFE (3); INSURANCE (16).

EVIDENCE.

1. The admission in evidence of tables of mortality showing plaintiff's expectancy of life, was harmless error, where there was evidence tending to show that such injuries were permanent and his physical condition, and the jury were instructed not to consider the tables unless they

EVIDENCE—Continued.

were convinced to a moral certainty that a permanent injury was received. *Jacobs* v. *Hagenbeck-Wallace Shows*, 75.

2. The admission, in an action for personal injuries received by a patron of a show in a tent, of opinion evidence tending to show that the stakes of the show tent should not have been driven vertically, at right angles with the earth, and should have been driven at another angle, given by witnesses not shown to have had any experience in securing such tents to the earth, was erroneous. *Id.*

3. The admission of testimony tending to prove that either before or after a certain storm from the effects of which upon defendant's tent in which plaintiff was attending defendant's show plaintiff was injured, certain employees of defendant admitted that the tent was not properly erected or made statements from which the inference of defendant's negligence would arise, was erroneous; otherwise, if at any time responsible officers and agents of defendant made such admissions. *Id.* 76.

4. In an action by a passenger against a street railway company to recover for personal injuries, evidence as to whether a witness for defendant in his search of the reports on file found any report of the accident is inadmissible. *Sibert* v. *Detroit United Ry.*, 117.

5. Under Rev. Stat. 1846, chap. xiv, §§ 96, 97, 102, providing that certain records of surveys made by the county surveyors since the organization of the State government may be received in evidence, records of surveys are not competent evidence unless made by county surveyors. *Wilcox* v. *Jenison*, 183.

6. Declarations by a surveyor, since deceased, to his employer that he had made a mistake in a former survey are admissible where such mistake was discovered during the course of the second survey, but it is not apparent whether the surveyor made the declaration in the course of such second survey. *Id.*

7. In an action to recover the balance of the contract price for installing a heating plant in a residence, parol evidence is admissible to supply an omission in the schedule attached to the written contract relating to the degrees of temperature at which the house was to be heated. *Sparks* v *Lord*, 415.

8. In a will contest the admission of evidence on cross-examination of one of the contestants and her former husband that a short time prior to the death of the husband the latter took his aged father to his home and procured a deed to himself of all the father's property, and the wife received a deed of part of the property from the husband, and, after the father's death, such deed was set aside in proceedings for its cancellation by other children, for the

EVIDENCE—Continued.

purpose of showing the character of the witnesses, was not prejudicial error. *In re Sparks' Estate*, 421.

9. The benefit of the presumption arising from the failure of the legatee to take the stand and testify in his own behalf in a will contest may not be claimed by contestants, where, after a consent order for exclusion of witnesses is made, it is announced that the legatee will not be offered as a witness, and opportunity is given contestants to cross-examine him, which is not done, and it is claimed that legatee's presence in court is necessary and that by his remaining under a modified order of the court he can no longer be called to the witness stand without the consent of the contestants, since the contestants, by their actions, foreclosed him from so doing. *Id.* 422.

10. In a will contest statements of the testator are inadmissible to show undue influence, but are admissible to show the effect that such undue influence had upon the testator in respect to making of the will. *Id.*

11. Evidence *held*, not to show that plaintiff's illness was so severe and of such permanent character that he could not testify so as to render admissible his evidence in another case as to the validity of the claimed contract involved in each case. *Neal* v. *Novelty Leather Works*, 598.

12. Statements and admissions of the president and general manager, and the treasurer of a corporation, who constitute a majority of the directors and are both officially and actively engaged in the business, relative to the existence of a contract with plaintiff, are competent evidence, in a suit against the corporation by an agent for an accounting as to commissions on goods sold. *Id.*

13. The real consideration of a lease, the consideration of which is stated as being one dollar, may be shown, if material. *Stotts* v. *Stotts*, 606.

14. The credibility of testimony and the force to be given to it are questions for the jury. *Harrison* v. *Grier*, 672.

15. In an action by a school district on a sewer tunnel contractor's bond to recover damages for failure to complete the tunnel through a hill, evidence of one who, with the engineer of plaintiff, examined the ground where the proposed tunnel was to be constructed before the contract was signed and was shown where the end was to be, and that, as constructed, it came out at a point some distance further away so as to make the tunnel longer, was inadmissible to show that the course of the tunnel was altered after the execution of the contract, where it appeared that such circumstance did not occur in the presence of the contractor, and he knew nothing of it when he signed the contract, and the engineer might have been mistaken or some other event might have transpired. *Township School District of Wakefield* v. *McRae*, 693.

EVIDENCE—Continued.

16. In an action for damages for assault and battery, evidence of the conduct of plaintiff in attempting to do work after the assault is admissible to show the extent, nature and probable effects of the injury. *Matthews* v. *Lamberton*, 746.

17. In an action for damages for assault and battery, the affirmative answer of plaintiff's wife as to whether plaintiff after the injury had any pain about his head was harmless error, where the ruling was made by the court that the witness could state what she noticed, and she subsequently testified that while in bed he often moaned and groaned and rolled and tossed from side to side. *Id.*

18. A question put to a witness, in an action by a bicycle rider against the driver of an automobile to recover damages for personal injuries, as to whether defendant appeared to have his car under control was not objectionable as calling for a conclusion. *Vezina* v. *Shermer*, 758.

19. The exclusion of the answer of a witness to a question whether defendant had his automobile under control, on the ground that it called for a conclusion, was harmless error, where, in later examination, the witness stated that the car did not run more than six feet after the collision and that defendant put his foot on the brake and the clutch at the same time and stopped the car almost instantly. *Id.*

20. Oral testimony cannot be resorted to in order to create a trust in real estate. *McNamara* v. *Langguth*, 776.

See APPEAL AND ERROR (16); ASSAULT AND BATTERY (2-4); AUTOMOBILES (1, 5); BILLS AND NOTES (1, 5); BOUNDARIES; BREACH OF PROMISE OF MARRIAGE (1); BROKERS (2); CARRIERS (1, 2, 5-8); COMPROMISE AND SETTLEMENT (3); DAMAGES (6); DEDICATION (2); DEEDS (2); DIVORCE; FRAUD (2, 3); FRAUDULENT CONVEYANCES (1, 2, 5); HOMESTEADS (3); HUSBAND AND WIFE (4); INJUNCTION (4); INSURANCE (6); MASTER AND SERVANT (3-6, 10, 13, 18, 20); MECHANICS' LIENS (4); NEGLIGENCE (1, 6); PRINCIPAL AND AGENT (1); RAILROADS (1, 4); REAL PROPERTY (1, 3); SPECIFIC PERFORMANCE (3); STREET RAILWAYS (7, 10); THEATRES AND SHOWS (4); TRADE-NAMES; TRIAL (2, 11-13); USES AND TRUSTS (1); WATERS AND WATERCOURSES (3); WILLS (4); WITNESSES (3-9).

EXCESSIVE CLAIMS—See MORTGAGES (8).

EXCESSIVE SPEED—See STREET RAILWAYS (10, 11).

EXCESSIVE VERDICTS—See APPEAL AND ERROR (10); BREACH OF PROMISE OF MARRIAGE (3); DAMAGES (1, 2, 4).

EXCLUSION OF TESTIMONY—See EVIDENCE (19).

EXCLUSION OF WITNESSES FROM TRIAL—See TRIAL (8).

EXECUTION.

1. The right to redeem from execution sales is a creature of statute. *Pellston Planing Mill & Lumber Co.* v. *Van Wormer*, 648.

2. The right to redeem from execution sale, in the absence of contract, continues during the period fixed by statute, and no longer. *Id.*

3. The period within which the execution debtor may redeem is fixed at one year from the time of execution sale, by Act No. 314, Pub. Acts 1915, chap. 23, §§ 96, 97 (3 Comp. Laws 1915, §§ 12911, 12912), and is not extended by section 113, giving execution creditors 15 months to redeem. *Id.*

4. The right to redeem from an execution sale, being a right created by law, the time for its exercise may be prolonged by verbal agreement. *Id.*

5. The statutory period of redemption from execution sale of one year is waived by a senior execution creditor where, after the expiration of such period, and before any junior execution creditor has acquired any rights, he accepts payment of his judgment. *Id.*

6. The levy of a junior execution creditor upon land sold to a senior execution creditor is upon lands of the execution debtor and not upon the latter's right of redemption. *Id.*

7. All rights of subrogation to the rights of the senior execution creditor by a junior execution creditor are barred where the senior levy is discharged after the period of one year from the sale and within the 15-months' period by the acceptance of payment from the execution debtor. *Id.* 649.

See WILLS (7).

EXECUTORS AND ADMINISTRATORS.

Proceedings in the probate court in the matter of estates of deceased persons are proceedings *in rem*, or proceedings to determine the status of the estate, and not proceedings *inter partes* between the various claimants. *In re Brown's Estate*, 545.

EXEMPTION—See USURY (2).

EXPERT WITNESSES—See EVIDENCE (2); TRIAL (3); WITNESSES (4-6, 8, 9).

EXPLOSIVES.

Judicial notice is taken of the fact that gasoline, either alone or mixed with kerosene, constitutes a highly explosive agent and that extreme care should be used by vendors thereof to prevent their mixture. *McLawson* v. *Paragon Refining Co.*, 223.

See NEGLIGENCE (4-9).

EXTENSION OF TIME—See EXECUTION (4); HIGHWAYS AND STREETS (2); MORTGAGES (9); SPECIFIC PERFORMANCE (1).

EXTREME CRUELTY—See DIVORCE (1).

FAILURE OF LEGATEE TO TESTIFY—See EVIDENCE (9).

FAILURE OF TREASURER TO FILE SWORN STATEMENT—See TAXATION.

FAILURE TO COMPLY WITH CONDITIONS—See WILLS (5).

FAILURE TO PERFORM—See CONTRACTS (5).

FIDUCIARY RELATIONS—See BROKERS (1).

FINDINGS OF INDUSTRIAL ACCIDENT BOARD—See MASTER AND SERVANT (13).

FIRE INSURANCE—See INSURANCE (1-11).

FLOODING LANDS—See WATERS AND WATERCOURSES.

FORECLOSURE—See BUILDING AND LOAN ASSOCIATION; MORTGAGES (2-9).

FORECLOSURE BY ADVERTISEMENT—See MORTGAGES (2-6).

FOREIGN CORPORATIONS—See CORPORATIONS (4).

FORFEITURE—See BROKERS (1); INSURANCE (2, 8); STREET RAILWAYS (4, 5).

FORMER APPEALS—See APPEAL AND ERROR (3, 4, 20).

FRANCHISES—See STREET RAILWAYS (4-6).

FRAUD.

1. Fraud and undue influence cannot be inferred from mere opportunity. *Powell* v. *Pennock*, 573.

2. Evidence *held*, insufficient to show undue influence and fraud on the part of a wife in inducing her husband to make bank deposits payable to either or to the survivor. *Id.*

3. Evidence *held*, sufficient to show mental competency of a husband who transferred large bank accounts to an account made payable to either him or his wife or to the survivor. *Id.*

See BROKERS (1); COMPROMISE AND SETTLEMENT (2-4); CONTRACTS (1, 2); CORPORATIONS (1, 2); DIVORCE (2); EQUITY (4, 6); HUSBAND AND WIFE (1); INSURANCE (7, 8, 12); LIMITATION OF ACTIONS (1-4); REAL PROPERTY (1).

FRAUDULENT CONCEALMENT OF RIGHTS—See LIMITATION OF ACTIONS (1-3).

FRAUDULENT CONVEYANCES.

1. The evidence was sufficient to show that the transfer by the members of a partnership, while it was insolvent, of horses used in delivering goods for a store and equipment and copies of route sheets bearing names of customers and orders and good will of the business to a father of one of the partners, an employee of the firm, was for an inadequate consideration, and invalid as against partnership creditors, and merely a cover for the starting of a new business under a new name in a new location. *Rennells* v. *Potter*, 49.

2. The requirements of 3 Comp. Laws, § 10203 (5 How. Stat. [2d Ed.], § 12864), relating to a *prima facie* case in suits begun by a bill in aid of execution, are met where plaintiff introduces the judgment in an action against a person exchanging property with plaintiff for fraudulent representations as to the exchanged property as alleged in the bill of complaint, the execution and levy, and the record thereof and the conveyance from plaintiff to the purchaser and her husband, and evidence tending to show that the whole of the consideration paid for the property conveyed by the deed was paid by the purchaser. *Lipp* v. *Jacobs*, 357.

3. Where a judgment at law had been obtained for fraudulent representations as to exchanged property, a bill in aid of execution alleging that the purchaser caused the deed from plaintiff to run to the purchaser and her husband for the purpose of making them tenants by the entirety, so that the premises would not be subject to execution levy, and that title was so taken to hinder, delay, and defraud the creditors of the purchaser, and for the purpose of defrauding plaintiff out of her just dues and demands, and to prevent her realizing upon any judgment she might secure against the purchaser by reason of the fraud practiced upon plaintiff, was sufficient to warrant relief so far as the deed gave any title to the husband of the purchaser. *Id.*

4. The mere fact that an execution creditor is herself the grantor in a deed does not preclude the maintenance by her of a bill in aid of execution against the purchaser. *Id.*

5. Evidence *held*, sufficient to show that the conveyance was made to the purchaser and her husband at the request of the purchaser. *Id.*

6. Under 3 Comp. Laws, § 9167 (3 Comp. Laws 1915, § 12897), providing that all real estate of any debtor, including legal and equitable interests in lands acquired by parties to contracts for sale and purchase of land, including lands fraudulently conveyed with the intent to defeat, delay or defraud his creditors, shall be subject to execution where a contract for the exchange of real estate is entered into and one purchaser takes title to the exchanged property

FRAUDULENT CONVEYANCES—Continued.

in the names of herself and husband for the purpose of defrauding the seller and other creditors, the interest of the purchaser may be subjected to execution. *Id.* 358.

See BANKRUPTCY (1).

FREIGHT RATES—See CARRIERS (9-16).

GAMBLING CONTRACTS—See CONTRACTS (1, 2); INSURANCE (9).

GASOLINE—See EXPLOSIVES.

GIFTS.

1. Under Act No. 248, Pub. Acts 1909 (2 Comp. Laws 1915, § 8038 *et seq.*), a husband who changes his bank accounts, making the same payable to himself or wife, or either, and to the survivor, creates a title in his wife at his death, provided he is competent to act and is not subjected to undue influence. *Powell* v. *Pennock*, 573.
2. Act No. 248, Pub. Acts 1909, relating to the creation of bank accounts in the names of the depositor and another jointly and the right of survivorship, is valid. *Id.*
3. Where a decedent left at the plaintiff's bank an order that her account therein should be a joint account with another person payable to either or the survivor, *held*, that if decedent's intention was that such person should take by right of survivorship such intent would be given force under section 3 of Act No. 248, Pub. Acts 1909 (2 Comp. Laws 1915, § 8040), relating to the creation of a joint tenancy with rights of survivorship in a deposit made in the name of the depositor and another person, in form to be paid to either or the survivor of them. *People's State Bank of Holland* v. *Miller's Estate*, 783.
4. An order upon a bank by a depositor to make her deposit a joint one payable to either or the survivor, is sufficient to bring it within section 3 of Act No. 248, Pub. Acts 1909. *Id.*

GOOD FAITH—See BILLS AND NOTES (4, 5); HIGHWAYS AND STREETS (2, 3); MORTGAGES (8); STREET RAILWAYS (4).

GOVERNMENT SURVEYS—See ADVERSE POSSESSION.

HARMLESS ERROR—See APPEAL AND ERROR (18); EVIDENCE (1, 8, 17, 19); TRIAL (4-6, 13); WITNESSES (3, 9).

HIGHWAYS AND STREETS.

1. The mere permissive use of a private road by the public, however long continued, will not make it a public highway. *Weihe* v. *Macatawa Resort Co.*, 335.
2. In an action by a township against contractors who had agreed to build a macadam road to recover damages for nonperformance of the contract, where it appeared that

HIGHWAYS AND STREETS—Continued.

in the fall of the year the work was to be done the time for performance was extended to the next summer and the engineer certified the work as being from 93 per cent. to 97 per cent. completed, and a new engineer taking charge in the spring ordered a good deal of the work taken up and done over, and the work not being done within the time allotted, upon a certificate of the engineer that it was being unreasonably delayed, it was completed by the township, as allowed by the contract in case of unreasonable delay, and the first engineer acted in good faith, *held*, that it was a question for the jury whether plaintiff's second engineer acted in bad faith. *Township of Rockland* v. *Oxnam*, 373.

3. An instruction on the finality of the certificate of the first engineer and that it was a question for the jury whether the second engineer acted in bad faith, *held*, proper as based on sufficient evidence of fraud and bad faith of the second engineer. *Id.*

See AUTOMOBILES (6); MUNICIPAL CORPORATIONS; RAILROADS (4).

HOLES IN ICE—See NEGLIGENCE (10).

HOMESTEADS.

1. A homestead right is an artificial estate in land for the protection of the family in possession of it as a home, and its character as such depends upon both possession and the actual intention of the parties, and, while the owners may live elsewhere temporarily, and, intending to return, retain their homestead rights, it is largely a matter of continuing intent, and is a fact to be proved like any other fact. *Stotts* v. *Stotts*, 606.

2. If a homesteader removes with his family the consent of his wife will be presumed. *Id.*

3. Evidence *held*, to show an abandonment by a husband and wife of homestead rights in property occupied as a homestead. *Id.*

See HUSBAND AND WIFE (1-3).

HUSBAND AND WIFE.

1. A prospective husband does not commit a fraud upon his intended wife by the assignment, one day before his marriage, of his interest in a land contract to one of his daughters, so as to render the assignment void as to her, because depriving her of rights of homestead and dower, especially where the assignment was intended to relieve the assignor of what had become, because of his financial condition, an onerous obligation. *Stotts* v. *Stotts*, 605.

2. A wife is not deprived of her homestead rights by the assignment of a life lease in a homestead, in which she does not join. *Id.* 606.

HUSBAND AND WIFE—Continued.

3. A husband and wife are estopped by their conduct and by laches from asserting homestead rights in a life lease of land bought under contract, where they abandon the property for 12 years and only make claim to it when the contract has been paid up by one daughter to whom the father had assigned the contract and by another daughter and her husband, and the father had been more than compensated by what his older daughters did in raising and educating one of his children. *Id.*

4. Evidence *held*, insufficient to show that the wife of a marine engineer who received part of his wages during his absence, acted as his agent in creating a bank account in her own name and in purchasing a home in her own name from the proceeds. *McNamara* v. *Langguth*, 776.

See USES AND TRUSTS.

HYPOTHETICAL QUESTIONS—See WITNESSES (4, 5, 7-9).

ILLEGAL CHARGES—See CARRIERS (10-14).

IMMORAL CONSIDERATION—See BREACH OF PROMISE OF MARRIAGE (5).

IMPLIED CONTRACTS—See RAILROADS (3).

IMPUTED NEGLIGENCE—See AUTOMOBILES (4).

INADEQUACY OF CONSIDERATION—See FRAUDULENT CONVEYANCES (1).

INCOMPETENT TESTIMONY—See TRIAL (13).

INCONSISTENT CLAIMS—See EQUITY (7).

INDEPENDENT CONTRACTOR—See MASTER AND SERVANT (6).

INDICTMENT AND INFORMATION—See CRIMINAL LAW.

INFECTION—See MASTER AND SERVANT (3-5).

INFERENCES—See NEGLIGENCE (12).

INJUNCTION.

1. Where the owner of land bordering on a lake has had knowledge for a number of years of the increased height of the water due to a dam of a power company, has stood by and allowed the company to spend a great deal of money in acquiring flowage rights and in making other large investments, and, in two different actions, has recovered and been paid damages for overflow for a series of years, he is not entitled to an injunction to compel the lowering of the dam to its former height, but the case will be remanded to take proofs on the question of damages in full satisfaction for the damage, past and prospective. *Holcomb* v. *Alpena Power Co.*, 165.

INJUNCTION—Continued.

2. A contingent application for dissolution of a preliminary injunction may be combined with a motion to dismiss the bill as insufficient on questions raised by demurrer prior to the passage of the judicature act (Act No. 314, Pub. Acts 1915, 3 Comp. Laws 1915, § 12004 *et seq.*). *Freeman* v. *Mitchell*, 207.

3. To grant or dissolve an interlocutory injunction is a discretionary order of the trial court with which the courts will rarely interfere, and then only on special application and a strong showing of palpable abuse of discretion. *Id.*

4. On a bill by lot and cottage owners against a summer resort corporation to restrain the erection of an addition to a hotel owned by defendant on land claimed to be a public park, evidence *held*, to show that such addition was necessary and would not interfere with certain driveways. *Weihe* v. *Macatawa Resort Co.*, 334.

5. The writ of injunction is not a writ of right, but its issuance rests in sound discretion, and such discretion should not be moved where the party applying does not bring his case within equitable principles, does not show superior equities that are entitled to protection at the hands of a court of equity, and does not make such a case as moves the conscience of the court to grant the relief. *Howard* v. *Lovett*, 710.

See APPEAL AND ERROR (6); CORPORATIONS (3); DEEDS (13); NUISANCE; TRADE-NAMES.

INJURIES TO PASSENGERS—See CARRIERS (1).

INSOLVENT PARTNERSHIP—See FRAUDULENT CONVEYANCES (1).

INSTRUCTIONS—See ADVERSE POSSESSION; APPEAL AND ERROR (5); ASSAULT AND BATTERY (4); BREACH OF PROMISE OF MARRIAGE (2, 4); EVIDENCE (1); HIGHWAYS AND STREETS (3); MASTER AND SERVANT (12); STREET RAILWAYS (2, 3); THEATRES AND SHOWS (8-11); TRIAL (1, 9-11, 13-15, 17); WILLS (2, 3); WITNESSES (8, 9).

INSURABLE INTEREST—See INSURANCE (9-11).

INSURANCE.

1. One partner may insure his interest in partnership property in his own name. *McPhee* v. *Millers' National Insurance Co.*, 215.

2. Act No. 128, Pub. Acts 1911, § 1 (2 Comp. Laws 1915, § 9481), providing that no policy of fire insurance issued thereafter shall be declared void for the breach of any condition, where a loss has not occurred during such breach and by reason of such breach of condition, must be construed as meaning that no forfeiture is to take

INSURANCE—Continued.

effect if the insurer has not been injured by a breach of the condition, nor if the fire was not caused by a breach of the condition, even though the breach was existing at the time of the fire. *Id.*

3. The denial of liability on part of an insurance company by its adjusters constitutes a waiver of the filing of proofs of loss. *Fisk* v. *Liverpool & London & Globe Ins. Co.*, 270.

4. Powers possessed by agents of insurance companies, like those of agents of any other corporations, are not governed by any individual principle, but are to be interpreted in accordance with the general law of agency. *Id.*

5. Act No. 84, Pub. Acts 1901, § 2, as amended by Act No. 215, Pub. Acts 1913 (2 Comp. Laws 1915, § 9151), relating to the granting of certificates of authority to insurance agents by the State, does not operate to increase an agent's authority and to make the principal liable for his representations as to authority. *Id.*

6. Evidence *held*, insufficient to show that a person representing himself as an adjuster of defendant insurance company was in fact an adjuster of such company. *Id.*

7. Where one verbally applies for fire insurance and he is not asked as to the state of the title, and he does not act fraudulently, he is not required to disclose the exact condition of the title. *Crossman* v. *American Ins. Co.*, 304.

8. If an application for fire insurance discloses the exact condition of his interest in the property insured in a verbal application to the insurer's agents, the insurer cannot claim a breach of condition so as to work a forfeiture of the contract and render it void from the beginning on the ground that insured was not the sole and unconditional owner of the property. *Id.*

9. Policies of insurance founded upon mere hope and expectation and without some interest in the property, or the life insured, are objectionable and void as a species of gambling, and are called wagering policies. *Id.*

10. The principal consideration in determining the existence of an insurable interest in property insured against loss by fire is not what is the title of the insured, or whether he has a lien thereon or possession, but whether he will suffer pecuniarily by its loss. *Id.* 305.

11. The possessor of an option for the purchase of property, for which he has paid a considerable sum, has an insurable interest in the property. *Id.*

12. Statements by an insurance company, which has reinsured a life policy, that dividends ought to operate to reduce very materially the charges against the policy, even though they did not entirely offset them, constitute merely an expression of an opinion as to what might occur in the

INSURANCE—Continued.

future and cannot be made the basis of an action for fraud, nor for the recovery of the premiums paid. *Warren* v. *Federal Life Ins. Co.*, 342.

13. Payments of premiums by an insured on a life policy are voluntary, where the insured is during all the period insured and has the benefits of the policy, and they cannot be recovered back. *Id.*

14. A reinsurance contract is not within the provisions of 2 Comp. Laws, § 7217 (2 Comp. Laws 1915, § 9351), providing that life insurance companies shall not make any insurance contract with any citizen of the State which shall not state distinctly the amount of life benefits, manner of payment, period of continuance and amount of premiums, and that any person who may have paid money therefore may recover same back at any time within six years from date of payment. *Id.*

15. Even if a reinsurance contract is within the provisions of 2 Comp. Laws, § 7217 (2 Comp. Laws 1915, § 9351), it complies with the statute where the original policy states not only the amount of insurance, but the monthly premium, and the insurer assumed all obligations of the policy, subject to the terms of a reinsurance contract between it and a third insurance company with which the risk had been previously reinsured, and the legality of the contract is unaffected by a demand of a greater than the specified premium. *Id.*

16. In an action against an insurance company, which had reinsured a life risk, to recover premiums paid, *held*, that plaintiff was estopped from invoking the provisions of 2 Comp. Laws, § 7217 (2 Comp. Laws 1915, § 9351), relating to the requirements of life insurance policies and giving the right of action for recovery of premiums paid under policies not complying with the statute. *Id.* 343.

See PRINCIPAL AND AGENT (3).

INTENT—See DEEDS (3, 6); GIFTS (3); HOMESTEADS (1); USURY (1).

INTENTION OF GRANTORS—See DEDICATION (1).

INTEREST, COMPUTATION OF—See TRIAL (9).

INTERSTATE COMMERCE—See MASTER AND SERVANT (7).

INTERVENTION BY TRUSTEE—See BANKRUPTCY (2).

JOINDER—See PARTIES.

JOINT BANK ACCOUNTS—See GIFTS.

JOINT TENANCY IN PERSONALTY—See BANKS AND BANKING; GIFTS.

JOINT TORTFEASORS—See MASTER AND SERVANT (8); PARTIES.

JUDICATURE ACT—See APPEAL AND ERROR (7, 16); INJUNCTION (2); JUSTICES OF THE PEACE (2); LIMITATION OF ACTIONS (1-4).

JUDICIAL NOTICE—See EXPLOSIVES.

JURISDICTION—See CORPORATIONS (2).

JUSTICES OF THE PEACE.

1. Where nearly four months had elapsed after an appeal was taken in an action in the justice's court by one broker against another to recover plaintiff's share of a commission for assisting in the sale of a saloon, stock, fixtures and business before plaintiff filed the notice for trial of the case in the circuit court, and nearly five months elapsed from the time the appeal was taken to the time of the trial, and during such time defendant took no steps to form an issue, the court did not abuse its discretion in refusing to allow defendant to file a plea of the general issue, with notice of failure of consideration and illegality of contract in place of a plea of the general issue only. *Dattner* v. *Weisz*, 367.

2. Under the judicature act, Act No. 314, Pub. Acts 1915, chap. 78, § 17 (3 Comp. Laws 1915, § 14417), providing that on filing the return of a justice of the peace the circuit court shall become possessed of the cause the same as if it had been originally commenced in the appellate court, and Circuit Court Rule No. 23, § 2, providing that any affirmative defense such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, statute of frauds, illegality, that an instrument is either void or voidable, want of consideration and any defense which by other affirmative matter seeks to avoid the legal effect or defeat plaintiff's action as stated in the declaration, and any ground which, if not raised by the pleadings, would be likely to take the other party by surprise, must be set forth in notice added to defendant's plea, the defense of illegality of contract and want of consideration cannot be proved under simply a plea of the general issue in a case in the circuit court appealed from the justice's court. *Id.* 368.

KNOWLEDGE OF AGENT—See PRINCIPAL AND AGENT (4-6).

LACHES—See HUSBAND AND WIFE (3); JUSTICES OF THE PEACE (1).

LAND CONTRACTS—See REAL PROPERTY; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

LAW OF CASE—See APPEAL AND ERROR (3, 4, 20).

LEASES—See DEEDS (1-3); EQUITY (1); EVIDENCE (13).

LIABILITY FOR INJURIES—See CARRIERS; ELECTRICITY; NEGLIGENCE (3-12).

LIABILITY OF OWNER—See AUTOMOBILES.

LICENSE—See NEGLIGENCE (2, 7).

LIFE ESTATES—See DEEDS (1-3).

LIFE INSURANCE—See INSURANCE (12-16).

LIMITATION OF ACTIONS.

1. Act No. 314, Pub. Acts 1915, chap. 9, § 20 (3 Comp. Laws 1915, § 12330), providing that when a cause of action is fraudulently concealed from the knowledge of the party entitled thereto, the action may be commenced at any time within two years after discovery of the fraud, applies both at law and in equity, even though the cause of action is based on original fraud. *Ramsey* v. *Child, Hulswit & Co.*, 658.

2. Act No. 314, Pub. Acts 1915, chap. 9, § 20 (3 Comp. Laws 1915, § 12330), was intended not to curtail, but, when applicable, to enlarge, the six-year limit provided by section 13, and applies in an action at law only when it will in fact enlarge it, and hence an action at law is barred in six years from the commission of the act complained of, unless the fraudulent concealment section can be invoked to extend the time, and even then, unless brought within two years from date of discovery of the cause of action. *Id.*

3. There was no fraudulent concealment of a cause of action of fraud in the sale of the bonds so as to make available the provisions of Act No. 314, Pub. Acts 1915, chap. 9, § 20 (3 Comp. Laws 1915, § 12330), where a purchaser of bonds from a bond house did not receive interest on her coupons at the time they were due and was afterwards informed that the enterprises were in serious financial straits, and the organization of bondholders' protective associations was urged, and the associations were perfected and she otherwise received information which should have put her on inquiry, since the statute was not designed to help those who negligently refrain from prosecuting inquiries plainly suggested by the facts known. *Id.*

4. The fact that the relation of trust and confidence exists between a purchaser of bonds and a bondhouse officer cannot impair the legal effect of notice of fraud in the sale which should have put her on inquiry so as to render available the provisions of Act No. 314, Pub. Acts 1915, chap. 9, § 20 (3 Comp. Laws 1915, § 12330). *Id.* 659.

5. Statutes of limitation are based on public policy, are vital to the welfare of society and are favored in law. *Id.*

6. Mere delay extending to the statutory limit is itself a conclusive bar to the prosecution of an action. *Id.*

LOSS OF PROFITS—See DAMAGES (3).

MANDAMUS—See MUNICIPAL CORPORATIONS.

MASTER AND SERVANT.

1. The written acceptance by an employer who is engaged in logging and lumbering business, and also owns a farm, of the terms of the workmen's compensation act, describing the occupation as logging, and the employer's indemnity insurance policy describing the nature of business as "logging and lumbering operations with transportation of logs to mills" do not cover the work of raising and repairing a foundation wall under the dwelling on the farm. *Kauri* v. *Messner*, 126.

2. A continuance of weekly compensation to an employee under an agreement approved by the industrial accident board is justifiable, although he twice sustains injuries to one of his legs by falling, where the injuries are simply mishaps due to the fact that he is obliged to use crutches, and he is still suffering otherwise from the original injury. *Cook* v. *Charles Hoertz & Son*, 129.

3. In proceedings for compensation under the workmen's compensation act for the death of a tannery workman, employed in unloading hides, alleged to be due to septic infection from dust from the hides, the evidence of a physician that hides are dead animal matter; that, as a general rule, all dead animal matter contains infection and that hides are no exception, tends to prove that dust arising from the hides contained infection. *Dove* v. *Alpena Hide & Leather Co.*, 132.

4. It was established to the satisfaction of the commission that hides are animal matter, that all dead animal matter contains infection and that hides are no exception, such facts would justify an inference that deceased became infected by handling the hides—that the septic germ entered his body through the respiratory organs and first found lodgment in the throat. *Id.*

5. A tannery workman employed in unloading hides suffers an accident causing his death where by chance septic germs in the dust from the hides are taken into his respiratory organs and carried into his system, an unusual occurrence in work at which he is employed, and death follows. *Id.*

6. In an action by an employee of a railroad to recover for injuries sustained as the result of the starting of machinery in a coal dock used for loading coal on engines, where the foreman in charge, in addition to his yard duties, had a contract with the company for loading coal and hired and paid plaintiff, evidence *held*, insufficient to show that such foreman was an independent contractor. *Guy* v. *Cincinnati Northern R. Co.*, 140.

7. One who is engaged in coaling and placing water in tanks of engines used in interstate commerce, among other duties, is engaged in interstate commerce. *Id.*

MASTER AND SERVANT—Continued.

8. The release of a foreman who is in charge of a railroad coal dock from liability for negligence in injuring another employee is not a defense in an action for damages for personal injuries against the railroad. *Id.*

9. The workmen's compensation act (Act No. 10, Extra Session 1912, part 2, § 15, 2 Comp Laws 1915, § 5445), providing that no proceedings for compensation may be maintained unless, in the event of physical or mental incapacity, a claim is presented within six months after the removal of such incapacity, does not relate to an incapacity from physical reasons to personally make out and personally mail or deliver the claim. *Podkastelnea* v. *Michigan Central R. Co.*, 321.

10. In an action by a railroad switchman to recover for personal injuries due to being caught between the beam at the front of a switch engine and a post in a fence through which a side track passed into a building as he jumped off the footboard of the engine on which he had been riding, *held*, on conflicting evidence, that it was a question for the jury whether the engine was operated at an excessive speed. *Sergeant* v. *Grand Rapids, etc., R. Co.*, 385.

11. Recovery could not be denied on the ground of contributory negligence of plaintiff in riding on the footboard of the engine where the only evidence on the subject was that of the engineer that the supposition was that the footboard was a proper place for switchmen to be and that he had a right to expect them there. *Id.*

12. An instruction that the jury would be warranted in finding that it was the duty of the engineer to stop if steam was blowing in his face and obscured his vision for any considerable length of time; that it was defendant's claim that the engineer was exercising due care and was on the lookout for signals and did not see any; that he did not see any and that the engine was not being run at a negligent rate of speed, and that if this was the case, it was for the jury to determine whether it was his duty to stop until his vision was cleared, was correct. *Id.*

13. In proceedings for compensation for the death of an employee under the workmen's compensation act, evidence *held*, by a divided court, sufficient upon which to base the findings of the industrial accident board so as to not warrant the disturbing of their conclusion in favor of claimant. *Miller* v. *Acme White Lead & Color Works*, 435.

14. The death of a servant due to the breaking of an auricle in his heart while he is engaged in unaccustomed, heavy lifting is the result of exercise and not of accident where deceased had suffered from chronic heart disease and the wall of the auricle which burst was in a thin condition and liable to break by exertion. *Stombaugh* v. *Peerless Wire Fence Co.*, 445.

MASTER AND SERVANT—Continued.

15. An employer is within the operation of the workmen's compensation act, by the provisions of section 6, part 1, thereof (2 Comp. Laws 1915, § 5428), from the date of the filing of his statement of acceptance if the approval of the industrial accident board be subsequently given, such approval operating retroactively to accomplish this result. *Bernard* v. *Michigan United Traction Co.*, 497.

16. The common-law defenses withdrawn by section 1 thereof are open to the employer under section 3, part 1, of the act (2 Comp. Laws 1915, § 5425), when he is under the act and the employee either voluntarily or involuntarily is not under it. *Id.*

17. The purpose of the legislature in making the industrial accident board's approval of the employer's acceptance of the workmen's compensation act operate retroactively so as to place the employer under the act from the date of the filing of his statement was to prevent the penalizing of the employer by the denial to him of his common-law defenses after he had indicated his desire to come under the act during the short period which must elapse between the filing of the acceptance and its approval by the board. *Id.*

18. While the doctrine of safe place does not apply where a carpenter is employed by the owner in constructing a scaffold to do work on a cupola on a new building, the steel framework of which had been constructed by an independent contractor, and was injured as the result of the falling of the scaffold due to the absence of a bolt in a steel beam on which the platform rested, yet the fact that he was directed to begin his work on top of a steel structure finished by an independent contractor is material as bearing upon his contributory negligence and the negligence of his employer. *Porth* v. *Cadillac Motor Car Co.*, 501.

19. Where the owner of the building had knowledge or notice of the absence of the bolt in the beam in the steel framework of the building which caused the injury of the carpenter upon falling of the scaffold, and he neglected to take proper precautions for the protection of the carpenters, he was responsible for the resulting injuries. *Id.* 502.

20. Evidence *held*, sufficient to go to the jury on the question whether a foreman in charge of the carpenters had direct notice of the defect in the steel work so as to bind defendant. *Id.*

MATTERS NOT DECIDED ON TRIAL—See APPEAL AND ERROR (13, 18, 19).

MATTERS OF COMMON KNOWLEDGE—See EXPLOSIVES.

MAXIMS—See MORTGAGES (7).

MEASURE OF DAMAGES—See WATERS AND WATERCOURSES (1).

MECHANICS' LIENS.

1. Lienors are not required by a decree making a mortgage to the contractor in the hands of an assignee a prior lien where the money represented by such mortgage, through the payment of the surety on the contractor's bond guaranteeing the construction of the building according to the plans and specifications, pursuant to an order of court, has been expended by the owner in liquidating the cost of construction of the building, and it is immaterial that the owner failed to secure a sworn statement from the contractor before delivering to him the mortgage, no money being due or to become due to any contractor or materialman at the time said mortgage was delivered. *Stevens* v. *Garland*, 25.

2. Under 3 Comp. Laws, § 10713 (3 Comp. Laws 1915, § 14799), making payment by the owner to the contractor at his own risk where he fails to require a sworn statement of the names of subcontractors, etc., before making payment, the owner is not protected in payments made to the principal contractor, in the absence of a statement on oath by the contractor showing the names of the subcontractors, etc., and such payments are made at the risk of the owner, and do not discharge liens, unless distributed by the contractor among the subcontractors, materialmen, and laborers, or, if distributed in part only, then to the extent of such distribution. *Id.*

3. A sworn statement by a contractor of the names of subcontractors, etc., is a sufficient protection to the owner in making a payment to the contractor under 3 Comp. Laws, § 10713 (3 Comp. Laws 1915, § 14799), where it states that the "amounts due or to become due to such subcontractors, laborers, and persons for work done and materials furnished at the date hereof is correctly and fully set forth opposite their names respectively," such statement being obviously false. *Id.*

4. Evidence *held*, sufficient to show a waiver by the owners of their right to insist upon the completion of a building contract by the contractor at the fixed date. *Id.*

5. The owners of a building are not injured by having a mortgage given to the contractor, and assigned by him to another, made a prior lien on the premises, although the contractor defaults, and the building is completed by the owners at increased expense, where the owners were secured for the amount of the mortgage by a bond entered into as a part of the same transaction, and the surety paid the bond. *Id.* 26.

See MORTGAGES (1).

MENTAL COMPETENCY—See DEEDS (1); FRAUD (3); WILLS (2-4).

MINORS—See AUTOMOBILES (4).

MISCARRIAGE OF JUSTICE—See SET-OFF AND RECOUPMENT.

MISCONDUCT OF SPECTATORS—See NEW TRIAL.

MISTAKE OF ENGINEER—See CONTRACTS (4).

MISTAKES—See EVIDENCE (6).

"MORE OR LESS"—See CONTRACTS (7).

MORTALITY TABLES—See EVIDENCE (1).

MORTGAGES.

1. The drawing of plans for a building is not the commencement thereof so as to give liens priority over a mortgage given to the contractor under 3 Comp. Laws, § 10718 (3 Comp. Laws 1915, § 14804), providing that liens "shall be preferred to all other titles, liens or incumbrances which may attach to or upon such building, machinery, structure or improvement, or to or upon the land upon which they are situated, which shall either be given or recorded subsequent to the commencement of said building or buildings, erection, structure or improvement," especially where a bond is given by the contractor of even date and like amount as the mortgage. *Stevens* v. *Garland*, 24.

2. A statutory foreclosure is not adapted to cases where there are conflicting equities; such equities can be properly considered and protected only in a court of equity. *Flax* v. *Mutual Building & Loan Association*, 676.

3. Whether there are conflicting equities in the matter of the foreclosure of a building and loan association mortgage by advertisement involves the entire question. *Id.*

4. The fairness and good faith of a foreclosure sale under one mortgagor by advertisement is not impeached because no information was given of prior mortgages at the sale, where the mortgages were all of record. *Id.* 677.

5. A notice of foreclosure sale by advertisement need not allege the existence of prior mortgages. *Id.*

6. Where a bill attacking a foreclosure sale by advertisement under a building and loan association mortgage does not ground the claim, that the amount stated in the notice of sale was excessive, on improper methods of computation, the trial judge may, within his discretion, permit submission of sworn computations by counsel on argument. *Id.*

7. The maxim "*de minimis non curat lex*," *held*, applicable to a claim that the amount stated in the notice of foreclosure sale under a building and loan association mortgage was excessive. *Id.*

8. Excessiveness in the amount claimed in the notice of foreclosure sale by advertisement will not necessarily invalidate the sale, provided the claim is made in good faith. *Id.*

MORTGAGES—Continued.

9. Where the period of redemption has not expired at the time of the filing of a bill to set aside a mortgage foreclosure sale by advertisement, and it is extended by stipulation until 30 days after the decree in the trial court, the right to redeem will expire at the end of the 30-day period if the mortgage sale is not set aside as void. *Id.*

See BUILDING AND LOAN ASSOCIATIONS; CORPORATIONS (1, 2, 4); MECHANICS' LIENS (1, 5); USURY (2, 3).

MOTION FOR NEW TRIAL—See APPEAL AND ERROR (10, 19).

MOTION TO DISMISS—See APPEAL AND ERROR (6, 7); INJUNCTION (2).

MULTIFARIOUSNESS—See EQUITY (4).

MULTIPLICITY OF SUITS—See ACTIONS (2).

MUNICIPAL CORPORATIONS.

Under Act No. 251, Pub. Acts 1915 (1 Comp. Laws 1915, § 3350 *et seq.*), mandamus will issue to compel the approval of a proposed plat by a board of county auditors, where such plat conforms to streets and alleys of adjoining plats and does not interfere with any general plan for streets and is disapproved by the board because relator has not provided for, and has refused to provide for, a certain street across his land. *Campau* v. *Board of Wayne County Auditors*, 468.

See STREET RAILWAYS (4-6).

MURDER IN FIRST DEGREE—See CRIMINAL LAW (2).

NAVIGABLE WATERS.

1. The public has the right to use a navigable stream in its fluid state for navigation purposes and in its frozen state for the purpose of traversing its surface, with due regard to the rights of riparian owners to its use for their own purposes. *Parsons* v. *E. I. Du Pont de Nemours Powder Co.*, 409.

2. Frozen navigable rivers are public highways and the traveler ordinarily has the paramount right of passage as necessarily incident to the reasonable enjoyment of his right, but it must be exercised in common with such uses as the frozen surface of the river is adapted to. *Id.*

3. Where a gas reducing plant discharges warm water into a stream and melts the ice in the winter time for some distance and makes the ice soft around the opening and causes the accumulation on the surface of the open water of a substance resembling ice, the owner must, in the exercise of its rights, proceed in such a manner as to least endanger the lives of skaters on the ice and others. *Id.*

See NEGLIGENCE (10).

NEGLIGENCE.

1. Evidence *held*, insufficient to show that children habitually played on logs along a railroad track or that any officers or agents of the company knew of children playing on logs prior to the death of a child which was killed by being run over by a log while playing on the logs. *Sandstrom* v. *Minneapolis, etc., R. Co.*, 99.

2. Acquiescence in the use of premises—license to use them—must depend upon some known customary use. *Id.*

3. In an action to recover for the death of a child which was run over by a log on which it was playing alongside of a railroad track, at a point on the bank, three feet above a tract of land owned by defendant on which children were accustomed to playing, where there was no evidence of a license to use the property of defendant, or that the depositing of the logs was a new use of the property, or that the depositing of the logs created a peril affecting any customary use of the premises, *held*, that a verdict for defendant should have been directed. *Id.*

4. The simple act of using kerosene for the starting of a new fire does not preclude the user thereof from recovering, in an action to recover damages for personal injuries resulting from negligent substitution by defendant of gasoline for kerosene, upon the ground that he was guilty of contributory negligence as a matter of law. *McLawson* v. *Paragon Refining Co.*, 222.

5. The pouring of kerosene directly from a can in relighting a dying fire or kindling a new one, without the party first assuring himself there is no fire in the stove, is negligence *per se*. *Id.*

6. In an action to recover for death due to the alleged substitution by defendant of gasoline for kerosene used by deceased in starting a fire, where there were no eyewitnesses and only the exploded can and the character and location of the burns upon the body of the decedent, it was a question for the jury whether deceased acted without first assuring himself there was no fire in the stove in which he was using the liquid. *Id.*

7. A minor who resides with his parents and is a member of their household, is entitled to use kerosene in starting a fire exactly the same as the parents, and is not a mere licensee. *Id.* 223.

8. One who delivers to another such an article or substance as gasoline for kerosene is liable for injuries resulting therefrom, even though he is ignorant of its noxious character, if, in the exercise of ordinary prudence, he or his servant should have possessed such knowledge. *Id.*

9. Whether defendant's agent, in making investigation as to the nature of the contents of a can supposed to contain kerosene to be furnished to plaintiff's decedent who was

NEGLIGENCE—Continued.

killed as a result of using same to start a fire, exercised that high degree of care imposed upon him by the fact that he was handling a dangerous and, under certain circumstances, a highly explosive substance, was a question for the jury. *Id.*

10. In an action against the owner of a gas reducing plant to recover for the death of plaintiff's son, due to falling into the river through soft ice at an open place caused by the melting of the ice by the discharge of warm water from the plant, *held*, that it was a question for the jury whether defendant should not have taken means to provide some barrier or guard, or have given warning of the dangerous condition of the ice. *Parsons* v. *E. I. Du Pont de Nemours Powder Co.*, 409.

11. In an action against the owner of a gas reducing plant for the death of a boy seven years old by drowning caused by falling, while skating, through soft ice near an opening in the ice caused by warm water from the plant, there being no eyewitnesses to the accident and it appearing that the scum that gathered on the opening had the appearance of dark ice, it was a question for the jury whether decedent was guilty of contributory negligence. *Id.*

12. The inference of negligence is not to be drawn from the mere happening of an accident. *Bury* v. *Detroit United Railway*, 447.

See AUTOMOBILES; CARRIERS (1-8); CONTRIBUTORY NEGLIGENCE; MASTER AND SERVANT (8, 12, 18, 19); RAILROADS (1, 4); STREET RAILWAYS (1, 3, 7); THEATRES AND SHOWS (1).

NEW TRIAL.

It was not ground for a new trial, in an action for damages for assault and battery, that the wife and daughter of plaintiff, witnesses in the case, wept when plaintiff's counsel, in his closing argument, referred to the fact that plaintiff would permanently be affected in his hearing. *Matthews* v. *Lamberton*, 747.

See APPEAL AND ERROR (3, 4, 10, 19).

NOMINAL CONSIDERATION—See EVIDENCE (13).

NONCOMPLIANCE WITH STATUTE—See INSURANCE (16).

NOTICE—See CARRIERS (3); LIMITATION OF ACTIONS (4); MORTGAGES (5); SPECIFIC PERFORMANCE (1).

NOTICE OF CLAIM—See MASTER AND SERVANT (9).

NOTICE OF LOSS—See INSURANCE (3).

NUISANCE.

1. The maintenance of an undertaking establishment and morgue in a residential section of a city, although not a nuisance *per se*, may be enjoined by nearby apartment owners where it will cause depression to the normal person, lower his vitality, render him more susceptible to disease, and deprive his home of the comfort, repose and enjoyment to which he is entitled, and he will sustain substantial financial loss, because of the depreciation in value of his property, and there is a strong probability that he will be disturbed by noxious odors due to the use of formaldehyde in the summer months when the windows are open. *Saier* v. *Joy*, 295.

2. The writ of injunction is not one of right, but of grace. It should not issue out of hand, but should issue in cases where the right to such relief is clearly established. *Id.*

OATH OF OFFICE—See SCHOOLS AND SCHOOL DISTRICTS (1, 2, 5).

OFFICERS.

A construction should not be placed upon any statute, enumerating the qualifications for office, which would require procedure not plainly set up in the statute, and which would operate to defeat the will of the electors by creating vacancies caused by a failure to observe conditions which the statute has not specifically imposed. *People, ex rel. Simmons*, v. *Anderson*, 38.

See CORPORATIONS (5-8); EVIDENCE (12); SCHOOLS AND SCHOOL DISTRICTS.

OMISSIONS—See EVIDENCE (7).

OPERATION OF CARS—See CARRIERS (1-8).

OPINION EVIDENCE—See EVIDENCE (2).

OPINIONS—See INSURANCE (12).

OPTIONS—See INSURANCE (11); VENDOR AND PURCHASER.

ORAL TESTIMONY—See EVIDENCE (20).

ORDER OF RAILROAD COMMISSION—See CARRIERS (9-16).

ORDINANCES—See STREET RAILWAYS (4).

OVERFLOWING LANDS—See WATERS AND WATERCOURSES.

OWNERSHIP OF PROPERTY—See USES AND TRUSTS.

PAROL EVIDENCE—See EVIDENCE (7).

PARTIES.

Where there are several tortfeasors, more than one negligently contributing to the injury, an action may be maintained against them jointly or severally. *Donlin* v. *Detroit United Ry.*, 328.

See BANKRUPTCY (2).

PARTNERSHIP—See BANKRUPTCY (1); INSURANCE (1).

PAVING CONTRACTS—See HIGHWAYS AND STREETS (2, 3).

PAYMENT.

Payment made under protest does not change a voluntary into an involuntary payment. *Warren* v. *Federal Life Ins. Co.*, 342.

See COMPROMISE AND SETTLEMENT; MASTER AND SERVANT (2); MECHANICS' LIENS (1-3).

PAYMENT OF PREMIUMS—See INSURANCE (13); PRINCIPAL AND AGENT (3).

PERMANENT INJURIES—See WATERS AND WATERCOURSES (1).

PERMANENT STRUCTURES—See INJUNCTION (1).

PERPETUITIES.

Act No. 122, Pub. Acts 1907, providing that charitable bequests otherwise valid shall not be invalid by reason of the "indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities," is constitutional. *In re Brown's Estate*, 544.

See WILLS (1).

PERSONAL INJURIES — See AUTOMOBILES; COMPROMISE AND SETTLEMENT (2); DAMAGES (1, 5, 6); EVIDENCE (1-4, 16-18); MASTER AND SERVANT (1, 2-6, 10-12, 18, 19); RAILROADS (1, 4); STREET RAILWAYS (1, 3, 8, 9); TRIAL (2, 3, 5, 6, 9, 16).

"PHYSICAL INCAPACITY"—See MASTER AND SERVANT (9).

PHYSICIANS AND SURGEONS—See WITNESSES (4-6).

PLATS—See MUNICIPAL CORPORATIONS.

PLEADING—See DAMAGES (5); EQUITY (4, 5, 7); JUSTICES OF THE PEACE; TRIAL (7).

PLEDGE OF STOCK—See BILLS AND NOTES (1-3).

POLICE POWERS—See AUTOMOBILES (3).

POWER OF LEGISLATURE—See ELECTIONS (1).

POWER OF STOCKHOLDERS—See CORPORATIONS (3, 5, 8, 9).

POWERS OF AGENT—See INSURANCE (4); PRINCIPAL AND AGENT (1).

PREJUDICIAL ERROR—See TRIAL (11).

PRELIMINARY INJUNCTION—See APPEAL AND ERROR (6); INJUNCTION (2).

PREPONDERANCE OF EVIDENCE—See STREET RAILWAYS (2).

PRESCRIPTION—See HIGHWAYS AND STREETS (1); WATERS AND WATERCOURSES (2).

PRESUMPTIONS—See APPEAL AND ERROR (1, 12); CORPORATIONS (5); DEATH; DEEDS (11); EVIDENCE (9); HOMESTEADS (2); STREET RAILWAYS (11); WILLS (2, 3).

PRINCIPAL AND AGENT.

1. Agency cannot be proved by the statements, declarations or admissions of the agent made out of court, but must be established by tracing its source to some word or act of the alleged principal. *Fisk* v. *Liverpool & London & Globe Ins. Co.*, 270.

2. The agency of one alleged agent cannot be shown by the admissions, declarations, and recognition of another agent of the same principal unless the latter be one authorized to make those admissions. *Id.*

3. Where an agent collects insurance premiums due two different insurance companies which he represented by taking a note payable for convenience to one of the companies without the knowledge of the other, and the note is discounted by the payee and applied, at the agent's request, in liquidation of his personal account and the note is subsequently paid, there is a payment to both companies. *Travelers' Insurance Co.* v. *Benjamin Douglas Co.*, 457.

4. The knowledge of the agent is the knowledge of the principal. *Loveland* v. *Bump*, 564.

5. The rule that knowledge of the agent is knowledge of the principal is applicable where a husband, as agent for his wife, makes a loan, and takes notes as collateral security therefor, the consideration for which is known and is illegal, for his principal, and latter subsequently claims to be a *bona fide* holder of such notes. *Id.*

6. The knowledge of agents within the scope of their agency is the knowledge of the principal. *McDonald* v. *Young*, 620.

See CORPORATIONS (8, 9); HUSBAND AND WIFE (4); INSURANCE (4, 5).

PRIORITY OF LIENS—See MECHANICS' LIENS (1); MORTGAGES (1).

PROBATE COURTS—See EXECUTORS AND ADMINISTRATORS.

PROOF OF AGENCY—See PRINCIPAL AND AGENT (2).

PROTEST—See PAYMENT.

PROXIMATE CAUSE.

Proximate cause is such a cause as operates to produce particular consequences without the intervention of any

PROXIMATE CAUSE—Continued.

independent unforeseen cause without which the injuries would not have occurred. *Wilmarth* v. *Michigan United Traction Co.*, 428.

See ELECTRICITY; STREET RAILWAYS (8).

PUBLIC PARKS—See CORPORATIONS (3); DEDICATION; INJUNCTION (4).

PUBLIC POLICY—See BREACH OF PROMISE OF MARRIAGE (4, 5); CONTRACTS (1, 2); LIMITATION OF ACTIONS (5).

PUBLIC ROADS—See HIGHWAYS AND STREETS.

QUALIFICATION OF TRUSTEES — See SCHOOLS AND SCHOOL DISTRICTS.

QUESTION FOR JURY—See AUTOMOBILES (1, 6); BILLS AND NOTES (5); BROKERS (2); CARRIERS (5); COMPROMISE AND SETTLEMENT (2); EVIDENCE (14); HIGHWAYS AND STREETS (2, 3); MASTER AND SERVANT (10); NEGLIGENCE. (6, 9-11); RAILROADS (4); STREET RAILWAYS (1-3, 7, 8, 10); THEATRES AND SHOWS (4); WITNESSES (1, 3).

QUESTION OF LAW—See CONTRACTS (1-3, 6-8).

QUESTIONS NOT RAISED ON TRIAL—See APPEAL AND ERROR (10, 17, 19).

RAILROAD COMMISSION—See CARRIERS (9-16).

RAILROADS.

1. In an action by a pedestrian against a railroad for damages for personal injuries sustained as the result of being struck by one of defendant's trains at a crossing while his foot was caught between a rail and a plank outside the rail, evidence *held*, to warrant a verdict for plaintiff. *Angel* v. *Grand Rapids, etc., R. Co.*, 9.

2. Railroad companies are not required to build or maintain tracks to private industries, nor to furnish the right of way or rails by which the traffic of a private industry reaches their lines. *Grand Rapids Terminal Belt Ry. Co.* v. *Waters*, 285.

3. Where the president of a cement company constructs a belt line railroad for transfer purposes which is intended for the use of the company and other industries that may be located and organizes a corporation to take over the railroad and owns all the stock therein, except qualifying shares, and cars are transferred to and from such plant only by engines of connecting railroads, there is no implied contract by the railroads to pay for the use of the line, demands for payment being met with refusal or with conduct tantamount thereto. *Id.*

4. It was a question for the jury whether the driver of an automobile struck at a railroad crossing at night, was guilty

RAILROADS—Continued.

of contributory negligence, where it appeared that the freight train which struck plaintiff's car was running backward without lights or signal at the end, that the headlight of the engine was not visible at the crossing, that there was a clear view except for the darkness for half a mile in each direction, and that plaintiff kept looking for trains and did not see any until he had crossed two tracks and was on the third and last one. *Mills* v. *Waters*, 637.

See CARRIERS (9-16); MASTER AND SERVANT (6-8, 10-12).

REAL PROPERTY.

1. On a bill by the assignee of a contract for the purchase of land against his assignor for the recovery of the consideration paid, evidence *held*, sufficient to show fraud and misrepresentation by the assignor. *Rodenhouse* v. *De Golia*, 402.

2. Act No. 91, Pub. Acts 1911, § 8 (1 Comp. Laws 1915, § 4275), providing that no suit may be maintained for the foreclosure of a land contract on which the tax provided by such act has not been paid, being a tax measure, is intended for the purpose of compelling the payment of the tax imposed, and the requirements of the law are fully met where the tax is paid before the decision of the court and the conclusion of the hearing. *Id.*

3. Evidence *held*, insufficient to show that the owner of a contract for the sale of real estate consented verbally to a transfer by the contract purchaser to another of such purchaser's interest in the contract. *Id.*

See EVIDENCE (20).

RECEIVERS—See CORPORATIONS (4).

RECKLESS DRIVING—See AUTOMOBILES (4); CONTRIBUTORY NEGLIGENCE.

RECORDS OF SURVEYS—See BOUNDARIES; EVIDENCE (5).

RECOUNTS—See ELECTIONS.

REDEMPTION—See EXECUTION; MORTGAGES (9).

REINSURANCE—See INSURANCE (14-16).

RELEASE—See COMPROMISE AND SETTLEMENT (2-4); MASTER AND SERVANT (8).

REMARKS BY COUNSEL—See TRIAL (2).

REMEDY AT LAW—See INJUNCTION (1).

REMITTITURS—See SET-OFF AND RECOUPMENT.

REQUESTS TO CHARGE—See BREACH OF PROMISE OF MARRIAGE (4); TRIAL (10, 17).

RESCISSION—See CONTRACTS (3, 5, 8).

"RESIDENCE"—See DEEDS (14).

RES IPSA LOQUITUR—See NEGLIGENCE (12).

RES JUDICATA—See APPEAL AND ERROR (3, 4, 20).

RETROACTIVE EFFECT—See MASTER AND SERVANT (15, 17).

RIGHT OF PARTNERS—See INSURANCE (1).

RIGHT OF PERSON ASSAULTED—See ASSAULT AND BATTERY (1).

RIGHT TO OPEN AND CLOSE—See TRIAL (7).

RIGHT TO RECOVER SALARY—See CORPORATIONS (6, 7).

RIGHT TO REDEEM—See EXECUTION.

RIGHT TO RELIEF—See INJUNCTION.

RIGHTS OF JUNIOR EXECUTION CREDITOR—See EXECUTION (6).

RIGHTS OF PATRONS—See THEATRES AND SHOWS.

RIGHTS OF PUBLIC—See NAVIGABLE WATERS.

RIGHTS OF STOCKHOLDERS—See CORPORATIONS (1, 2).

RIPARIAN RIGHTS—See WATERS AND WATERCOURSES.

SAFE PLACE TO WORK—See MASTER AND SERVANT (18).

SALARY—See CORPORATIONS (6, 7).

SCHOOLS AND SCHOOL DISTRICTS.

1. Act No. 154, Pub. Acts 1903, § 1 (2 Comp. Laws 1915, § 5892), providing that a township school district shall become a separate organization when the first trustees shall have been duly elected and shall have filed their acceptances with the township clerk, and section 2, providing that the officers elected April, 1903, shall hold until the trustees elected in July, 1903, shall have filed their acceptances and become duly qualified, and that subsequently elected trustees shall hold until their successors are duly qualified and file their "acceptances," and section 3, requiring the first trustees to take the constitutional oath of office within five days after notice of their election, and file it with the township clerk, must, in view of the fact that the evident purpose of the act was to conform the schools covered by it to the general school law then in existence, which did not require a constitutional oath of office as a qualification of an acceptance, be construed as not requir-

SCHOOLS AND SCHOOL DISTRICTS—Continued.

ing a constitutional oath in addition to the writing accepting the office to constitute an "acceptance." *People, ex rel. Simmons,* v. *Anderson,* 38.

2. Act No. 21, Pub. Acts 1903, § 5 (2 Comp. Laws 1915, § 5672), changed the qualifications of general school officers by requiring a property affidavit in addition to an acceptance of the office. *Id.* 39.

3. Under 2 Comp. Laws, § 4667 (2 Comp. Laws 1915, § 5669), where a newly-elected township school trustee has filed his acceptance within the required time there is no vacancy. *Id.*

4. Under Act No. 154, Pub. Acts 1903, § 2 (2 Comp. Laws 1915, § 5893), the right of an incumbent of the office of township school trustee to hold over expires when his successor files his acceptance. *Id.*

5. Under the Constitution, Art. xvi, § 2, providing that all officers, executive and judicial, except those exempted by law, shall, before entering upon the duties of their offices, take the prescribed oath, school officers are executive officers. *Id.*

SCOPE OF AUTHORITY—See CORPORATIONS (3).

SCOPE OF EMPLOYMENT—See MASTER AND SERVANT (1).

SCOPE OF REVIEW—See APPEAL AND ERROR (15-20).

SEDUCTION—See BREACH OF PROMISE OF MARRIAGE.

SELF-DEFENSE—See ASSAULT AND BATTERY.

SET-OFF AND RECOUPMENT.

In an action to recover the balance of $145 due on a contract, in which the defendant filed a counter claim for $129.80, and there was evidence to sustain the allowance of the counter claim in full, and the jury returned a verdict for $2.14 for defendant, any error of the court in requiring a remittitur of $20 by subtracting the sum of $125 from $145 and of the jury in returning a verdict for the defendant, the latter not having appealed, did not, under Act No. 89, Pub. Acts 1915 (3 Comp. Laws 1915, § 14565), and Act No. 314, Pub. Acts 1915, chap. 50, § 28 (3 Comp. Laws 1915, § 13763), result in a miscarriage of justice except as to the excess sum allowed defendant and the case was affirmed on condition that defendant file a remittitur of the $2.14. *Sparks* v. *Lord,* 415.

See APPEAL AND ERROR (11).

SETTING ASIDE DECREE—See EQUITY (6).

SIDE TRACKS—See RAILROADS (2).

SIGNATURE BY MARK—See WILLS (7).

SPECIFIC PERFORMANCE.

1. Specific performance of a land contract, in which time of payment is made the essence of the contract, will not be granted in favor of the contract purchaser where, although the time of payment is extended a few days in order to allow the purchaser to have certain restrictions as to the use of the property removed, and, on the day to which time of payment was extended, she called at the vendor's office several times and was ready to make the payment due, she made no tender to, and left no notice with, those in charge of the office, and had not obtained the removal of the restrictions, and did not intend to; and shortly thereafter received notice of termination of the agreement from the vendor and took no steps in the matter until about five months later when she filed her bill, having in the meantime learned that a purchaser was about to relieve the property of its restrictions. *Tattan* v. *Bryant*, 515.

2. Specific performance of a land contract will not be granted as a matter of right, but in the discretion of the court. *Id.*

3. Evidence *held*, insufficient to sustain the burden of proof upon plaintiff, the purchaser, in an action for specific performance of an agreement for sale of land. *Id.*

SPECULATIVE DAMAGES—See DAMAGES (3).

STATEMENTS OF TESTATOR—See EVIDENCE (10).

STATE OFFICERS—See ELECTIONS.

STATUTES.

1. While not binding on the courts, the construction given laws by departmental State officers is entitled to serious consideration. *People, ex rel. Simmons*, v. *Anderson*, 39.

2. Effect should be given to all the provisions of a statute, if possible. *Podkastelnea* v. *Michigan Central R. Co.*, 321.

3. The workmen's compensation act should not be given a construction which will nullify any of its provisions, unless necessary. *Id.*

See APPEAL AND ERROR (7, 16); AUTOMOBILES (2, 3); BANKS AND BANKING; BOUNDARIES (1); BUILDING AND LOAN ASSOCIATIONS (1); CARRIERS (10, 14, 16); CRIMINAL LAW; EXECUTION (1-3); FRAUDULENT CONVEYANCES (2, 6); GIFTS; INJUNCTION (2); INSURANCE (2, 5, 14-16); JUSTICES OF THE PEACE (2); LIMITATION OF ACTIONS; MASTER AND SERVANT (1-5, 9, 13-17), MECHANICS' LIENS (2, 3); MORTGAGES (1); MUNICIPAL CORPORATIONS; OFFICERS; PERPETUITIES; REAL PROPERTY (2); SCHOOLS AND SCHOOL DISTRICTS (1-4); SET-OFF AND RECOUPMENT; USES AND TRUSTS (1); USURY (2, 3); WILLS (1, 3).

STOCKHOLDER, POWERS OF—See CORPORATIONS (9).

STREET RAILWAYS.

1. In an action by the owner of an automobile against a street railroad company for damages for personal injuries and for injury to his automobile caused by the automobile being struck in the rear as plaintiff was proceeding on the track but was slowing up to speak to a man on the sidewalk, *held*, that it was a jury question whether defendant was guilty of negligence and plaintiff of contributory negligence. *McNeal* v. *Detroit United Ry.*, 108.

2. The refusal of instructions on the preponderance of evidence on behalf of defendant in an action for personal injuries, is not error where the court instructs that before one can recover under a claim of negligence, he must show and establish by proofs in the case the negligence of the person charged, and that it is left for the jury to determine whether or not plaintiff has shown by the "fair preponderance" of evidence that in what he did at the time of the accident he exercised that degree of care and caution that an ordinarily prudent person would exercise under like circumstances. *Id.*

3. In an action by a prospective passenger against a street railway company for personal injuries alleged to be due to her hold upon the car and her clothing catching in the door of a folding step car, upon its being closed as she attempted to board the car, and her being dragged some distance, the contributory negligence of the plaintiff was involved warranting an instruction on the subject, where plaintiff testified that the conductor shut the door in her face, while she had one foot on the step, and rang the bell for the car to move, and then described what immediately occurred, involving her position, her actions, as well as the movement of the car, and the result. *Sibert* v. *Detroit United Ry.*, 118.

4. A municipality may not extrajudicially forfeit a street railroad franchise where the company has constructed its road after the time prescribed by the ordinance has expired, and such construction is carried on without interference by the municipality, and especially where the company entered upon the construction of the road in good faith, relying upon the grant. *Township of Sandstone* v. *Michigan Ry. Co.*, 234.

5. Municipalities, in the performance of legislative functions involving discretion and judgment, can so act only at authorized meetings duly held, and the members of a township board granting a franchise to a street railroad cannot make a valid determination of forfeiture binding upon the municipality by their assents separately or individually expressed. *Id.*

6. Where an interurban railroad franchise granted by a township relating to the charge to be made was clear and unambiguous and provided for a rate of 1½ cents per mile from any point within the township to any point within

STREET RAILWAYS—Continued.

a city, and from any point within the city to any point within the township, with a minimum charge of 5 cents, and this construction of the franchise had been adopted by the various operating and owning companies during a period of 12 years, *held*, that the operating company was operating the interurban railroad under such franchise and that it was immaterial that the grantee of the franchise constructed the road only to a particular point in the city, and not to the interurban station, and did not warrant the collection of a city 5 cent fare for the ride between such point and the interurban station over tracks of a street railroad under a city franchise, to the rights under which the operating company as lessee had succeeded. *Id.*

7. It was a question for the jury whether the defendant street railway company was guilty of negligence in the operation of the car, where there was evidence that the car was operated at excessive speed in a densely populated neighborhood; that no gong was sounded, and that the car was not under control. *Donlin* v. *Detroit United Ry.*, 327.

8. It was a question for the jury whether the contributory negligence of the driver of the automobile, in driving on the track at such a high rate of speed as to make it impossible to stop before the track was reached, was the proximate cause of the injuries to an occupant of the car. *Id.* 328.

9. The driver of a one horse loaded coal wagon which is struck by a street car is not chargeable with contributory negligence where it appears that he was walking on the side of the wagon opposite that from which a street car was approaching from the south on the further track on the street he was crossing, and just between the wagon box and the horse where he could see, and he made a careful observation just before starting across the nearer track and noted a car coming from the south over a block distant, and, at the rate his horse was traveling, decided he could safely cross, and twice as far, before the car arrived, provided it was run at the lawful speed, and he exercised the judgment of an ordinarily cautious and prudent man under like circumstances. *Flokstra* v. *Grand Rapids Railway Co.*, 629.

10. The question of speed of a street car is for the jury where the evidence as to the rate it is going when it strikes a wagon crossing the street is conflicting. *Id.* 630.

11. The driver of a wagon proceeding across a street has the right to assume that the speed of an approaching street car does not exceed that allowed by law. *Id.*

See CARRIERS (1-8); CONTRIBUTORY NEGLIGENCE.

STRIKING OUT TESTIMONY—See TRIAL (15, 16).

SUBROGATION—See EXECUTION (7).

SUBSEQUENT INJURIES—See MASTER AND SERVANT (2).

SUBSTITUTING GASOLINE FOR KEROSENE—See NEGLIGENCE (8, 9).

SUFFICIENCY OF ALLEGATIONS—See FRAUDULENT CONVEYANCES (3).

SURVEYORS—See ADVERSE POSSESSION; BOUNDARIES (1); EVIDENCE (5, 6).

SURVIVORSHIP—See BANKS AND BANKING; GIFTS.

SUSPENDING POWER OF ALIENATION—See WILLS (1).

SWORN STATEMENTS—See MECHANICS' LIENS (1-3); TAXATION.

TAXATION.

The failure of a township treasurer, in making his return to the county treasurer for unpaid taxes, to make the sworn statement required by law relative to such taxes, was not fatal so as to prevent the collection of taxes. *Robinson* v. *Taber*, 767.

See REAL PROPERTY (2); USURY (2, 3).

TENDER—See COMPROMISE AND SETTLEMENT (4).

TENT SHOWS—See THEATRES AND SHOWS.

TERMINATION OF OFFICE—See SCHOOLS AND SCHOOL DISTRICTS (4).

TERMS AND CONDITIONS—See CONTRACTS (3).

TERMS OF DECREE—See BANKRUPTCY (1).

TESTAMENTARY CAPACITY—See WILLS (2-4).

TESTIMONY ON FORMER TRIAL—See EVIDENCE (11).

THEATRES AND SHOWS.

1. Negligence is the gravamen of an action to recover damages for personal injuries sustained by one attending a show in a tent by the effect upon the tent of a windstorm, although the declaration alleges as inducements to plaintiff to enter the tent an advertisement circulated by the defendant to the effect that the tent was storm-proof and wind-proof and also that plaintiff paid the price of admission asked by the defendant. *Jacobs* v. *Hagenbeck-Wallace Shows*, 73.

2. Proprietors of public entertainments are not insurers of the safety of patrons, but must exercise, to prevent disaster, care commensurate to the situation. *Id.* 74.

THEATRES AND SHOWS—Continued.

3. That in the latitude where defendant erected its show tent summer storms with wind and rain were common, that the wind often attained considerable velocity and did considerable injury, and that such storms often arrived or broke suddenly and were as soon gone, were circumstances to be considered by defendant in erecting the tent and by the patrons of the show in attending. *Id.*

4. Whether the facts upon which the defendant's liability depends were established, *held*, to be for the jury. *Id.*

5. The proprietor of a show tent is bound to anticipate, in selecting and erecting the tent, the ordinary and usual storm of the season and latitude and its probable consequences, reference being had to the character of the structure to which the public was invited, and, in view of such storm arising and such consequences, to use ordinary care in such selection and erection as to prevent injury to patrons. *Id.*

6. In an action by a patron of a tent show to recover for personal injuries sustained as the result of a sudden windstorm while plaintiff was attending defendant's show, if, as claimed by plaintiff, the storm was an ordinary one, and, as claimed by defendant, the tent was selected and erected with ordinary care, in view of probable storms arising and their consequences, there was no duty on the part of defendant to warn its audience of the approach of the storm. *Id.*

7. The proprietor of a show tent who does not use ordinary care in the selection and erection of the tent, as the result of which a patron is injured in a storm, is liable unless the storm was so violent in character that whether defendant was or was not negligent in such selection and erection the result would have been the same *Id.*

8. An instruction that, "as applied to this case, an act of God may be defined as a natural cause, such as a storm of wind, whatever its characteristics may be, which cannot be prevented by the exercise of ordinary care and the use of those appliances which the situation of the party renders it reasonable that he should employ," was not erroneous. *Id.* 75.

9. An instruction that defendant was not required to contemplate or provide against unusual or extraordinary storms, was proper as preferred without the addition that the storm was of such a character that human care and foresight could not anticipate or guard against it. *Id.*

10. An instruction that the burden was upon defendant to show that the storm was so violent that it was the sole proximate cause of plaintiff's injuries was erroneous, as plaintiff had the burden upon the whole case to prove defendant's negligence was the proximate cause of such injuries. *Id.*

THEATRES AND SHOWS—Continued.

11. An instruction that as defendant presumably knew the actual condition of the tent it was its duty to warn its audience of the approach of the storm, was not erroneous. *Id.*

See INJUNCTION (5); TRADE-NAMES.

TIME—See HIGHWAYS AND STREETS (2).

TIME FOR FILING CLAIMS—See MASTER AND SERVANT (9).

TIME FOR TAKING EFFECT—See DEEDS (4).

TITLE BY PRESCRIPTION—See HIGHWAYS AND STREETS (1).

TITLE TO REALTY—See INSURANCE (7).

TORTS—See ELECTION OF REMEDIES (2).

TRACKS—See RAILROADS (2).

TRADE-NAMES.

On a bill to enjoin the use of the alleged trade-name "Mercedes" by defendants, a rival vaudeville company, in an act produced by them, one of the defendants, a woman, and who bore such name, having been formerly a member of plaintiff's company, evidence *held*, to show that the word "Mercedes" was used to designate the actress in plaintiff's production and not as the name of the act. *Howard* v. *Lovett*, 710.

TRIAL.

1. The charge of the court must be read as a whole and with regard to the contentions of the parties. *Jacobs* v. *Hagenbeck-Wallace Shows*, 74.

2. In an action by a passenger against a street railroad company for personal injuries, it is improper for counsel for the defendant to tell the jury that no report was made of any such accident to defendant by the crew, as evidence to such effect would be inadmissible if offered. *Sibert* v. *Detroit United Ry.*, 117.

3. Where the cross-examination of a medical witness for plaintiff, in an action against a street railway company for personal injuries was, in some respects, of very doubtful propriety, the trial court committed error in expressing impatience at objections to the cross-examination of the witness and informing the jury that the mere fact that the physician possessed special knowledge did not warrant giving credence to his testimony, and emphasizing the right of cross-examination and credibility of witnesses. *Id.*

4. The fact that the plaintiff in an action of breach of marriage promise, aggravated by seduction, becomes hysterical during a recess, is not reversible error where the

TRIAL—Continued.

court cautions the jury with reference thereto. *Gagush* v. *Hoeft*, 263.

5. The misconduct of counsel for plaintiff in a personal injury action, in referring to the circumstances of an accident to a passenger alighting from a train, and relating a conversation with counsel for plaintiff in another action as to the right of recovery and the subsequent death of the plaintiff in such other action, is harmless error where the question of an excessive verdict has not been preserved for review. *Sergeant* v. *Grand Rapids, etc., R. Co.*, 386.

6. Any misconduct of counsel for plaintiff in an action for damages for personal injuries in referring to the fact that certain persons were fortunate enough to receive their pay from the railroad company, meaning plaintiff's attending physician in particular, is harmless error, where the testimony relating to who had paid plaintiff's medical bill, on which the statement was based, was stricken out by the court and the jury warned to disregard it. *Id.*

7. Under Circuit Court Rule No. 42, § 3, providing that whenever in an action the defendant, by notice accompanying his plea, waives the benefit of the general issue and admits the facts alleged in the plaintiff's declaration, but attempts to defeat plaintiff's recovery by set-off or recoupment, or by affirmative defense which, if true, defeats plaintiff's recovery, such defendant shall have the opening and closing in the taking of testimony and in the argument, where a defendant by plea waives the benefit of the general issue and admits facts alleged in declaration, claims the right to open and close and files notice of recoupment, he does not admit away all right of defense in case and has the right to open and close. *Sparks* v. *Lord*, 415.

8. Where, by a consent order, all unsworn witnesses were excluded from the court room during a will contest by the order of court, and, after counsel for legatee stated that they desired that the latter be allowed to remain in court for the purpose of assisting counsel in the cross-examination of witnesses and that he would not be called for direct examination, and offered to allow him to be cross-examined at once, there was no abuse of discretion by the trial judge in not modifying the order as to the legatee. *In re Sparks' Estate*, 421.

9. In an action for personal injuries an instruction that if the jury should find for the plaintiff they should deduct the amount already received was confusing and prejudicial, where it would devolve upon the jury to figure interest on the amounts to be deducted and they were uninstructed upon that subject. *Porth* v. *Cadillac Motor Car Co.*, 502.

10. Any error on the part of the trial court in a murder case in failing to give an instruction on the right to find the

TRIAL—Continued.

defendant guilty of manslaughter is untenable, where the case is tried on the theory of the State of murder while attempting to rob, and the defense is an alibi, and no instruction that defendant might under the information be found guilty of manslaughter is requested. *People* v. *Page*, 524.

11. The admission, in a criminal prosecution for murder, of evidence of former crimes of accused will not be presumed to be prejudicial error where the court grants a motion to strike out such testimony and the jury at once is instructed to disregard it, and the instruction is also stated in the general charge. *Id.* 525.

12. An objection to the conduct of counsel for the State in attempting to introduce incompetent evidence in a criminal case must be specific in order to constitute a basis for the assignment of error. *Id.*

13. The attempt of the State, in a criminal prosecution for murder, to introduce incompetent testimony is harmless error where the court promptly rules that it would not be competent and the jury is cautioned to pay no attention to it. *Id.*

14. In determining whether there is error in a court's charge, the charge must be considered as a whole. *Harrison* v. *Grier*, 672.

15. It is error to give an instruction, the only basis for which is stricken testimony. *Township School District of Wakefield* v. *McRae*, 693.

16. In an action by a bicycle rider against the driver of an automobile for personal injuries sustained in a collision, the testimony of defendant's wife that she knew defendant was not looking back because he never did look back when driving was properly stricken out. *Vezina* v. *Shermer*, 758.

17. In an action by the purchaser of hay to recover money paid on the contract with damages for nonfulfillment thereof, and in which defendant sought to recoup damages for failure of plaintiff to take the hay, including commission on resale, work and labor, storage, cost of baling hay and interest, *held*, that the charge sufficiently presented to the jury the theories of the respective parties on the controlling issues so that the refusal of a requested instruction was not erroneous. *Saginaw Milling Co.* v. *Schram*, 773.

See NEW TRIAL.

TRIAL ON MERITS—See ELECTION OF REMEDIES (2).

TROVER—See ELECTION OF REMEDIES (1).

TRUSTEE IN BANKRUPTCY—See EQUITY (2).

TRUSTS—See EVIDENCE (20).

ULTRA VIRES—See CORPORATIONS (3).

UNDERTAKING ESTABLISHMENT—See NUISANCE (1).

UNDUE INFLUENCE—See DEEDS (1); EVIDENCE (10); FRAUD (1, 2); WILLS (4).

UNFAIR COMPETITION—See TRADE-NAMES.

UNREASONABLE DELAY—See HIGHWAYS AND STREETS (2).

USE OF KEROSENE FOR STARTING FIRES—See NEGLIGENCE (4-7).

USE OF TRACKS—See RAILROADS (3).

USES AND TRUSTS.

1. Under 3 Comp. Laws, § 8835 (3 Comp. Laws 1915, § 11571), providing that where a grant for a valuable consideration is made to one person and the consideration paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall rest in the person named as alienee except when a trust results in favor of creditors under the next section, and section 8837 (3 Comp. Laws 1915, § 11573), providing that section 8835 shall not extend to cases where the alienee shall have taken the conveyance as an absolute one in his own name, without the knowledge or consent of the person paying the consideration, or when such alienee, in violation of some trust, shall have purchased the land with money belonging to another, no trust is created in a husband where a wife takes title to real estate in her own name, and it is not shown that the husband did not have knowledge thereof and consent thereto and that the consideration was paid by the husband. *McNamara* v. *Langguth*, 776.
2. Where a wife prior to her marriage had been personally engaged in business and during her married life deposited her own money and that received by her as agent for her husband in a bank account in her own name, a finding as to what portion of the bank account belonged to the husband and what belonged to the wife would be based upon mere conjecture. *Id.*

USURY.

1. To constitute the charge of usury, there must be an intent to do something which is in violation of the statute. *Flax* v. *Building & Loan Association*, 677.
2. A building and loan association mortgage which bears interest at the highest permissible rate is not usurious because of a provision that the borrower shall pay any tax assessed upon it, such provision being mere surplusage, in view of 2 Comp. Laws 1915, § 10011, exempting such mortgage from taxation. *Id.*

USURY—Continued.

3. Mortgages held by building and loan associations are exempt from taxation under 2 Comp. Laws 1915, § 10011. *Id.* 678.

VACANCIES—See OFFICERS; SCHOOLS AND SCHOOL DISTRICTS (3).

VALIDITY OF SIGNATURE BY MARK—See WILLS (7).

VENDOR AND PURCHASER.

A memorandum of agreement relating to the sale of land which contains no obligation to purchase and makes reference to a "prior option," with the terms of which both parties are familiar, and provides that a deed will be given on compliance with the "terms of this option," and that on failure to make the stipulated payments the instrument will be canceled, constitutes a mere option and not an agreement for the sale and purchase of land, even though the parties are designated as seller and purchaser and other language more properly belonging in an agreement for sale and purchase is used, since the absence of an obligation to purchase is the distinctive characteristic of an option contract. *Tattan* v. *Bryant*, 515.

VERBAL AGREEMENTS—See EXECUTION (4).

VERDICTS—See APPEAL AND ERROR (11); SET-OFF AND RECOUPMENT.

VOLUNTARY PAYMENTS—See INSURANCE (13); PAYMENT.

WAIVER—See ACTIONS (1); APPEAL AND ERROR (14); CORPORATIONS (5); EXECUTION (5); INSURANCE (3); MECHANICS' LIENS (4).

WATERS AND WATERCOURSES.

1. The measure of damages for the overflow of land bordering on a lake, due to the increased height of a dam, is the difference in value of the property as it is and as it would be if the dam had remained without alteration. *Holcomb* v. *Alpena Power Co.*, 165.

2. On a bill by an upper riparian owner to enjoin a mill owner from maintaining a new dam at a level higher than the one replaced, *held*, that the ultimate test of defendant's prescriptive right was the extent to which the old dam raised and held the level of the water it impounded. *Potter* v. *Dundee Hydraulic Power Co.*, 585.

3. Evidence *held*, to show that by the maintenance of a tighter and more perfect dam, even if no higher, defendant had increased its poundage capacity over the old dam to a certain extent and also to show that the height of the new dam at the spillway exceeded that of the old one. *Id.*

WILLS.

1. A will devising an estate in trust to be distributed in a certain number of years after the death of the testator, the income in the meantime to be paid to designated persons, is void under 3 Comp. Laws, § 8796 (3 Comp. Laws 1915, § 11532), providing that every future estate shall be void in its creation, which shall suspend the absolute power of alienation for longer than the period prescribed by law, and such power of alienation is suspended when there are no persons in being in whom an absolute fee in possession can be conveyed, and 3 Comp. Laws, § 8797 (3 Comp. Laws 1915, § 11533) providing that the absolute power of alienation shall not be suspended by any limitation or condition for a longer period than the continuance of two lives in being at the creation of the estate, and 3 Comp. Laws, §§ 8805, 8818, 8839 (3 Comp. Laws 1915, §§ 11541, 11554, 11575) providing that limitations of terms of years, disposition of rents and profits of lands and trust estates in land shall be governed by the same rules, and 3 Comp. Laws, § 8847 (3 Comp. Laws 1915, § 11583) providing that no person beneficially interested in a trust estate for the receipt of rents and profits can dispose of such interest. *Otis* v. *Arntz*, 196.

2. In a will contest an instruction that the contestant has the burden of proof to show mental incapacity, as the law presumes, in the absence of any proof at all, that a man was not influenced in making his will, and that all men are sane until proved insane, *held*, to be correct. *In re Gardnier's Estate*, 203.

3. Under Act No. 314, Pub. Acts 1915, chap. 17, § 58, the contestant in a will contest has the burden of proof to show mental incapacity of testator, as the law presumes, in the absence of any proof at all, that a man was not influenced in making his will, and that all men are sane until proved insane. *Id.*

4. Where a witness in a will contest, a banker, showed by his testimony that he had met decedent on the average of twice a week during a period of ten years preceding testator's death and had observed him in various business transactions in the bank, it was not error to allow witness to testify that decedent was the equal of the average business man and could not be influenced in business transactions against his will. *In re Sparks' Estate*, 421.

5. The next of kin cannot claim title to bequeathed property, although a charitable corporation to which is bequeathed property in trust for charitable purposes is unable to take because the trust is invalid as to it, where there are valid alternative legacies to two cemetery boards, as the title to the property would pass at the testator's death, *eo instanti*, to such boards, and although the bequest to one of the boards is inoperative because of failure to comply with the conditions imposed by the

WILLS—Continued.

will, the other board, in such event, being entitled to the latter's share under the terms of the will. *In re Brown's Estate*, 545.

6. The fact that alternative legatees of a charitable trust do not appeal from a decision of the probate court directing the disposition of the residue of an estate is not important. *Id.*

7. A will executed by a testator who can write by affixing his mark, his signature having been affixed by another, at his direction, is as validly executed as if he had himself written his signature with his own hand. *In re Canterbury's Estate*, 743.

See EVIDENCE (8-10); PERPETUITIES; TRIAL (8).

WIND STORM—See THEATRES AND SHOWS.

WITNESSES.

1. The credibility of witnesses is a question for the jury. *Sibert* v. *Detroit United Ry.*, 117.

2. In order that the jury may get a proper appreciation of the fairness and reliability of the testimony of witnesses, considerable latitude is generally allowed in the cross-examination of witnesses, the extent of such cross-examination being a matter left largely to the discretion of the trial court. *In re Sparks' Estate*, 421.

3. In an action for damages for assault and battery, it was harmless error to permit plaintiff's counsel to take an answer of plaintiff upon redirect examination as to whether he understood a question put to him by defendant's counsel and to correct his answer, where the court stated that it was for the jury to say whether he in fact misapprehended the question. *Matthews* v. *Lamberton*, 746.

4. In an action for damages for assault and battery, any error based upon a hypothetical question put to a physician, whose answer was not based upon an opinion and indicated a knowledge of the facts acquired as an attending physician, cannot be complained of by defendant, where no objection was made to the withdrawal of such question and plaintiff's counsel examined the physician as to his actual knowledge of plaintiff's condition, based upon his personal observation. *Id.*

5. In an action for damages for assault and battery, it is not error to allow a physician testifying for plaintiff to answer a question as to whether, if plaintiff's ear was filled with dirt, gravel and blood, as the witness found upon his examination, that would be the natural and most probable way of having germs introduced into the ear, where the answer of the witness was based entirely upon his personal observation and not upon hypothesis. *Id.* 747.

WITNESSES—Continued.

6. A physician who has examined a patient may, in an action for damages for assault and battery, state whether or not the patient is unable to hear. *Id.*

7. It is the better practice to reduce a hypothetical question to writing where the facts are confusing or complicated. *Id.*

8. There is no reversible error in the allowance of a hypothetical question not reduced to writing, where the facts are complicated and confusing, where the jury is instructed that before they can consider a hypothetical question and its answer they must find that the assumed facts have been established by a preponderance of the evidence. *Id.*

9. It is harmless error to allow a hypothetical question not reduced to writing which assumes facts set forth in a prior question, where the jury was instructed after the giving of the prior question that before they could consider a hypothetical question and its answer they must find that the assumed facts have been established by a preponderance of the evidence. *Id.*

See APPEAL AND ERROR (18); DEATH; EVIDENCE (3-9, 14-19); WILLS (4).

WORDS AND PHRASES—See CONTRACTS (7); MASTER AND SERVANT (9, 14); MORTGAGES (7); THEATRES AND SHOWS (8).

WORK AND LABOR—See COMPROMISE AND SETTLEMENT (1).

WORKMEN'S COMPENSATION ACT—See COMPROMISE AND SETTLEMENT (2); MASTER AND SERVANT (1-5, 9, 13-17); STATUTES (3).